

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 March 2013

Public Authority: Environment Agency
Address: Tyneside House
Skinnerburn Road
Newcastle Business Park
Newcastle Upon Tyne
NE4 7AR

Decision (including any steps ordered)

1. The complainant has requested information relating to a meeting between the Cabinet Office, the Environment Agency and Natural England.
2. The Commissioner's decision is that the Environment Agency has correctly applied the exception provided by regulation 12(4)(e) (internal communications) of the EIR.
3. The Commissioner requires the Environment Agency to disclose the information it has identified as appropriate for disclosure during his investigation as outlined in paragraph 20 of this notice.

Request and response

4. On 6 February 2012, the complainant wrote to the Environment Agency (EA) and requested information in the following terms:

1. This is a request for information under the Freedom of Information Act and the Environmental Information Regulations about a meeting between the Cabinet Office, the Environment Agency and Natural England. The details of the meetings are below:

12.01.12 – Cabinet Office – Oliver Letwin; Environment Agency; Natural England.

Please supply any information held by the Environment Agency relating to the meeting, which includes, but is not limited to:

- *Place of meeting*
- *Full lists of those in attendance, including names of senior members of staff (in accordance with the DPA)*
- *Minutes*
- *Agenda*
- *Any other form of notes taken at the meeting*

2. Please provide details of any correspondence between the Environment Agency and

- a) The Cabinet Office*
- b) Natural England*

regarding the restructuring or revision of UK environmental regulation guidance in line with the Red Tape Challenge.

By correspondence I mean:

- *Emails*
- *Letters*
- *Briefing documents*
- *Notes taken during/after phone calls*
- *Any other form of correspondence used by your office*

My request is only for correspondence between 01/12/11 and 31/01/12

5. EA responded on 23 February 2012. It provided some of the information requested at part 1, confirming that a meeting took place on 12 January 2012 between Cabinet Office, Defra, The Environment Agency and Natural England. It also confirmed the attendees at the meeting, aside from the junior officials.
6. EA stated that in relation to the other information requested, it considered that it should not be disclosed under the EIR and cited regulations 12(3); 13; 12(4)(e), 12(5)(f).
7. Following an internal review EA wrote to the complainant on 30 May 2012. It explained that where it did not hold information within the

scope of the request the duty to make information available under regulation 5(1) did not arise, because in accordance with regulation 3(2) it did not hold the information requested. Regulation 12(4)(a) also applied as it did not hold the information requested. EA went on to state that it upheld the application of the exception at regulation 12(4)(e) to withhold information and that the exception at regulation 12(5)(f) had been incorrectly applied.

8. EA went on to confirm the location of the meeting and the organisations that each of the attendees represented. EA stated that it did not hold any information relating to the agenda or minutes of the meeting. Therefore regulation 12(4)(a) applied – information not held.
9. EA further stated that it held some information within the scope of the request however it continued to withhold it on the grounds that it was internal communications, produced for the purpose of informing a debate about possible restructuring or revision of UK environmental regulation guidance. It maintained its position that it had correctly withheld this information citing regulation 12(4)(e).
10. EA went on to explain that it had incorrectly applied regulation 12(3) and 13 relating to details of other attendees as it did not hold information relating to the junior officers.
11. With regard to the second part of the request, EA stated that it did not hold any correspondence between itself, the Cabinet Office or Natural England regarding the restructuring or revision of UK environmental regulation guidance in line with the Red Tape Challenge between 1 December 2011 and 31 January 2012. Therefore, regulation 12(4)(a) applied.
12. EA stated that the other information requested was correctly withheld under regulation 12(4)(e) and that it was no longer relying on regulation 12(5)(f).

Scope of the case

13. The complainant contacted the Commissioner on 18 September 2012 to complain about the way his request for information had been handled.
14. In its response to the Commissioner EA stated that it considered all of the withheld information engaged the exception at regulation 12(4)(e). It further stated that having reviewed the request, the exceptions at regulation 12(4)(d) and 12(5)(d) were also engaged.

15. The Commissioner considers the scope of this case to be to determine if EA correctly applied regulations 12(4)(a) 12(4)(d), 12(4)(e) and 12(5)(d) of the EIR.

Background

16. The complainant requested information relating to The Red Tape Challenge. This is a government led initiative on which it states

"this government has set a clear aim: to leave office having reduced the overall burden of regulation."

<http://www.redtapechallenge.cabinetoffice.gov.uk/about/>

17. The Red Tape Challenge covers regulations on various areas including health and safety, pensions, equalities and the environment.
18. EA explained that the Red Tape Challenge hold 'Star chamber' meetings in which, normally, officials with expertise on an area of regulation explain to the Minister of State, Cabinet Office, Minister for Government Policy (MGP) their proposals for the reform of regulations in order to reduce the regulatory burden. Their contribution is then subject to further in depth questioning by the MGP and his officials and advisers. The Star Chamber process plays an important part in formulating and developing policies across the Red Tap Challenge.
19. The meeting on 12 January 2012 was attended by the Minister, together with officials from Cabinet Officer, Defra, Natural England and the Environment Agency Chief Executive to consider elements of environmental regulation that could be modified or simplified in order to meet "the Red Tape Challenge".
20. During the Commissioner's investigation EA reconsidered its position. Subsequently it advised that having reviewed the withheld information it believed that it correctly applied to exceptions at the time of the request. However, with the passage of time some of the information is now less sensitive. EA stated that it would now release some additional information to the complainant. At the time of this decision notice, EA had provided a spreadsheet indicating what information was to be released, although some with redactions. This consists of some email correspondence between EA officials, EA and Defra.

Reasons for decision

21. Regulation 2 of the EIR defines what environmental information is. The first step for the Commissioner is to consider whether the information falling within the scope of the request is environmental in accordance with this definition and so whether EA correctly dealt with this request under the EIR.
22. 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 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."
23. As outlined by EA, the information requested relates to a meeting that took place to discuss environmental policies. Therefore the Commissioner considers that the requested information is environmental information and EA was correct to respond to the request under the EIR.
24. Regulation 12(4)(e) of the EIR 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 the Commissioner will consider whether the request would involve the disclosure of internal communications. Secondly, this exception is a qualified exception subject to the public interest test. This means that the information must be disclosed if the public interest in maintaining the exception does not outweigh the public interest in disclosure.
25. With regard to whether this request would involve the disclosure of internal communications, regulation 12(8) is specific in that internal communications for the purposes of EIR includes communications

between government departments. The information in question consists of emails between EA officials and between EA and Defra.

26. EA is the principal environmental regulation in England and Wales. It was created on 1 April 1996 as a non-Departmental Public Body by section 1 of the Environment Act 1995. It is accountable to Parliament. EA has statutory responsibilities in relation to the collection and dissemination of environmental information, assessing the environmental impacts of pollution and promoting an understanding of methods for environmental protection and management, including undertaking its own monitoring, following developments in pollution avoidance technology and doing or promoting research.
27. EA explained that of particular relevance to the Star Chamber meetings and its input to the Red Tape Challenge, it is required by statute in relation to pollution control to assess the environmental impacts of pollution or options for avoiding, limiting, or cleaning up pollution, when Central Government and/or the Assembly Government request that it does so.
28. In pursuing its functions, EA has a duty to make a contribution towards achieving the objective of sustainable development. As the primary regulator in environmental matters, when considering amendments to environmental regulation, the Secretary of State and Ministers will and did call on the EA to advise in accordance with its statutory duty under the Environment Act 1995 section 37(2).
29. EA explained that the withheld information consisted of communications either within the EA, or between the EA, Defra, Cabinet Office and Natural England.
30. The Commissioner has reviewed the withheld information and it is his view that the requested information constitutes internal communications. The exception provided by regulation 12(4)(e) is therefore engaged.

Public interest arguments in favour of disclosure

31. EA has acknowledged the public interest in favour of disclosure. It stated that it considered that in relation to each exception there is a strong element of public interest in being open and transparent with the public regarding discussion or possible changes to the regulatory approach taken in the context of environmental regulation.
32. EA stated it had taken into consideration the positive public interest and general benefit that releasing information helps to inform public debate about policy formulation and development, particularly those concerned with how it carries out its regulatory activities.

33. EA stated that debate at the time was intense with much media interest in how the Government was going to seek to change the way that industry was regulated. It acknowledged that enabling such a debate can, through allowing input from the public, through their submission of ideas, improve the development of policy and change in practice. This in turn can contribute in a positive way to the effective running of the public sector and protection of the environment which is the aim of the EIR.
34. The complainant has presented several arguments however the Commissioner has not detailed them all in this Decision Notice. The complainant argued that the Red Tape Challenge proposes to make radical and lasting changes to the regulation of the environment in the UK. The government is seeking to remove regulation, which currently protects: air quality; biodiversity, wildlife management, landscape, countryside and recreation; energy labelling and sustainable products; industrial emissions and carbon reductions; noise and nuisance; waste; and environmental permits, information and damage.
35. For each area of the Red Tape Challenge the public have been invited to participate in the process by submitting ideas for reducing environmental 'red tape'.
36. The complainant further argued that the public has so far registered disagreement with the proposals and frustration that their voices are not being listened to in the online forum hosted on the Red Tape Challenge website.
37. The complainant provided a sample of comments from the forum and stated that the public had expressed clear and direct disagreement to the Red Tape Challenge's proposals. Therefore, it ought to be clear that more information is urgently needed to be disclosed so that the public can build a more informed view of the policy proposals.
38. The complainant considered that there was a very strong public interest in facilitating accountability and transparency of the policy making and consultation processes at EA.
39. The complainant stated that disclosing the information would introduce a further measure of accountability in the policy process and work to reassure the public that their opinions are considered. This is particularly important in this specific context because the Red Tape Challenge has sought to engage public opinion but now appears not to be listening. Disclosure would help to dispel disillusion with the democratic process if it is demonstrated that government must be open and accountable on issues of public interest.

Public interest arguments in favour of maintaining the exception

40. The complainant acknowledged the public interest in giving officials a private thinking space to formulate good policy.
41. In its response to the Commissioner EA explained that in its view there were factors with significant weight that suggest the information should not be disclosed. These factors were relevant to all three exceptions upon which it was relying – they all seek to give some protection to the ability of public authorities to think in private. This was particularly so, given the timing of the request.
42. EA explained that at the time of the request the debate was live, the content was sensitive and there was a need for there to be internal deliberation of the issues for a period of time without external interference and distraction.
43. EA explained that there is and was information available to the public about the process that the Government was undertaking and why they were doing it. This also allowed for the participation of the public in the on-going debate¹. By following the links, these pages give the opportunity for public input. Further information about the Red Tape challenge in the environment context is and was available on Defra's website².
44. EA also stated that more recently the pages had been updated to include information about an important on-going piece of work arising from the Red Tape Challenge: the Smarter Environmental Regulation Review (SERR). Again there is the opportunity via the web pages, for public input.
45. EA stated that as indicated above, the request for information was made and responded to in February, asking for information about a meeting in January, and Defra published its document on 19 March 2012, releasing to the public the initial outcome of the policy process of which the

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http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_187876.pdf

<http://www.defra.gov.uk/corporate/about/how.regulation/>

<https://www.gov.uk/government/policies/reducing-the-impact-of-regulation-on-business>

² <http://www.defra.gov.uk/publications/2012/03/19/pb13728-red-tape-environment>

meeting formed a part. The issues were at the time of the request and response very much still being debated and live and even now discussion of the Red Tape Challenge and the proposals for changes to regulation are being discussed with on-going meetings to advise Cabinet Office.

46. EA stated that it refused to disclose information as to do so whilst the government was still debating its proposals internally, would have an adverse effect on EA's ability to carry out its functions, giving free and frank advice to the Secretary of State and Minister, as required by statute. It would harm its ability in those immediate discussions and also in the advice that it gives in other areas of environmental regulation and the broad remit of duties that it has.
47. EA argued that public bodies need the opportunity to formulate and debate issues in a private safe space away from public scrutiny. The release of information communicated during a period of 'thinking in private' would not have added to the public understanding of factors taken into consideration in taking decisions and in reaching the early interim policy position published in March. Had it released the information in February, this would have been very likely to have given rise to enquiries and a debate of suggestions and thoughts and ideas exchanged internally which were not then adopted in the proposals, so distracting those developing the proposals and hampering their ability to get on with the work in hand.
48. In addition, EA considered that release of documents would have had a negative effect on the working relationship between the parties involved at the time.
49. EA further explained that the frank nature of some of the exchanges could have been used by the public to seek to cause friction between the working partners and would have had the effect of damaging the ability of the EA to inform Government policy through its debates and exchanges with Defra and ultimately in the meeting with the Cabinet Office and the MGP.
50. EA also argued that if the advice and comments were released at all, even after a period of time, then public servants would not be so willing to make comments and challenges which might turn out to be wrong in future circumstances when they are required to advise. Ministers must be able to speak freely, to be wrong and to challenge ideas at all stages of policy discussion. They will not be able to do so if disclosure means they are held accountable for the process of policy making rather than its result. Advice on similar or different issues would be less robust in the future for these reasons.

Balancing of the public interest

51. The Commissioner recognises there is a public interest in transparency, openness and accountability in relation to decisions made by government to instigate change. In forming a conclusion the Commissioner has taken into account the specific factors in this case and in relation to the requested information. This includes the arguments presented by the complainant and EA.
52. The Commissioner acknowledges the safe space argument and recognises that part of the reason for needing safe space is to allow free and frank discussion. In this regard he notes that the First Tier Tribunal in a recent DfE³ case found that ministers and officials were entitled to time and space to agree policies by exploring safe and radical options without the threat of media involvement or external scrutiny. Therefore the Commissioner accepts that the need for safe space to debate and reach decisions without external comment is a valid argument.
53. In addition, the Commissioner notes that the request was made on 6 February 2012, less than a month after the meeting took place. This increases the strength of the 'safe space' argument as the policy formulation process is at the very early stage.
54. The Commissioner notes that discussion about changes in legislation relating to the restructuring or revision of UK environmental regulation was on-going at the time of the request, and is still a live issue. The Commissioner therefore considers that disclosing copies of correspondence between EA, the Cabinet Office and Natural England before final agreement has been reached could have a detrimental effect on their ability to have frank exchanges.
55. The Commissioner has carefully balanced the arguments for maintaining the exception against the arguments in favour of disclosure. He accepts that there is a strong public interest in assisting the public in understanding decisions made. However, he also accepts that there is a stronger public interest in maintaining the safe space for proposals to be developed and discussed.
56. The Commissioner has therefore decided that the public interest in maintaining the exception outweighs the public interest in disclosure. Accordingly, EA has correctly applied the exception at 12(4)(e) to withhold the information.

³ Information Tribunal reference EA/2006/0006

57. As all the information is covered by the exception at regulation 12(4)(e) the Commissioner has not gone on to consider the application of 12(4)(d) and 12(5)(d).

Regulation 12(4)(a) – information not held

58. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that it does not hold that information when a request is received.
59. In cases such as this, where there is some dispute as to whether a public authority holds information falling within the scope of the request the Commissioner has been guided in his approach by a number of Tribunal decisions which have used the civil standard of the balance of probabilities, i.e. whether on the balance of probabilities the Commissioner is satisfied that no further information is held⁴. In deciding where this balance lies the Commissioner will take into account the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate any other reasons offered by the public authority to explain why the information is not held.
60. EA advised the Commissioner that it did not hold any correspondence on the subject described between the EA and the Cabinet Office or Natural England. It further advised that there were no formal agenda, minutes or list of names of junior officials attending the meeting.
61. EA confirmed that all potentially relevant information was gathered. It was then assessed to see what information fell within the scope of the information requested.
62. EA confirmed that the individual who is the point of contact for correspondence between Defra, Cabinet Office and Natural England and other organisations in respect of, amongst others, the Red Tape Challenge meeting on 12 January 2012 searched his email in-box, out-box and sub folders for all emails falling within the terms of the request.
63. Furthermore, calls were made to the CEO office and colleagues involved with the policy discussions and the meeting to check they had no independent correspondence with the Cabinet Office and Natural England or information relating to the meeting, and none was reported.

⁴ See *Bromley v Information Commissioner* [EA/2006/0072].

64. EA further confirmed that no documents were deleted or destroyed except where email chains were present. It explained that early parts of chains may have been deleted but these are still kept on file with later contributions. It referred to its Records Management, A Practical Guide for Staff which explains when it is not necessary to retain information as it is not required as a record.
65. After considering the representations of EA, the Commissioner is satisfied that, on the balance of probabilities, EA does not hold any information relating to other attendees, minutes of the meeting or correspondence between EA, the Cabinet Officer and the Natural England regarding the restructuring or revision of UK environmental regulation guidance in line with the Red Tape Challenge.

Right of appeal

66. 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

67. 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.
68. 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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