

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

Decision notice

Date: 3 December 2013

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

Decision (including any steps ordered)

1. The complainant has requested a letter from the Secretary of State for Energy and Climate Change, Ed Davey and to the Prime Minister's private secretary about John Hayes. He also asked for any response. The Department for Energy and Climate Change (DECC) refused the request under section 35(1)(a) and (b) on the grounds that the information related to government policy and was also a ministerial communication. The Commissioner decided that the request should be considered under the EIR at which point the DECC applied regulation 12(4)(e) – internal communications to withhold the letter from Ed Davey. However it did not address the issue of whether there was any reply to that letter.
2. The Commissioner's decision is that regulation 12(4)(e) is engaged in respect of the letter from Ed Davey but finds that the public interest favours disclosure. The Commissioner requires the public authority to disclose the letter.
3. The DECC should also deal with the second element of the request. If there was no response, the DECC should confirm this by applying regulation 12(4)(a).
4. 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 26 November 2012, the complainant wrote to the DECC and requested information in the following terms:

"In the Guardian on Saturday, 24 November, there was an interview with Ed Davey in which he describes the content of a letter sent by his private secretary about John Hayes.

Please send me a copy of the full context of this letter.

Mr Davey told the Guardian there was no reply. However if a reply has now been received, please send me a copy of that too."

6. The DECC responded on 21 December 2012. It stated that it held information falling within the scope of the request but it withheld that information under the exemption provided by section 35(1)(a) – information relation to the formulation and development of government policy, and section 35(1)(b) – relating to ministerial communications.
7. Following an internal review the DECC wrote to the complainant on 19 February 2013. It stated that it maintained its application of sections 35(1)(a) and (b).

Scope of the case

8. The complainant contacted the Commissioner on 13 March 2013 to complain about the way his request for information had been handled. In particular he argued that the DECC had failed to take account of the impact Ed Davey's press interview had the public interest in maintaining the exemptions. He argued that in his press interview, Ed Davey had already undermined the principle of collective responsibility and need for safe space in which to consider government policy and to make decisions.
9. The Commissioner considers that the information in question is environmental information in that it is on a measure likely to affect the environment. It follows that the request should have been dealt with under the EIR. During the course of the Commissioner's investigation the DECC did argue that to the extent that the Commissioner considered the information may be environmental information, it considered the information would be exempt under regulation 12(4)(e) of the EIR. This exception provides that a public authority can withhold internal communications when responding to a request. The exception is subject to the public interest.

10. The main focus of the investigation is whether the DECC was correct to withhold the letter under regulation 12(4)(e) and, if so, whether the public interest favours maintaining that exception.
11. The complainant has specifically asked for a copy of any response to Ed Davey's letter. The Commissioner will also consider how the public authority dealt with this element of the request.

Environmental Information -

12. The first issue to address is which access regime the request should have been handled under.
13. The definition of environmental information is contained in regulation 2 of the EIR. Regulation 2(c) extends the definition to include measures (including administrative measures), such as policies, plans affecting or likely to affect the environment. The proposed removal of responsibilities for renewable energy from John Hayes's ministerial portfolio was to reduce the likelihood of legal challenge to the implementation of the Government's renewable energy policies and in particular those policies relating to the development of onshore wind farms. Clearly the implementation of renewable energy policies with the specific aim of reducing carbon emissions would affect the environment. It follows that any steps taken, or proposed that are intended to ensure the smooth implementation of those policies or to avoid those policies being frustrated, are also a measure likely to affect the environment. For this reason the Commissioner is satisfied that the letter requested in the first part of the request constitutes environmental information.

Reasons for decision

Regulation 12(4)(e)

14. Regulation 12(4)(e) of the EIR provides that a public authority may refuse a request to the extent that the request involves the disclosure of internal communications.
15. The letter in question was sent from Ed Davey's principal private secretary to the Prime Minister's principal private secretary. Under regulation 12(8) internal communications can include those between government departments. The Commissioner is satisfied that the letter is an internal communication and so engages the exception. However the exception is subject to the public interest test.

Public interest test

16. The public interest test is set out in regulation 12(1)(b) and provides that even if information is covered by an exception, that information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
17. Over the course of its handling of this request and the Commissioner's investigation the DECC has presented a number of public interest arguments in favour of maintaining sections 35(1)(a) and (b) as well as regulation 12(4)(e). The Commissioner accepts that, in this case, the arguments presented in favour of section 35 are also relevant to regulation 12(4)(e). The public interest arguments in favour of withholding the information relate to the adverse effect on the formulation of the Government's policy on renewable energy, the need to preserve the confidentiality of ministerial communications and the harm that disclosure would have on the principle of collective responsibility.
18. The DECC has argued that renewable energy deployment is very much live and that government at the highest level should be allowed safe space in which to have a full and candid debate on the issues. The Commissioner agrees that while policy development is on-going, there is a significant public interest in allowing government to fully consider different options in private. However having examined the letter in question he is satisfied that it does not actually discuss policy options. It simply deals with the Secretary of State's concerns about the implementation of policy options should one of his ministers continue to be responsible for that area of work. As such the Commissioner does not accept that disclosing the letter would stifle the actual policy debate on renewable energy within Government.
19. The DECC has also argued that ministers should be free to exchange information in a free and frank manner and that to do so it is necessary for those discussions to remain confidential. This is particularly true in respect of sensitive issues. The Commissioner does not disagree with this principle. However the communication only warrants protection if its contents have not already been disclosed by those involved.
20. The request was prompted by an article in the Guardian newspaper. In that article the Secretary of State, Ed Davey explained that he had written to the Prime Minister and asked him to remove responsibility for renewable energy from one of his ministers, John Hayes. The article went on to say that this was because he considered John Hayes' public comments were not in line with coalition policy on onshore wind farms and, based on legal advice, this made the decisions made by John Hayes

in that policy area more susceptible to legal challenges. The Commissioner has therefore gone on to consider the extent to which the Secretary of State revealed the contents of that letter in his interview with the newspaper.

21. Having studied the letter and the article referred to in the complainant's request, the Commissioner is satisfied that the article covers the same ground as the letter. This greatly diminishes the value in protecting the letter.
22. The Commissioner recognises that in the absence of the press article there would be weighty arguments in favour of withholding the information and that ministers would normally expect that the protection afforded to their communications would not be set aside lightly. The Commissioner has therefore gone on to consider whether the disclosure of this information would have a chilling effect. That is, would ministers feel less able to communicate with one another in a free and frank manner because they feared those communications would also be disclosed.
23. The Commissioner rejects the argument that the disclosure of this letter could be interpreted as signalling the routine disclosure of ministerial communications. The very obvious background to this case, ie Ed Davey's press article, is sufficient to distinguish it from other cases.
24. The DECC has also argued that the release of the information could also damage the principle of collective responsibility. Collective responsibility is the longstanding convention that ministers are bound by decisions of the Cabinet and carry joint responsibility for all government policy and decisions. For this convention to operate properly it is important that ministers can argue points of policy and disagree in private without those discussions becoming public as that would undermine the ability of all ministers to unite behind the final decision in public.
25. The Commissioner, and the Tribunal, have placed great weight in the importance of collective responsibility. However the Commissioner notes that the actual issue at stake is not directly about policy matters. More importantly is the fact that the newspaper article discussing these issues had already been published. Therefore disclosing the actual letter which the Secretary of State discussed in that article is unlikely to cause any significant harm to collective responsibility.
26. When looking at the public interest in disclosing the information, the Commissioner has considered the general public interest in increasing transparency and accountability. The information would help inform the public about the workings of government and in particular the appointment and management of ministers. This public interest is

heightened at a time of a coalition government when there is an increased public interest in understanding the ability of politicians from different parties to work together.

27. The information in question does concern renewable energy and the government's ability to pursue coalition policy in this area. This is an important issue impacting both on the environment and on consumers in terms of the cost of these developing technologies.
28. The Commissioner notes that the harm disclosing this information would have on the confidentiality of ministerial communications and collective responsibility is minimised because much of its contents were revealed in the press article. For the same reason the public interest in disclosure is diminished to some extent by the press article.
29. However on balance the Commissioner finds that the public interest in favour of disclosure still outweighs the limited public interest that remains in favour of withholding the information.

The request for any response.

30. The complainant has asked for a copy of any response that Ed Davey received from the Prime Minister. The DECC has not specifically addressed this issue. If it is that no response was received by the time the request was received the DECC would be required to apply regulation 12(4)(a). Regulation 12(4)(a) provides that a public authority may refuse a request on the grounds that it does not hold the information.
31. Strictly speaking the exception is subject to the public interest test however in practice the Commissioner recognises that this would be a meaningless process.
32. The DECC is required to deal to with the second element of the request. If no response is held, it should apply the exception provided by regulation 12(4)(a).

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

Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF