

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

**Date:** 29 September 2015

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

**Decision (including any steps ordered)**

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1. The complainant has requested correspondence and meeting information about shale gas sites from the Department of Energy and Climate Change ("DECC"). DECC refused to provide this citing EIR exceptions at regulation 12(4)(d) (unfinished material), regulation 12(4)(e) (internal communications) and regulation 13(1) (unfair disclosure of personal data) as its basis for doing so. It upheld this at internal review. During the course of the Commissioner's investigation it introduced the EIR exception at regulation 12(5)(b) (adverse effect on the course of justice) in relation to some information within the scope of the requests.
2. The Commissioner's decision is that DECC is entitled to rely on regulation 12(4)(e) in relation to all the information that it has withheld.
3. No steps are required.

**Request and response**

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4. On 19 August 2014 the complainant (an organisation) requested information of the following description:

"1) I am seeking information on meetings internal to DECC in relation to i) planning permission, ii) planning guidance and iii) access rights regarding shale gas sites; which involve at least one of the following ministers/civil servants from DECC:

Ed Davey MP

Gregory Baker MP  
Matthew Hancock MP  
Michael Fallon MP  
Amber Rudd MP  
Baroness Verma  
Stephen Lovegrave (Permanent Secretary)  
David MacKay (Chief Scientific Advisor)  
Katrina Williams (Director General International, Science and Resilience Group)  
Angie Ridgwell (Director General of Finance and Corporate Services Group)  
Clive Maxwell (Director General, Consumers and Households Group)  
Simon Virley (Director General, Markets and Infrastructure Group)

Please ensure you provide all documentation generated in such meetings, including:

- I Any meeting minutes
- II. Correspondence in relation to meetings
- III. Meeting readouts
- IV. Briefing notes
- V. Or other meeting memoranda

I am requesting meetings taking place in the period beginning 1<sup>st</sup> December 2014 to the present.

2) I am also seeking internal correspondence which in any way discusses i) planning permission, ii) planning guidance and iii) access rights regarding shale gas sites; again involving at least 1 of the above named people.

Please ensure that your search for correspondence includes:

- I Email correspondence (including attachments)
- II Memos
- III. Reports
- IV. Briefing documents or the equivalent
- V. Letters
- VI. Telephone records and any notes made during and after telephone calls
- VII. Correspondence includes any other type of correspondence frequently used by the department, including text messages and private emails
- VIII. Correspondence that is stored on cloud services such as Dropbox

I am requesting correspondence generated from 1<sup>st</sup> December 2014 to date."

5. On 15 October 2014, DECC responded under the EIR. It refused to provide the requested information. It cited the following exceptions as its basis for doing so:
  - Regulation 12(4)(d) (material in the course of completion, unfinished documents, and incomplete data);
  - Regulation 12(4)(e) (internal communications); and
  - Regulation 13(1) (unfair disclosure of personal data).
6. The complainant requested an internal review on 20 October 2014. DECC sent the outcome of its internal review on 17 December 2014. It upheld its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 13 January 2015 to complain about the way their request for information had been handled. Specifically, they raised concerns about DECC's reliance on the three exceptions that public authority had referred to in correspondence with them.
8. In correspondence with the Commissioner, DECC explained that it was seeking to rely on regulation 12(4)(e) for all the information within the scope of the requests. It sought to rely on regulation 12(4)(d) and Regulation 13(1) for some parts of the withheld information. Finally, it introduced reliance on Regulation 12(5)(b) (adverse effect on the course of justice) in relation to other parts of the withheld information.
9. The Commissioner has considered the application of Regulation 12(4)(e) first, given that it has been applied to all the withheld information. Where, or to the extent that, he disagrees that Regulation 12(4)(e) applies, he will consider the other exceptions that DECC has relied upon.

### **Reasons for decision**

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#### *Is the information environmental?*

10. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies the definition in regulation 2 it must be considered for disclosure under the terms of the EIR rather than the FOIA.

11. The Commissioner has considered the nature of the information sought by the complainant – meeting information and correspondence about shale gas sites.
12. Regulation 2(1)(a) covers the state of the elements of the environment, including water, soil, land and landscape. Regulation 2(1)(c) provides that information is environmental where it is on:

*"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 [2(1)](a) and (b) as well as measures or activities designed to protect those elements"*.
13. Having considered the withheld information, the Commissioner is satisfied that the information requested by the complainant constitutes environmental information under regulation 2(1)(c). He has reached this conclusion on the basis that the information relates to discussions with clear and extensive reference to decisions made around planning as well as the process of obtaining shale gas from fracking - an activity likely to affect several of the elements of the environment referred to in 2(1)(a).
14. The Commissioner considers that the withheld information is all environmental information and that the EIR is the correct regime to consider this request.

*Regulation 12(4)(e) internal communications*

15. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. It is subject to a balance of public interest test. DECC argued that regulation 12(4)(e) applied to all the requested information.
16. By virtue of regulation 12(8), communications between government departments will constitute internal communications for the purpose of the exception at regulation 12(4)(e).
17. The Commissioner's published guidance on this exception<sup>1</sup> addresses the issue of internal communications. Essentially, an internal communication is a communication that stays within one public authority. Once a

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1634/eir\\_internal\\_communications.pdf](https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf)

communication has been sent to someone outside the authority, it will generally no longer be internal.

18. It is self-evident, from the requests themselves, that information falling within the scope of those requests will constitute internal communications for the purpose of the exception at regulation 12(4)(e).
19. The Commissioner has seen the withheld information and is satisfied that it all clearly falls within the class of information described in regulation 12(4)(e). He is therefore satisfied that regulation 12(4)(e) is engaged.

*The public interest*

20. As he is satisfied that regulation 12(4)(e) is engaged, the Commissioner has gone on to consider the public interest test attached to the application of this exception, as required by regulation 12(1)(b) of the EIR. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
21. When carrying out the test the Commissioner must take into account a presumption in favour of disclosure of the information which is required by regulation 12(2).

*Public interest arguments in favour of disclosing the requested information*

22. The complainant set out the following arguments in favour of disclosure:
  - Changes had been made to the planning process but the Lords Secondary Legislation Scrutiny Committee has raised concerns about the extent of local objection and whether the government department leading on those changes (Department for Communities and Local Government ("DCLG")) had "adequately thought through its implementation of the underlying policy,"<sup>2</sup>. The complainant, again quoting from the Committee, said this suggested that DCLG may "imperfectly achieve their policy objectives".<sup>3</sup>

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<sup>2</sup> <http://www.publications.parliament.uk/pa/ld201314/ldselect/ldsecleg/131/13104.htm>

<sup>3</sup> <http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/news/lords-committee-publishes-report-on-2-statutory-instruments-relevant-to-fracking-/>

- The complainant also drew attention to changes in trespass laws to prevent individual landowners or residents from blocking planning proposals for shale gas sites.
- While the complainant recognised there is a public interest in promoting what it referred to as a “nascent industry” – the recovery of shale gas – it said that there was also a strong public interest in transparency around the regulation of this industry, particularly at this early stage. The remarks of the Lords’ Committee reflected wider concerns about how regulation was developing.
- There was also a strong public interest in the proper notification of residents. Attempts to streamline the process did not improve the disquiet of the public. The Committee had also referred to a 96% objection level when the matter of secondary legislation on planning changes was put out to consultation. This added weight to the public interest in disclosure.
- DECC had used what the complainant termed “boiler plate” arguments and appeared to have deemed Regulation 12(4)(e) to be an absolute exception from the duty to disclose with no consideration of the strong public interest arguments in favour of disclosure in this case.
- DECC’s “safe space” arguments were undermined by the fact that policy development was at an advanced stage as evidenced by the fact that the relevant legislation proposals are being discussed in Parliament.

23. DECC acknowledged the following arguments in favour of disclosure:

- There is a substantial public interest in the progress of shale gas exploration in the UK as well as related deliberations at central government level about access rights and planning guidance.
- Disclosure could provide useful insight into how Government policy is evolving and the reasoning behind that policy.
- There is a general public interest in disclosure. Openness may increase public trust in and engagement with the Government.

- Decisions that Ministers make may have a significant impact on the lives of citizens and there is a public interest in deliberations on this topic being transparent.
24. It provided links to information which it had already published in order to serve the public interest in disclosure.<sup>4</sup> In addition, it said that it had supported other departments and relevant regulators in preparing planning guidance. It also provided a link to a public consultation that it had run regarding access and its published response to that consultation.<sup>5</sup>

*Public interest arguments in favour of maintaining the exception*

25. Arguing in favour of maintaining the exception, DECC made the following arguments to the Commissioner:
- Development of good policy depends on frank and robust discussion which might be hindered if this information were made public.
  - As described in the request itself, the information in scope includes "submissions and advice to the Minister, e-mails between officials and correspondence with Cabinet colleagues and other Ministers". It drew attention to the policy not yet being fully developed. It stressed the importance of allowing the completion of policy development and the risk to that where ministers and officials are challenged on points that are still in draft – disclosure does not give a complete picture of government thinking.
  - There would be a chilling effect on future discussions because disclosure would lead to inhibition on frankness and candour. The quality of advice would suffer and ultimately this would lead to poorer decision making within Government.
  - This may also give rise to the risk that evidence or thinking is not shared with other parts of Governments. Similarly, advice from relevant stakeholders may not be shared as readily.

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<sup>4</sup> <https://www.gov.uk/government/publications/about-shale-gas-and-hydraulic-fracturing-fracking> and <https://www.gov.uk/government/publications/regulatory-roadmap-onshore-oil-and-gas-exploration-in-the-uk-regulation-and-best-practice>

<sup>5</sup> <https://www.gov.uk/government/consultations/underground-drilling-access>

- As described in the request, the withheld information includes ministerial correspondence. Disclosure would undermine the principle of collective responsibility which is a central tenet of the UK constitution and protecting it is in the public interest in order to allow a safe space for the formulation, development and refinement of policy. Free and frank discussions can be held in this safe space and undermining the principle of collective responsibility is detrimental to good Government.
- The substantive policy issues were live at the time of the request and remain so as new policy on the exploitation of shale gas is being developed.
- The party which headed DECC at the time of the request is now in opposition and, given that the policy is not yet settled, disclosure would politicise an issue that has thus far been discussed on its merits.

*Balance of the public interest*

26. There is always a general public interest in disclosing environmental information, derived from the purpose of the EIR. In that respect, regulation 12(2) specifically states that a public authority shall apply a presumption in favour of disclosure. In addition, there may be an argument for informing public debate on the particular environmental issue that the information relates to.
27. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exception. If the public interest in the maintenance of the exception does not outweigh the public interest in disclosure, the information in question must be disclosed.
28. A key factor in assessing the weight of public interest arguments is the extent to which the information itself would inform public debate on the issue concerned. There is always an argument for presenting a full picture of how a decision was made or a policy position was arrived at. If disclosing incomplete material or draft documents would support this then it increases the weight of the argument for disclosure. On the other hand, information may be within the scope of a request but nevertheless shed little light on the issue itself. In that case the weight of the argument for disclosure may be less than it otherwise would be.
29. In the Commissioner's view, the complainant has made compelling arguments in favour of disclosure. The process of fracking to extract



shale gas remains controversial. Access to land where shale gas is held has given rise to considerable debate. Stakeholders on all sides of the debate seek to be heard and their views considered. There is a strong public interest in learning as much as possible about how Government policy in this area is evolving.

30. Initial work in Lancashire appeared to lead to earth tremors that are not common in that region.<sup>6</sup> Trust in the oversight and regulation of the industry was severely undermined by these events. More recently, in June 2015, Lancashire County Council rejected an application for further drilling in the area apparently contrary to the advice of its own planning department.<sup>7</sup> There is a very compelling public interest in increasing the public's understanding of Government proposals for planning legislation which, arguably, could be served through disclosure in this case.
31. DECC has submitted arguments as to the likely "chilling effect" that disclosure would have on future discussions. The Commissioner does not dismiss this argument completely but does not give it any great weight. Officials will, in the Commissioner's view, continue to carry out their duties in accordance with their obligations to contribute freely and frankly to policy development. That said, the Commissioner does give greater weight to the general expectation that such policy will be developed in a "safe space" for free and frank contributions. He accepts that this expectation can be undermined by disclosure of information which reveals policy development, particularly where the issue is still live, as is the case here.
32. The complainant has asserted that the policy in question, namely planning legislation around the question of access to shale gas sites, was near completion at the time of the request in that it was already before Parliament. The Commissioner does not accept this as an indication that the matter is no longer live. As evidenced by the decision of Lancashire County Council referred to above, which post-dates the request by almost a year, the question of planning applications in respect of shale gas sites remains a live issue. It is Government policy to encourage the development of what the complainant has referred to as the "nascent industry" of shale gas extraction. Disclosure of recent discussions about planning options for shale gas sites would, in the Commissioner's view, undermine the safe space in which such discussions are still being held.

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<sup>6</sup> <http://www.bbc.co.uk/news/uk-england-lancashire-15550458>

<sup>7</sup> <http://www.bbc.co.uk/news/uk-england-lancashire-33313084>

33. In the Commissioner's view, this point is particularly compelling when considering the exchange of ministerial communications on this topic. As described in the request itself, the withheld information includes communications among named Ministers. The public interest in protecting the safe space in which Ministers communicate is particularly strong.
34. The Commissioner agrees that there is a compelling public interest in disclosure in this case. There is a public interest in considerable transparency around government decision making on the matter of planning for shale gas sites. However, and by a narrow margin, the Commissioner has concluded that there is a greater public interest in protecting the safe space in which discussions in government are held. This would be served in this case by maintaining the exception at regulation 12(4)(e). In reaching this view, he has given particular weight to the fact that the matter was live at the time of the request. There is a strong public interest in protecting the space in which ministers and officials discuss live matters. This overrides the compelling public interest in making those discussions public at this time.

*Regulation 12(4)(e) - conclusion*

35. In light of the above, the Commissioner has concluded that DECC is entitled to withhold all the requested information under regulation 12(4)(e). Given his decision as regards the application of regulation 12(4)(e) in relation to all the requested information, he has not gone on to consider the application of the other regulations cited by DECC in support of withholding parts of the same information.

## Right of appeal

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36. 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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

37. 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.
38. 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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