

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 14 August 2018

**Public Authority:** Department for Business, Energy & Industrial Strategy

**Address:** 1 Victoria Street  
London  
SW1H 0ET

#### **Decision (including any steps ordered)**

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1. The complainant has requested information concerning the cost benefit analysis of advanced (energy) meters carried out by the former Department for Business, Enterprise & Regulatory Reform (now the Department for Business, Energy & Industrial Strategy). BEIS refused the original request in its entirety and a subsequent refined request in part under Section 12 (costs limit of the FOIA and/or Regulation 12(4)(b)(manifestly unreasonable).
2. The Commissioner's decision is that BEIS correctly refused both requests as manifestly unreasonable and that the public interest balance favours maintaining the exception in both cases. However, the Commissioner has found that BEIS breached Regulations 5(2) and 11(4) in their handling of the requests.

#### **Request and response**

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3. On 30 November 2016, the complainant wrote to the Department for Business, Energy & Industrial Strategy (BEIS) and requested information in the following terms:

*'1. Any and all supporting documentation, analysis and evaluation used and/or produced by Department for Business, Enterprise & Regulatory Reform (BERR) (now known as DBEIS) in relation to the Cost Benefit Analysis (CBA) as published in the following:*

*1.1 The main document being 'Department for Business Enterprise & Regulatory Reform – Energy Billing and Metering, Changing Consumer Behaviour: A Consultation on Policies Presented in the Energy White Paper (August 2007) ('Consultation');*

*1.2 Which contains at Annex C an 'Impact Assessment of Billing & Metering Policies set out in the Energy White Paper (May 2007);*

*1.3 Which includes at page 66 a section entitled 'Summary: Analysis & Evidence in relation to Provision of Smart Meters for Business' and at page 79 a section titled 'CBA results;*

*We are specifically searching for any documents relating to and supporting the sections detailed at paragraph 1.3 above (for reference such sections are repeated as part of 'BERR, Energy Metering, A Consultation on a Draft Licence Modification for Provision of Advanced Metering for Larger Business Sites (July 2008');*

*2. Any and all reports, cost benefit analysis or other such documents produced as part of the Smart Meter CBA Development period proposed as taking place from August 2007 – October 2007 at page 13 of the Consultation;*

*3. The analysis conducted for the Energy White Paper [which] suggests that smart meters are not universally cost-effective [as at the time of writing] as referred to at paragraph 2.3 of the Consultation; and*

*4. Any additional cost benefit analysis or cost model, not provided in response to the above, produced in relation to the advanced metering roll-out obligations for profile classes 5-8 as now contained within the Electricity Act 1989 Standard Conditions of Electricity Supply Licence, conditions 12.17 – 12.22. By way of example, in relation to the Smart meter roll-out for domestic and small and medium non-domestic sectors, DBEIS has published a document entitled 'Smart Meter Roll-Out Cost-Benefit Analysis (August 2016)'.  
4. The complainant noted that they would appreciate receiving the information requested piecemeal if some information was easier to locate than others and also asked the Department, in the event of the request exceeding the Section 12 costs limit (or similar EIR provision), to provide advice and assistance as to how they could refine the request.*

5. BEIS responded to the request on 3 January 2017, and advised that the request was being refused under Section 12 of the FOIA. The Department advised that;

*'In order to provide you with the information on the scale that you have requested would require us having to search through hundreds of documents across multiple file locations to identify and extract all the items in the scope of your request. We estimate that to do so would exceed the appropriate limit. Therefore, your request will not be processed further at this time'.*

6. The Department suggested that the complainant *'may wish to refine your request by narrowing its scope, such as reducing the number of areas for which you are requesting information. However, we estimate that complying with Qs 1 and 2 on their own would still exceed the appropriate limit'*. BEIS confirmed that they would be happy to consider whether any revised request could be dealt with within the cost limit.
7. The complainant requested an internal review on 31 January 2017. The complainant contended that *'a great deal, if not all'* of the information requested is environmental in nature and therefore subject to the Environmental Information Regulations 2004 rather than the FOIA. Noting that there is no direct costs equivalent exception under the EIR the complainant stated that, *'you have not provided any valid grounds to refuse disclosure of environmental information and we note that a number of items requested could be very quickly located, retrieved and provided to us, so cannot reasonably be said to amount to a request which is voluminous and complex, or manifestly unreasonable under the EIR'*.
8. To the extent that any of the requested information was non-environmental and therefore subject to the FOIA, the complainant contended that BEIS had *'failed to explain how and why the items requested would trigger the threshold as required by ICO guidance and the applicable Code of Practice'*. The complainant contended that the Department had failed in their duty to provide advice and assistance, *'making no attempt to suggest how you may help, or how the request could be narrowed, or what you could provide within the costs limit'*. The complainant asked the Department to reconsider their refusal in light of the concerns raised, and noted that, *'in case it is of assistance, the information of most interest and which is most urgently required is that set out at question one of the request'*.
9. The complainant asked the Department, should they remain of the view that it was not possible to provide any of the information requested, to *'please set out your reasons fully in relation to the EIR and/or FOIA'*.

10. BEIS wrote to the complainant on 10 February 2017 and advised that they were treating the request for prioritisation of the information contained in question one of the request as a revised request (assigning it a separate reference number) whilst at the same time the Department confirmed that they were dealing with the request for an internal review of their response of 3 January 2017 (under the original reference number).
11. The Department provided the complainant with their internal review on 21 April 2017, almost three months after this had been requested by the complainant.
12. BEIS noted that they had previously indicated to the complainant that to provide them with the information requested would require them having to search through hundreds on documents across multiple file locations to identify and extract all the items in the scope of the original request. The Department had estimated that to do so would exceed the appropriate limit.
13. In the internal review, BEIS advised the complainant that they had conducted a further review of the folders held on the Department's electronic information system (DOC Shares) where much of the information is stored. The Department stated that, *'in relation to question 1 only, a search of the key terms contained in your request covering the period from 1 January 2006 to 1 January 2008 identifies more than 700 folders on which some of the papers may be contained'*. The Department stated that whilst they could refine the searches in looking for the documents requested, searches covering the four separate areas of information requested would take considerable time. They advised that they would also have to make enquiries with colleagues responsible for the policy at the time and still working in the Department (of which there were a number). Having identified all relevant information, BEIS stated that they would then be required to retrieve and extract the information from records. Therefore, the Department did not consider that they would be able to meet the original request covering the four separate areas of information without exceeding the cost limit and they considered that their decision to refuse the request under Section 12 of the Act was the correct one.
14. BEIS disputed the complainant's contention that they had failed to provide any advice or assistance, or had made no attempt to suggest how they could help, noting that they had previously advised the complainant that they might wish to reduce the number of areas for which they were requesting information. Having noted the complainant's notification that the information most urgently required was that set out in question 1 of the request, BEIS advised that following review, they considered that it was possible to provide the

complainant with the information which they held covering this area, within the cost limit.

15. The review confirmed that in relation to question 4 of the request, the Government did not produce any cost benefit analyses relating to the roll-out of advance metering for business, subsequent to the one that was published in the document entitled, '*Changing Consumer Behaviour: A Consultation on Policies Presented in the Energy White Paper*' published in August 2007, and reproduced in '*A Consultation on a Draft Licence Modification for Provision of Advanced Metering for Larger Business Sites*', published in July 2008. BEIS did however confirm that the Government did produce additional Impact Assessments for the roll-out of smart and advanced metering for small and medium sized businesses and other non-domestic premises.
16. The Department also advised that to the extent that some of the (unspecified) information requested '*may*' be environmental in nature and therefore subject to the EIRs rather than the FOIA, they considered that Regulation 12(4)(b)(manifestly unreasonable) applied to such information. The Department stated that:

*'We believe that searching for and retrieving information in the four separate areas covered by your request would create unreasonable costs and lead to an unreasonable diversion of resources that are currently engaged in other policy and implementation matters related to the roll out of smart meters.'*
17. The Department recognised and detailed public interest arguments both for and against disclosing the information requested:
18. The Department confirmed that they considered that Regulation 12(4)(b) was engaged in this instance, '*given that dealing with the request would create unreasonable costs and an unreasonable diversion of resources. The public interest is served by not providing the information requested.*'
19. In a separate letter dated 21 April 2017, the Department provided the complainant with all of the information which they held within scope of question 1 of the original request and subsequently refined request of 31 January 2017. The information was disclosed in a table attached to the letter.
20. By way of background to the development of policy relating to this area, the Department advised the complainant that in the consultation document published in August 2007, the Government had proposed that smart metering should be installed for businesses in profile classes 5-8 of the electricity market and all non-daily metered gas sites consuming > 732,000 kWh per annum. It had confirmed that it would move ahead

with this policy in Budget 2008 and subsequently published a response to the consultation in April 2008 reiterating this.

21. The Government published a '*Consultation on a Draft Licence Modification for Provision of Advanced Metering by Larger Business Sites*' in July 2008 that would implement the policy. This consultation included the Government's final impact assessment on this matter at Annex C. The Government published a response to this consultation '*Licence Condition for the Provision of Advanced Metering for Larger Business Sites*' in November 2008, which included revised licence modifications.
22. BEIS confirmed that they had considered the complainant's refined request under the EIRs '*as some of the information that you sought disclosure of falls within the definition 'environmental information'*'. To the extent that such information fell under the EIR, the Department confirmed that it too was set out in the attached table. BEIS advised that some information held constituted third party personal data and was therefore exempt from disclosure under the relevant provisions of the FOIA and the EIR.
23. On 21 June 2017 the complainant requested an internal review of the Department's response to the refined request. The complainant noted that they were surprised by the limited volume of information provided and stated that after a delayed response '*all we received were 4 hyperlinks to publically available information (without claiming any exemption for the non-provision of the information, such as Section 21 of FOIA) and an extract of a single meeting in May 2007*'. Noting that no exemption other than Section 40(2) had been cited by BEIS, the complainant understood this to mean that the Department held '*no other supporting documentation, analysis or evaluations*' relevant to the request, which they found surprising.
24. The complainant complained about the time taken by the Department to provide their response, noting that this had been over 55 calendar days and '*arguably closer to 5 months*' when it was considered that the refined request was the same as question 1 contained in the original request of 30 November 2016. The complainant requested that the Department investigate the cause of the delay and provide an appropriate response.
25. The complainant stated that, '*it is hard to believe that a nationwide program in relation to the roll out of smart meters across the UK would have so little supporting documentation, analysis and/or evaluations regarding the cost benefit analysis as requested*'. The complainant highlighted the BERR paper disclosed to them ('*Synthesis of the Analysis of the Energy White Paper, May 2007*') and noted that at section 6.7 of this paper it was stated that:

*'All of the CBA carried out for the EWP was peer reviewed. This review process was chaired by the chief economist of the DTI and involved the chief economists from DEFRA, DfT and HM Treasury and external experts as appropriate. The peer review group was also supported by an interdepartmental group of analysts who were able to study the CBAs in detail and feed comments to the main panel'.*

26. The complainant noted that they had not been provided with any copies of, or sight of, such CBAs, comments from or feedback by the peer review group. Given that such information was not contained in the table previously disclosed by BEIS, the complainant stated that they *'can only conclude that not all of the relevant information has been provided to us'*. The complainant also suggested that, on the balance of probabilities, it seemed extremely unlikely that no records would have been created since May 2007 on this topic and retained by BEIS.
27. The complainant therefore requested that the Department reconsider the information held and *'provides to us a complete set of information requested'*. The complainant noted that as the Department had previously confirmed that they could comply with question 1 (i.e. the refined request) without exceeding the cost threshold under FOIA or incurring the manifestly unreasonable exception under the EIR, *'we expect there to be no reliance on such exemption/exception for the provision of the outstanding information'*.
28. The complainant also highlighted the Department's information (as contained in the previous internal review of the response to the original request) that the various places where documents relevant (to the original request) may be stored, covered about 700 folders as well as additional information which may have been stored in individual personal records. The complainant stated that BEIS is obliged to contend with Section 46 of the FOIA and Regulation 16 Codes of Practice regarding records management, the purpose of which *'is to provide some assurance that the information provided will be complete and reliable'*.
29. It was put to BEIS by the complainant that:  
  
*'Given the national reach and importance of this project and the requirement on BEIS to meet the requirements of the Section 46/Regulation 16 Codes of Practice, it is surprising that information as important as documentation, analyses and evaluations supporting cost benefit analysis and considerations for the project are not stored in a manner which would enable BEIS to refer to them more readily, notwithstanding the passage of time'.*

30. On 19 July 2017, the Department informed the complainant that they were not yet able to respond *'as further time is needed to complete the review'*. They stated that they hoped to provide the review shortly *'and no later than by 12 August 2017'*. BEIS apologised for the delay in their response.
31. On 21 July 2017, the complainant submitted a complaint to the ICO both about the internal review of the Department's response to the original request of 30 November 2016 and the delayed internal review of the Department's response to the refined request of 31 January 2017.
32. BEIS subsequently provided the complainant with the delayed internal review on 15 August 2017.
33. Prior to addressing the complainant's complaints, the Department stated that they understood the request to relate to *'the advanced meter roll-out, rather than the smart meter roll-out'*. For clarity, BEIS explained:  
  
*'The advanced meter rollout was introduced by Government in April 2009 and required suppliers to roll-out advanced gas and electricity meters to their larger non-domestic customers by 6 April 2014. The smart meter rollout is a related but separate Government scheme and requires suppliers to roll-out smart meters to all domestic and smaller non-domestic customers by the end of 2020. Our response therefore relates to the advanced meter rollout'*.
34. The Department apologised for taking longer than anticipated to complete the internal review and stated that, *'as we notified you in our emails of 3 March and 30 April, this was linked to the reply to your internal review of (case reference number). It was necessary for us to consult other colleagues to ensure that the two responses were considered and finalised concurrently'*. BEIS stated that *'due to the complex nature of this internal review it was necessary to expand the response timeframe to within 40 working days'*.
35. In undertaking the internal review, BEIS confirmed that they had conducted further searches of the folders held on their electronic information systems. Having taken note of the complainant's observations and comments of 21 June 2017, they had *'refined our searches further'*. For example, they had searched for key words relating to *'peer review'*, *'interdepartmental group of analysts'* and *'IAG'*. As a result of these additional searches, BEIS confirmed that *'we have discovered that there is some further information which may be in scope of your request but was not accounted for in the original reply'*. The Department advised the complainant that the searches which they had already carried out prior to their response of 21 April 2017 *'had already been extensive'* and that they believed in good faith that they had found and provided all of the information held in scope of the request. The

Department confirmed that it was only as a result of conducting the more targeted searches (those based on the points raised by the complainant) that they had determined that they held some additional information.

36. The internal review therefore concluded that the Department's response of 21 April 2017 was incomplete, in that it did not account for all of the information that was in scope of the request, either by providing it or relying on exemptions or exceptions to withhold it. BEIS apologised for this error.
37. BEIS advised that whilst they had identified information relating to the peer review of the Energy White Paper, much of this was deemed to be out of scope and did not relate to the complainant's request. Where this information did relate to the request and was deemed to be in scope, the Department confirmed that they were now releasing this in an attached Annex B. The Department advised that Annex B included three emails which analyse '*EWP carbon savings*' and included figures. Whilst they had included all three emails in the disclosure, they had deemed the email of 3 April 2007 to be the most up-to-date with the most relevant figures.
38. The Department confirmed that the remainder of the information requested was exempt under sections 12, 21 and 40 of the FOIA or Regulation 12(4)(b) of the EIR.
39. BEIS estimated that they had already spent more than 24 hours of staff time in investigating and responding to the refined request of 31 January 2017. The Department advised the complainant that it was therefore open to them to rely on section 12 and Regulation 12(4)(b) in relation to any further work for the purpose of the internal review.
40. BEIS advised that '*to a large extent, we chose not to rely on these provisions*'. Having identified and released (in the course of the internal review) some additional information within scope of the request, BEIS advised that they estimated that '*the further searches conducted and the synthesis of the information found took around 49 additional staff hours. In other words, we have voluntarily incurred an additional £1225 of cost beyond the costs already incurred in responding to your original (refined) request of 31 January*'.
41. However, the Department advised the complainant that they had chosen to rely on section 12 and Regulation 12(4)(b) to some extent. Specifically, the Department noted that some of the emails released to the complainant referenced attachments. Having conducted their further searches, BEIS considered that it would take too much additional time and resources to extract and identify all of the relevant information within these attachments. This was partly because the attachments

were stored in a separate digital location with no electronic links to the relevant emails. This was due to the nature of these being old records and the way the data had been migrated. The Department explained that it would therefore require additional time to identify and extract all of these attachments and match them to the relevant emails, and much of this matching would have to be done manually.

42. BEIS also advised the complainant that they would also need to use a third party service provider to locate and extract the information from their records management system, at an estimated cost of £900 per day plus VAT. BEIS advised that there was no guarantee that if the service provider was successful in finding and extracting the attachments, they would be in scope of the request. The process for determining whether the information was in scope would itself involve additional staff hours.
43. Having already conducted considerable further searches, the Department confirmed that they considered that it would require further significant additional cost and diversion of resources from the teams concerned to search through all of the items potentially in scope of the request to identify and extract further potentially relevant information.

### **Scope of the case**

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44. As noted, the complainant contacted the Commissioner on 21 July 2017 to complain about the Department's internal review of the original request of 30 November 2016 and the delayed internal review of the Department's response to the refined request of 31 January 2017.
45. In their complaint to the ICO, the complainant confirmed that they do not dispute the Department's application of sections 21 and 40(2) and their complaint concerns the Department's use of section 12 and/or Regulation 12(4)(b) in response to both their original and refined requests, and the delay in responding to their requests.
46. With regard to the scope of the request the complainant advised the Commissioner that their requests related to the advanced meter rollout, which was the Department's understanding of the scope of the request. However, the complainant advised that in the early stages of the advanced meter rollout, BEIS and its predecessor, the Department of Energy and Climate Change (DECC) used the term, 'Smart Meter' both as a generic term covering both advanced meters for commercial properties, which their requests related to, and also for Smart Metering Equipment Technical Specifications (SMETS) devices, which covered residential properties.
47. The complainant advised the Commissioner that in a previous letter to them from BEIS in April 2017, the Department had advised that *'it is*

*proposed that smart metering should be installed for businesses*'.

Therefore, the complainant advised the Commissioner that whilst their requests related to the advanced meter rollout, they considered that there was a strong possibility that some of the information requested would actually have been described or referred to by BEIS and/or DECC under the 'Smart Meter' nomenclature, as opposed to being described as advanced meters. They would have expected BEIS to have reviewed any documents referring to smart meters to identify whether they actually related to advanced meters as opposed to SMETS devices.

48. In submissions to the Commissioner, BEIS confirmed that their search terms were defined so that they would capture references to smart meters or capture both smart and advanced meters by being neutral as to meter type (which would have enabled material describing both types of meter to be identified).
49. BEIS advised the Commissioner that advanced meters provide measured gas or electricity consumption for multiple time periods (i.e. for each half hour in electricity or hour in gas) and provide the supplier with remote access to that data. Advanced meters have a lower minimum level of functionality than smart meters.
50. The advanced meter rollout was introduced by Government in April 2009 and required suppliers to rollout advanced gas and electricity meters to their larger non-domestic customers by 6 April 2014. The advanced meter rollout implemented a requirement for the provision of advanced metering for larger non half hourly read electricity and non-daily read gas sites in the non-domestic sector.
51. In providing submissions to the Commissioner, BEIS was asked to reconsider which information access regime they considered the complainant's requests to fall under – FOIA or EIR. The Commissioner notes that the complainant had previously contended that most, if not all, of the information requested, was environmental in nature and therefore subject to the EIR rather than the FOIA.
52. In submissions to the Commissioner, BEIS noted that they were only in a position to consider this issue in terms of the categories of requested information, in the absence of access to the actual information (which had not been retrieved in reliance on section 12 of the FOIA or Regulation 12(4)(b) of the EIR).
53. The Department noted that they had taken into consideration the Court of Appeal judgement in *BEIS v Information Commissioner and Henney* [2017] EWCA Civ 844 which upheld the previous finding of the Upper Tribunal that information in a Project Assessment Review about the communications and data component of the UK Government's Smart Meter Programme was 'environmental information' under Regulation

2(1)(c) of the EIR. As Lord Justice Beatson stated (paragraph 38 of the judgement) *'The Smart Meter Programme is clearly a 'measure', and it is common ground that it is one that affects or is likely to affect the elements and factors referred to in the regulation'*.

54. BEIS advised the Commissioner that they had determined that the requested information *'is highly likely to fall under the EIR on the basis of regulation 2(1)(e), namely that it is information on cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in regulation 2(1)(c)'*. The Department noted that in respect of the Implementation Programme (SMIP), given references to the role of the SMIP in reducing CO2 emissions and hence helping to deliver environmental policy objectives, it has been accepted that the programme as a whole is likely to affect the relevant elements and factors, such as 'air and atmosphere' and 'energy'. The Department recognised that the SMIP itself was considered by the Court of Appeal to be a measure referred to in regulation 2(1)(c).
55. BEIS advised that whilst the technology underpinning advanced meters for large business sites supports many of the same benefits as the roll-out of smart meters, there are some differences between the two roll-outs. In particular, the domestic roll out of smart metering has an explicit focus on engaging and changing the behaviour of consumers to save energy, for example, through the provision of an In Home Display. However, on balance, BEIS considered that the advanced meter roll-out is likely to amount to a measure, namely a policy, plan or programme, *'that at the very least is 'likely to affect the elements and factors referred to in (a) and (b)'*.
56. The Commissioner is satisfied that the requested information is 'environmental' in nature, for the reasons described by BEIS. Therefore, the applicable information access regime is the EIR and the scope of the Commissioner's investigation has been to determine whether BEIS were correct to apply regulation 12(4)(b) to both the complainant's original request of 30 November 2016 and the subsequent refined request of 31 January 2017.

## Reasons for decision

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### *The original request of 30 November 2016*

57. In submissions to the Commissioner the Department advised that upon receipt of the request they first looked to identify the appropriate information access regime (i.e. FOIA or EIR) which applied to the same. They stated that they needed to make this assessment without being able to examine the detailed content of the possible information that

might be in scope of the request. This was because the breadth of the information request meant that identifying and extracting the information would have taken considerable time and they estimated that it would exceed the cost limit for FOIA and it was likely that the broadly equivalent exception under EIR would be engaged. They concluded at the time that the information requested should be considered under the FOIA.

58. At internal review stage the Department considered that some of the information requested may be environmental in nature and therefore they applied Regulation 12(4)(b) to the information as well as section 12 of the FOIA. However, as noted above, in submissions to the Commissioner, having reconsidered the request, BEIS considered (and the Commissioner agrees) that the information is environmental in nature and that therefore the request should be considered under the provisions of the EIR, specifically Regulation 12(4)(b).
59. The Department has therefore confirmed that they are relying upon Regulation 12(4)(b) of the EIR to refuse to comply with the complainant's original request. BEIS' position is that the request is manifestly unreasonable on the grounds that to comply with it would impose a significant and detrimental burden on their resources, in terms of officer time and cost to the Department. The Commissioner addresses this exception below, following consideration of the Department's procedural breaches of the EIR.
60. Regulation 5(2) of the EIR places a duty upon a public authority to provide information (where held) to a requester as soon as possible and no later than 20 working days after the date of receipt of the request.
61. The Commissioner notes that the complainant's original request was made on 30 November 2016 and BEIS responded to the same on 3 January 2017. This was outside the required time-scale, albeit only by a few days.
62. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
63. The EIR differ from the FOIA in that there is no specific limit set for the amount of work required by an authority to respond to a request, as there is for section 12 of the FOIA.
64. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the fees regulations) which apply in relation to section 12 of the FOIA are not directly relevant to the EIR – the cost limit and hourly rate set by the fees regulations do not apply in relation to environmental information. However, the Commissioner considers that the fees regulations provide a useful (but not determinative) guide

where the reason for citing Regulation 12(4)(b) is the time and cost of a request.

65. The Commissioner notes that Regulation 12(4)(b) sets a fairly high benchmark for a public authority to meet before it is no longer under a duty to respond to a request. The benchmark is 'manifestly' unreasonable, rather than simply being 'unreasonable' per se. The Commissioner considers that the term 'manifestly' means that there must be an obvious or clear quality to the identified unreasonableness.
66. It should also be noted that public authorities may be required to accept a greater degree of burden in providing environmental information than other information. This was confirmed by the Information Tribunal in the DBERR case<sup>1</sup>, where the Tribunal considered the relevance of Regulation 7(1) and commented as follows (paragraph 39):

*'We surmise from this that Parliament intended to treat environmental information differently and to require its disclosure in circumstances where information may not have to be disclosed under FOIA. This is evident also in the fact that the EIR contains an express presumption in favour of disclosure, which FOIA does not. It may be that the public policy imperative underpinning the EIR is regarded as justifying a greater deployment of resources. We note that recital 9 of the Directive calls for disclosure of environmental information to be 'to the widest extent possible'. Whatever the reasons may be, the effect is that public authorities may be required to accept a greater degree of burden in providing environmental information than other information'.*

67. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will take the following factors into account:
  - Proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services;
  - The nature of the request and any wider value in the requested information being made publicly available;

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<sup>1</sup> Department for Business Enterprise and Regulatory Reform v the Information Commissioner and Platform. Appeal no. EA/2008/0097

- The importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue;
  - The context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester;
  - The presumption in favour of disclosure under regulation 12(2);
  - The requirement to interpret the exceptions restrictively.
68. In submissions to the Commissioner, BEIS provided their rationale for applying Regulation 12(4)(b) to the original request.
69. The Department took steps to identify if they held information in scope of the request, and discovered that there was no single central file or location where they could be confident that search would locate all relevant information that could potentially be in scope of the request. That is to say, information could potentially be found in a number of locations in the Department.
70. The Department advised that given the subject matter of the request, some of the potentially relevant information is over 10 years old and is stored in a separate digital location. Moreover, these records have been saved using an older file format following the migration of the data between Departments following Machinery of Government changes and upgrades to IT systems over time. The Department explained that this has affected the way these older files have been stored and how readily the information embedded within them can be accessed. For example, the attachments embedded within linked emails are no longer accessible without further processing. This inevitably impacts the amount of time required to identify and extract all of the files and determine if the information is in scope, as much of this would have to be done manually.
71. The Department explained that as a sampling exercise, officials searched DOC Shares (the Department's electronic filing system) to provide an initial estimate of the work involved and the volume of information likely to be held. Officials used a variety of search terms and included a date range (1 January 2006 to 1 January 2008) to narrow the search. BEIS explained that they chose this time period to reflect the timing of the main consultation quoted in the request. They also provided an allowance of several months prior and post these dates to capture any relevant information.
72. Search terms included 'Analysis business smart meter domestic evidence assessment' and 'Energy White Paper Analysis 2007 Meter'. The DOC Shares searches uncovered 21 folders which contained a total

of 2,269 items. BEIS advised that any of these items could potentially have been in scope given the breadth of the request. They would have needed to open every document found as part of the search results to establish whether it contained information in scope of the request (i.e. correspondence on the relevant subject) and then to extract any relevant information that was identified.

73. Using an estimate of (on average) 2 minutes to open and consider each item, BEIS advised that it would take approximately 75 hours and 38 minutes to consider whether each item in the folders was within the scope of the request. BEIS confirmed that they had sought to apply the quickest possible method to gather the information requested. However, based on the assessment set out above, complying with the wide request would clearly have exceeded the appropriate limit in the fees regulations.
74. As part of the internal review of the original request, BEIS advised that they undertook the same searches and re-interrogated the Department's electronic record system and again ran a sampling exercise where officials searched DOC shares to provide an estimate of the work involved and the volume of information likely to be found. In addition to the information already found, the extra time spent on searching DOC shares resulted in uncovering 8 additional folders containing a total of 56 items potentially in scope of the request.
75. Regulation 11(4) of the EIR requires a public authority to provide an internal review (where one is requested) as soon as possible and no later than 40 working days after the date of this being requested. The Commissioner notes that the Department breached this Regulation in respect of the original internal review of 21 April 2017.
76. In view of the estimates outlined above, BEIS contends that the task of locating the information requested by the complainant in the original request of 30 November 2016, is manifestly unreasonable. This is because they are unable to locate and extract the information needed to comply with the request without placing a disproportionate burden on the Department.
77. Under Regulation 9 of the EIR a public authority is required to provide advice and assistance to a requester, so far as it would be reasonable to expect the public authority to do so. Although the complainant has contended that in their original response to the request BEIS made no attempt to suggest how the request could be narrowed, or what information the Department could provide within the cost limit, the Commissioner notes that the Department did suggest to the complainant that they might wish to refine the request by narrowing its scope, such as reducing the number of areas for which they were requesting information. The Department also advised that they

estimated that complying with questions 1 and 2 of the request on their own would still exceed the appropriate limit. However, the Commissioner does not consider that the advice and assistance provided by the Department was particularly helpful or useful, since the Department provided no positive information (such as which areas of the original request should be reduced) as to how the complainant could submit a more manageable request.

*The Commissioner's conclusion*

78. The Commissioner notes that the complainant's original request of 30 November 2016 was potentially very wide in scope, referring as it did to 'any and all' information relating to the documents and publications cited. To determine whether the request is manifestly unreasonable, the Commissioner is obliged to consider the terms of the complainant's request alongside how the requested information is likely held by the Department.
79. The Commissioner considers that the Department's estimate as to the cost of complying with the original request was reasonable, since it was informed by and based upon the sampling exercise undertaken by BEIS. That exercise showed that for the two year period selected by the Department alone, the potential information relevant to the request (having been identified through the use of appropriate search terms) comprised 21 folders containing 2,269 items.
80. The Department's estimate of the time needed to locate and extract information within scope of the complainant's request is based upon a detailed breakdown which is not unreasonable or unrealistic (i.e. an average of 2 minutes to open and consider each item). The estimated cost of 75 hours and 38 minutes (not including the additional time needed to consider the further information identified at internal review) is well in excess of the cost limit which is described by the Fees Regulations for requests under the FOIA. For central government departments the appropriate limit is £600 and this limit will be exceeded if it would require more than 24 hours work by the central government department to process the request. The Commissioner notes that the cost limit would most likely be further exceeded, were the Department to extend the time period beyond the two year period used for the purposes of the sampling exercise.
81. As the Department's reasonable estimate of the cost of complying with the original request is clearly well in excess of the appropriate limit provided by the Fees Regulations, the Commissioner considers that BEIS is justified in considering the request to be manifestly unreasonable. The Commissioner considers that the burden imposed on the Department by this request is markedly greater than that normally required to provide environmental information such that the

Commissioner considers that Regulation 12(4)(b) is correctly engaged to the same.

82. As the refined request of 31 January 2017 concerned the information requested in question 1 of the original request of 30 November 2016, the Commissioner will consider the public interest factors applicable to both requests later in this notice.

*The refined request of 31 January 2017*

83. As noted, BEIS treated the complainant's notification (in the internal review request of 31 January 2017) that the information in the original request which was of most interest and most urgently required was that contained in question 1 as a new (refined) request.
84. In addition to the checks and searches detailed above in respect of the original request, the Department advised the Commissioner that they identified five officials who were mainly responsible for the policy at the time and asked each one to search their inboxes. BEIS confirmed that the email to these officials did not specify the search terms that should be used, but did provide them with the two year date range to be applied (1 January 2006 to 1 January 2008) as well as a copy of the refined request (question 1 of the complainant's original request). These email searches identified 3 relevant documents and upon checking the same BEIS found that the majority of the information related to the smart meter rollout rather than the advanced meter rollout.
85. On 21 April 2017 the Department responded to the refined request and confirmed that they held relevant information. At the time BEIS considered the information under both the FOIA and the EIR and applied the respective third party data provisions only. The information deemed to be in scope was provided in an annex to the response and consisted of four hyperlinks to publicly available documents and an extract from one email.
86. The Commissioner notes that it took almost three months for the Department to respond (on 21 April 2017) to the complainant's refined request of 31 January 2017. In submissions to the Commissioner, BEIS noted that they had acknowledged and apologised for the delay to the complainant. The Department advised that the process took longer than anticipated, given the breadth, depth, complexity and historical nature of the requests and pressure this put on staff resources. The Department also explained that they had consulted widely about the requests to ensure the factual integrity and consistency of the same.
87. The Commissioner has noted the explanation provided for the delays by BEIS. However, this was a significant and serious breach of Regulation 5(2). Furthermore, as the complainant has noted, as their refined

request was simply a repeat of one part of the original request, far from needing more time to provide their response, the Department should have been able to respond to the refined request comfortably within the statutory time-frame.

88. As previously noted, the Department identified further information following information highlighted by the complainant in their internal review request of 21 June 2017 and disclosed this information to the complainant.
89. In the internal review, BEIS estimated that they had already spent more than 24 hours of staff time in investigating and responding to the refined request of 31 January 2017. The Department advised the complainant that it was therefore open to them to rely on section 12 and Regulation 12(4)(b) in relation to any further work for the purpose of the review. BEIS advised the complainant that, *'to a large extent, we chose not to rely on these provisions'*.
90. Having therefore identified and disclosed (in the course of the internal review) some additional information within scope of the request, BEIS stated that *'the further searches conducted and the synthesis of the information found took around 49 additional staff hours. In other words, we have voluntarily incurred an additional £1225 of cost beyond the costs already incurred in responding to your original request of 31 January'*.
91. The Commissioner recognises and appreciates that the further searches conducted by BEIS in response to the complainant's request for an internal review of 21 June 2017, will have incurred additional expense. However, the Commissioner considers that it was entirely reasonable for the complainant (having read the information disclosed by BEIS in their response of 21 April 2017) to highlight parts of that information which suggested that further relevant information was likely to be held by the Department. If BEIS had initially estimated that it would have exceeded the cost limit to respond to the refined request of 31 January 2017, then they should have applied the relevant provision (section 12 and/or regulation 12(4)(b)) and provided the complainant with advice and assistance as to how they should appropriately narrow their request.
92. In any event, BEIS has confirmed that they are relying upon regulation 12(4)(b) in respect of the email attachments as they estimate that the cost of providing these alone would exceed the appropriate limit.
93. In submissions to the Commissioner, BEIS explained that the relevant email attachments have been saved using an older file format. This impacts the amount of time required to identify and extract all of the files and determine if the information is in scope, as much of this would have to be done manually. The Department confirmed that they would

need to use a third-party service provider to locate and extract the information from their records management system, at an estimated cost of £1,080 per day.

94. Based on discussions with relevant colleagues and from previous experience where it has taken 1 day to extract information from only a few files, BEIS estimate that it would take a minimum of 2 working days to extract the information that may be in scope of the request. BEIS advised that there is no guarantee that if the service provider was successful in finding and extracting the attachments, the attachments would be in scope of the request. The process for determining whether the information was in scope would itself involve additional staff hours.
95. In submissions to the Commissioner, BEIS contended that providing the relevant email attachments would create unreasonable costs and lead to an unreasonable diversion of resources that are currently engaged in other policy and implementation matters related to the roll out of smart meters.
96. As noted previously, the appropriate costs limit for central government departments is £600 and this limit will be exceeded if it would require more than 24 hours work by the central government department to process the request. BEIS have advised that it would take a minimum of 2 working days to extract the information (contained in the email attachments) that may be in scope of the request and the estimated (minimum) cost of the third-party service provider would therefore be £2,160. Further time would be needed for the process of determining whether the information was in scope of the request. The Commissioner notes that the cost limit would most likely be further exceeded, were the Department to extend the time period beyond the two year period (1 January 2006 to 1 January 2008).
97. As the Department's reasonable estimate of the cost of complying with the request for the email attachments is clearly well in excess of the appropriate limit provided by the Fees Regulations, the Commissioner considers that BEIS is justified in considering this part of the refined request to be manifestly unreasonable. The Commissioner considers that the burden imposed on the Department is markedly greater than that normally required to provide environmental information such that the Commissioner considers that Regulation 12(4)(b) is correctly engaged to the same. In reaching this view the Commissioner has been mindful of the fact that were the Department to locate, extract the information and consider the same, there is no guarantee that it would comprise information within scope of the refined request.
98. In submissions to the Commissioner, BEIS also addressed the complainant's contention that it seems very unlikely, on the balance of probabilities, that no relevant information would have been created on

this topic since May 2007. The Department noted that the refined request is in relation to a document published in August 2007. Therefore, it is likely that most supporting documentation, analysis and evaluation would have pre-dated this document.

99. The Department advised that the policy was confirmed in the Government's response to the August 2007 consultation, which was published in April 2008. This document contained no mention of any further analysis. *'Moreover, as the complainant noted in their original request, the final Impact Assessment was included as an annex to the July 2008 consultation on a Draft Licence Modification. The text and figures in the final Impact Assessment were exactly as in the August 2007 consultation. This suggests that no further analysis or evaluation was carried out after 1 July 2007 (the date of the partial Impact Assessment).'* However, BEIS advised that they allowed for several months post the consultation in their searches in case further relevant information was created.

#### *Public Interest Test*

100. In keeping with all of the exceptions contained in the EIR, Regulation 12(4)(b) is subject to the public interest test, and the Commissioner must consider whether the public interest favours maintaining the exception or favours disclosure of the information requested (this being the information requested in the complainant's original request and the subsequent refined request).
101. The complainant did not provide the Commissioner with any public interest arguments in support of disclosure of the information requested (the complaint being that the information provided to them by BEIS was insufficient).
102. In submissions to the Commissioner the Department confirmed that they had considered the following public interest arguments in favour of disclosure of the information:
- there is a general public interest in having sight of such information as it promotes transparency and government accountability and can provide better insight into the policy being developed and the reasoning behind it and enable public debate and scrutiny of the policy and how it was arrived at;
  - the roll-out of advanced meters to the non-domestic sector was an important national modernisation programme covering the energy sector, allowing organisations to make informed decisions about investing in energy efficiency. Information underpinning the cost benefit analysis of the policy proposed would be of interest to the organisations affected.

103. However, BEIS considered that the above considerations needed to be balanced against the following public interest factors in favour of maintaining the exception;

- the Government sought at the time to serve the public interest and be as transparent as possible in publishing the evidence and assumptions used to estimate the costs and benefits of the roll-out of advanced metering;
- given that around 10 years have elapsed since the information was prepared and the policy relating to the roll-out of advanced metering now settled, there is little benefit to the public at large in incurring costs and diverting resources to locating, retrieving and providing that information at the expense of developing and implementing policy relating to the current roll-out of smart meters to homes and small business.

104. On balance, the Department considered that the public interest in maintaining the exception outweighed the public interest in disclosing the information requested.

*Commissioner's conclusion*

105. In considering the public interest factors in this case, it is important to emphasise that the information in question relates to the roll-out of advanced meters to the non-domestic sector rather than the roll-out of smart meters to the domestic sector.

106. The roll-out of smart meters is live and ongoing at the present time and in FER0467548 (March 2014) the Commissioner acknowledged the public interest in this project. In paragraph 30 of her decision notice the Commissioner stated that:

*'The subject matter of the policy making in question here is highly significant. The smart metering project would clearly be a very major undertaking, involving the expenditure of very significant amounts of public money, over a reasonably long period of time. The impacts of the project would be myriad, in particular to the environment and to other residents. There is also a significant public debate about the arguments for smart meters in terms of the outcomes it is designed to produce. Disclosure here would significantly add to transparency about the plans of the Government for smart meters. The information would significantly enable the public to take part in the debate about the merits and wide ranging impacts of the smart meters project. The view of the Commissioner is that the subject matter of this information is a valid factor in favour of disclosure and of very significant weight'.*

107. By contrast, the advanced meter project had been implemented and completed (2014) at the time of the complainant's request. The

Commissioner notes that following the introduction of the project in April 2009, suppliers had a five-year period in which to prepare to supply gas and electricity through advanced meters. This obligation required around 28,000 gas meters and 155,000 electricity meters to be upgraded or replaced. Based on assessments by Ofgem, the independent energy regulator for Great Britain, the roll-out *'was only 75% complete in electricity by April 2014, compared to 86% complete in gas'*<sup>2</sup>. Whilst the advanced meter roll-out was clearly extensive and significant in its scope and impact, the current smart meter roll-out has far greater impact and significance, the £11bn scheme being to put 53m devices in 30m homes and small businesses by 2020<sup>3</sup>. In July 2018, it was reported by the Guardian newspaper that the smart meter project was experiencing delays and cost increases, with the National Audit Office investigating the project for the third time.

108. As BEIS have acknowledged in their submissions to the Commissioner, the roll-out of advanced meters to the non-domestic sector was an important national modernisation programme covering the energy sector, allowing organisations to make informed decisions about investing in energy efficiency. The Commissioner agrees that information underpinning the cost benefit analysis of the policy would be of interest to the organisations affected and energy suppliers.
109. However, as BEIS have explained, the Department sought at the time to serve the public interest and be as transparent as possible by publishing the evidence and assumptions used to estimate the costs and benefits of the roll-out. This information was contained in the Impact Assessment: Billing and Metering section of *'Energy Metering: A Consultation on a draft licence modification for provision of advanced metering for larger business sites'*, published by BERR in July 2008<sup>4</sup>. That document stated that the assumptions used in the analysis were based on the Carbon Trust Advanced Metering Field Trials, which trialled the use of smart meters in the business sector, beginning in 2004, *'to better understand the potential for more efficient energy use in this sector, the potential carbon savings involved and the barriers which exist to the broader uptake of this technology'*.

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<sup>2</sup> <https://www.ofgem.gov.uk/publications-and-updates/e-pay-7-million-failing-supply-advanced-meters>

<sup>3</sup> <https://www.theguardian.com/environment/2018/jul/21/smart-meters-to-save-uk-households-only-11-a-year-report-finds>

<sup>4</sup> <http://webarchive.nationalarchives.gov.uk/20081013121307/http://www.berr.gov.uk/files/file47192.pdf>

110. The Commissioner is cognisant of the fact that advanced meters are significantly less technologically advanced or useful than smart meters, and smart meters have themselves developed considerably over the period that government has rolled out the same.
111. Given the challenges and problems currently affecting the smart meter roll-out, which clearly has a huge public interest as it affects the entire domestic sector, the Commissioner does not consider that it would be in the public interest for the Department's time and resources to be diverted and distracted from managing such challenges by the locating, retrieving and providing of information concerning the advanced meter project. Whilst such information does carry some public interest weight, this is largely restricted to the organisations affected, rather than the wider public as a whole.
112. The Commissioner considers that the public interest in this issue was strongest at the time of the project being proposed and put out to consultation, and the Department met the due and proportionate public interest of transparency and accountability through the published information referred to above.
113. Whilst the Commissioner recognises that the additional information requested by the complainant would further this public interest, the Commissioner does not consider that it would be either proportionate or reasonable for the Department to expend the significant time and resources necessary to identify, retrieve and extract such information. This would in effect be an historical exercise, when the current and more pressing public interest lies with BEIS meeting the considerable challenges and problems posed by the live and ongoing smart meter roll-out, which affects the wider public as a whole.
114. Therefore, for the reasons set out above, the Commissioner considers that the public interest balance in this case favours maintaining the Department's application of Regulation 12(4)(b).

## Right of appeal

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115. 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)

116. 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.

117. 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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