Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 11 September 2018

Public Authority: Department for Business, Energy & Industrial Strategy

Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant submitted a request to the Department for Business, Energy & Industrial Strategy (BEIS) for information about meetings between the Secretary of State and The Prince of Wales. BEIS confirmed that one meeting had taken place during the time period of the request and provided the complainant with some briefing material related to this meeting. However, it sought to withhold further briefing material on the basis of either section 37(1)(aa) (communications with or relating to the heir to the Throne) of FOIA or regulation 12(4)(e) (internal communications) of the EIR. The Commissioner has concluded that section 37(1)(aa) has been applied correctly. However, she has also concluded that although some of the withheld information falls within the scope of the exception provided by regulation 12(4)(e) the public interest favours disclosing this information.

2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

   - Provide the complainant with a copy of the information which she has identified in the confidential annex.

3. 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

4. The complainant submitted the following request to BEIS on 23 July 2017:

> *'Please note that I am only interested in information which relates to the period 23 July 2016 to the present day…*
>
> *1…During the aforementioned period did the Secretary of State meet with the Prince of Wales to discuss matters of interest and concern to the Prince and or matters or issues relating to Government policy.*
>
> *2…If the answer is yes can you please provide the following details. In the case of each meeting can you please provide a time, date and venue. In the case of each meeting can you please provide a full list of those present. In the case of each meeting can you please provide a brief description of the issues under discussion. In the case of each meeting can you please provide copies of any briefing notes or similar which were issued to the Secretary of State.*
>
> *3…Can you please provide copies of any correspondence and communications (including emails) exchanged by the Secretary of State and the Prince of Wales which specifically relate to the meetings and or the discussions which took place at the meetings. Some of this correspondence and communications could have predated the meetings while some of it would have been generated afterwards. Please note I am interested in receiving both sides of the correspondence and communication.*
>
> *4…Please do provide details of any relevant documentation which was destroyed during the aforementioned period. In the case of each document can you provide a brief description of its contents and explanation of why and when it was destroyed.'*

5. BEIS responded on 23 August 2017. It explained that one meeting had taken place during the scope of the complainant's request, on 6 December 2016, and it also provided the time and location of the meeting and confirmed that only the Secretary of State and the Prince of Wales were present. BEIS also explained that it held some further information falling within the scope of part 2 of the request but it considered this to be exempt from disclosure on the basis of section 37(1)(aa) (communications with or relating to the heir to the Throne) of FOIA and regulation 12(4)(e) (internal communications) of the EIR. BEIS also confirmed that it did not hold any correspondence about this meeting nor had any relevant information been destroyed.

6. The complainant contacted BEIS on 29 August 2017 and asked it to conduct an internal review of this decision.

7. BEIS informed him of the outcome of the internal review on 26 September 2017. The review upheld the application of section 37(1)(aa) of FOIA and regulation 12(4)(e) of the EIR.

Scope of the case

8. The complainant contacted the Commissioner on 2 October 2017 in order to complain about BEIS' decision to withhold information in response to his request.

9. The information which BEIS sought to withhold consisted of the following:

- An email (email 1) from the BEIS policy team to the Secretary of State's office which had two attachments, namely:
    - 'Clarence House – The Prince of Wales: Industrial Strategy Brief' (attachment 1a)
    - 'SoS Industrial Strategy Brief for Clarence House' (attachment 1b)

- An email (email 2) from the Secretary of State's office to the Prince of Wales' Private Secretary which had four attachments, namely:
    - 'Clarence House – brief on the UK commitment to tackling climate change for HRH The Prince of Wales' (attachment 2a)
    - 'Clarence House Industrial Strategy Brief for HRH The Prince of Wales' (attachment 2b)
    - Greg Clark's biography (attachment 2c)
    - 'Clarence House – [Redacted] Brief for HRH The Prince of Wales' (attachment 2d).

10. However, during the course of the Commissioner's investigation BEIS amended its position and disclosed some information to the complainant on 27 July 2018. This information consisted of attachments 2a and 2c which were disclosed in full and part of attachment 2b with the remainder of this document being withheld on the basis of section 37(1)(aa) of FOIA.

11. Consequently, at the point that this decision notice is being issued, BEIS' position is as follows:

- Email 1 and its attachments 1a and 1b, constitute environmental information and are exempt from disclosure on the basis of regulation 12(4)(e) of the EIR.

- Email 2, its attachment 2d and the non-disclosed part of attachment 2b do not contain environmental information and therefore fall to be considered under FOIA and are exempt from disclosure on the basis of section 37(1)(aa).

12. The Commissioner has therefore considered firstly whether BEIS has correctly determined whether the withheld information constitutes environmental information or not, and secondly she has then gone on to determine whether information is exempt from disclosure on the basis of the applicable access regime, ie FOIA or the EIR.

Reasons for decision

Is any of the withheld information environmental information?

13. Regulation 2(1) of the EIR defines environmental information as:

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

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

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

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);…"

14. The Commissioner recognises that it can sometimes be difficult to identify environmental information, and has provided guidance[1] to assist public authorities and requesters. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC[2] which the EIR enact.

15. With regard to email 1 and its attachments, BEIS explained that the two briefs (ie attachments 1a and 1b) were produced to inform the Secretary of State about the environmental subjects for discussion with The Prince of Wales. The Commissioner has carefully considered the attachments in question. Having done so she is of the view that only one small part of attachment 1a contains information that could be correctly categorised as environmental information and only about half of attachment 1b contains information which could be correctly categorised as environmental information. This information, the Commissioner accepts, can be correctly categorised as information falling within one or more of the regulations 2(1)(a) to (c) given that it focuses directly on either the state of the elements of the environment, namely air and the atmosphere, factors likely to affect them and/or measures likely to affect them. However, the Commissioner does not accept that remaining content of these two attachments falls within the definition of environmental information given that it simply discusses the government's 'Industrial Strategy' in high level and overarching terms and in her view any link between the content of this information and the environment is too remote. The same is also true of the content of email 1. The Commissioner has set out in a confidential annex, a copy of which will be provided to BEIS only, which parts of attachments 1a and 1b she accepts constitute environmental information.

16. With regard to email 2, attachment 2b and the withheld parts of 2d, the Commissioner agrees with BEIS that all of this information falls to be considered under FOIA rather than under the EIR. Her rationale being that, as with parts of the attachments to email 1, the information in question discusses the government's Industrial Strategy in high level and overarching terms and in her view any link between the content of this information and the environment is too remote to make the

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[1] https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003L0004

information fall within the definition of environmental information contained at regulation 2(1)(c).

17. In summary then, the Commissioner agrees with BEIS that email 2, attachment 2b and the withheld parts of attachment 2d fall to be considered under FOIA. In relation to email 1, the Commissioner disagrees with BEIS that it should be considered under the EIR; rather she considers it should be considered under FOIA. Similarly, whereas BEIS considers that all of attachments 1a and 1b fall to be considered under the EIR the Commissioner only accepts that parts of these documents contain environmental information and as a result the remaining portions of these attachments should be considered under FOIA.

Regulation 12(4)(e)

18. As explained above, BEIS sought to withhold email 1 and both of its attachments under regulation 12(4)(e). In light of her findings in relation to the applicable access regime, the Commissioner has only considered whether this exception applies to the parts of attachments 1a and 1b which she accepts constitute environmental information.

19. Regulation 12(4)(e) states that:

> *'….a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.'*

20. BEIS argued that as the attachments were sent by the BEIS policy team to the Secretary of State's office they clearly fell within the definition of internal communications.

21. The Commissioner agrees with this assessment and accepts that the relevant parts of the attachments fall within the scope of this regulation 12(4)(e).

Public interest test

22. Regulation 12(1)(b) requires that, where the exception under regulation 12(4)(e) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out her assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

23. BEIS acknowledged that there was a public interest in disclosing internal communications as this enables the public to assess the quality of advice and guidance and provides transparency in the process. It explained

that it appreciated that there is a public interest in transparency regarding government engagement with the Royal family.

24. However, BEIS explained that the briefings were intended to inform the Secretary of State about environmental subjects for discussion with The Prince of Wales. BEIS argued that it was important that officials have a safe space in which to brief ministers and it considered that releasing the internal communications in this instance would inhibit the ability of officials to provide ministers with free and frank advice if there was a possibility that this advice could be disclosed at a later date. BEIS argued that this would have a detrimental effect on the briefing process, leading civil servants to be less candid in their views and would undermine the formulation of government policy.

25. With regard to the need for a safe space in the particular circumstances of this case, BEIS explained that the meeting between the Secretary of State and The Prince of Wales took place on 6 December 2016 and the briefing was submitted to the Secretary of State’s office in advance of the meeting on 5 December 2016. This took place before the Industrial Strategy Green Paper was published on 23 January 2017, which launched a 12-week formal consultation. The Industrial Strategy White Paper was subsequently published on 27 November 2017, which set out the government's plan to create an economy that boosts productivity and earning power throughout the UK. BEIS therefore noted that the request was submitted on 23 July 2017 between the publication of the Green Paper and the publication of the White Paper and consequently at the time of this request the formal consultation period had been completed but the government’s policy regarding the Industrial Strategy was still under formulation.

26. With regard to the balance of the public interest arguments, for attachment 1a the Commissioner only accepts that one brief paragraph of this document constitutes environmental information and thus is potentially exempt under regulation 12(4)(e). However, the Commissioner has established that this information has, in effect, already been provided to the complainant as it is replicated in attachment 2b. Consequently, there is little value or indeed public interest in favour of maintaining this exception in respect of this particular piece of information.

27. In terms of attachment 1b, the Commissioner recognises that the balance of public interest is more nuanced. In theory, she agrees with BEIS that there is a need for government departments to have a safe space, whilst policy decisions are still being made, to formulate and develop ideas away from public interference and/or influence. She also accepts that given the timing of this request the government’s policy making in respect of the Industrial Strategy was live and ongoing at the time of the complainant’s request. Furthermore, again in theory, the

Commissioner accepts that disclosure of internal communications could potentially have a chilling effect on future contributions and that the risk of such an effect is arguably higher if information is disclosed whilst the policy making process is live and ongoing.

28. However, as with all cases the content of the withheld information is key to determining the weight that should be attributed to such arguments. Having considered the information contained in attachment 1b to which the Commissioner accepts regulation 12(4)(e) applies, in her view this information arguably replicates or summarises information which was contained in the Green Paper, or replicates information available elsewhere in the public domain. The Commissioner also notes that the information in question essentially summarises activities that the government has *already* undertaken in this area rather than setting out potential policy goals or options which could be considered in the future. In light of this, in the Commissioner's opinion disclosure of this information in July 2017, would have been unlikely to significantly encroach on the safe space the government arguably needed to complete its policy making in this area. Moreover, given the lack of any genuinely free or frank information in the withheld information the Commissioner is not persuaded that disclosure of this information in response to the complainant's request would have created a real risk of a chilling effect on any future briefings to ministers. Furthermore, in the Commissioner's opinion there is a genuine public interest in the disclosure of information which informs the public about how the government interacts with members of the Royal family. This is particularly the case given the controversy in the past concerning The Prince of Wales' alleged lobbying of government departments. Taking the above into account the Commissioner has concluded that the public interest favours disclosing the information contained in attachment 1b which she accepts is caught by the exception contained at regulation 12(4)(e) of the EIR.

Section 37(1)(aa)

29. Section 37(1)(aa) of FOIA provides an exemption for information '*if it relates to… communications with the heir to, or the person who is for the time being second in line of succession to, the Throne'*. It is an absolute exemption and therefore it is not subject to the public interest test.

30. The term 'relates to' should be interpreted broadly. In practice this means that the scope of the exemption will cover more than just the actual communications themselves; it will also apply to information that refers to, or is derived from those communications.

31. Furthermore, the exemption will also cover communications made or received by a person (or organisation) who was acting on behalf of the heir to the Throne.

<u>Email 2 and attachment 2d and the withheld parts of attachment 2b</u>

32. With regard to email 2 and its attachments which have not been disclosed, BEIS argued that although these did not constitute direct exchanges of information between the Secretary of State and The Prince of Wales as referred to in part 3 of the request, they were provided to The Prince of Wales' office to aid discussion at the meeting and therefore they fall within the scope of this exemption. The Commissioner agrees with BEIS' rationale and accepts that email 2, attachment 2d and the non-disclosed parts of attachment 2b fall within the scope of section 37(1)(aa) on that basis. Furthermore, the Commissioner is satisfied that as email 2 was sent to The Prince of Wales' Private Secretary, and it is clear that he was acting on behalf of His Royal Highness, the withheld information can also be said to fall within the scope of that exemption by virtue of the fact that it constitutes a direct communication with someone acting on behalf of the heir to Throne.

<u>Email 1 and the parts of attachments 1a and 1b which the Commissioner has decided fall under FOIA</u>

33. For the reasons set out above the Commissioner has concluded that email 1 and parts of attachments 1a and 1b do not contain environmental information. Such information therefore needs to be considered under FOIA rather than the EIR.

34. For its part, BEIS has not advanced any alternative submissions or arguments should the Commissioner disagree with its assessment that email 1 and it attachments constitute environmental information.

35. Nevertheless, the Commissioner is satisfied that email 1 and the non-environmental information parts of attachments 1a and 1b fall within the scope of the exemption provided by section 37(1)(aa) of FOIA. This is

because the purpose of email 1 was the preparation of briefs for the Secretary of State for his meeting with The Prince of Wales and also the preparation of briefs to forward on to The Prince of Wales' office prior to the meeting. Given the broad reading of the phrase 'relates to' within the exemption contained at section 37(1)(aa), the Commissioner is satisfied that email 1 and its attachments can therefore said to relate to communications with The Prince of Wales, either by virtue of relating to briefings subsequently sent to his office, or by virtue of relating to the forthcoming meeting with His Royal Highness.

Other matters

36. The Commissioner wishes to record the fact that she had to serve an Information Notice under section 51 of FOIA on BEIS given its delays in responding to her enquiries. The Commissioner initially wrote to BEIS on 4 January 2018 in relation to this complaint. Having failed to receive a response to her letter she served the Information Notice on 27 June 2018.

Right of appeal

37. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

38. 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.

39. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed ………………………………………………

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