

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

Decision notice

Date: 25 June 2018

Public Authority: HM Treasury
Address: 1 Horse Guards Road
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant has requested information contained in submissions from HM Treasury officials to Ministers concerning Vehicle Excise Duty for Budgets 1999 and 2000. The public authority disclosed most of the information held and withheld the remainder relying on the exceptions at regulations 12(4)(e) EIR in respect of all of the withheld information and 12(5)(e) EIR in respect of some of the withheld information.
2. The Commissioner's decision is that:
 - The public authority was entitled to rely on the exception at regulation 12(4)(e) in respect of some of the withheld information.
 - The public authority was not entitled to rely on the exception at regulation 12(5)(e) in respect of the information withheld on that basis.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the information withheld relying jointly on the exceptions at regulations 12(4)(e) and 12(5)(e).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. The complainant submitted four related requests for information to the public authority in January 2017 and July 2017. The requests are reproduced below in chronological order.

"11 January 2017

"Request for environmental information contained in submissions from HM Treasury officials to Ministers concerning VED for Budgets 1999 and 2000 which had been located and extracted as in scope of question 1 at the time of initial handling of FOI2016/06072."

"Request for non-environmental information contained in submissions from HM Treasury officials to Ministers concerning VED for Budgets 1999 and 2000 which had been located and extracted as in scope of question 1 at the time of initial handling of FOI2016/06072."

12 July 2017

"Request for the environmental information contained in submissions to ministers concerning vehicle excise duty in relation to each of the following budgets:

(a) 1999; (b) 2000.

This is to be limited to

-information in the 8 electronic records previously identified as potentially relevant to my June 2017 request.

AND

-that information contained within paper records which can be located via use of the search terms 'VED' and 'Vehicle Excise Duty' and 'Budget'."

"Request for the non-environmental information contained in submissions to ministers concerning vehicle excise duty in relation to each of the following budgets: (a) 1999; (b) 2000.

This is to be limited to

-information in the 8 electronic records previously identified as potentially relevant to my June 2017 request.

AND

-that information contained within paper records which can be located via use of the search terms 'VED' and 'Vehicle Excise Duty' and 'Budget'."

6. The public authority responded to all four requests on 10 October 2017 under the FOIA. It disclosed a total of 11 submissions, most of which had been partially redacted on the basis of the exemptions at section 35(1)(b), section 40(2) and section 43(2) FOIA. The remaining submissions were withheld in full. It explained that no information had been withheld from the submissions under the EIR.
7. The complainant requested an internal review on 14 November 2017. He specifically asked the public authority to review the decision to rely on section 35(1)(b) and section 43(2). He did not challenge the decision to rely on section 40(2).
8. On 1 December 2017 the public authority wrote to the complainant with details of the outcome of the internal review which upheld the application of section 35(1)(b) and section 43(2).

Scope of the case

9. The complainant contacted the Commissioner on 13 December 2017 to complain about the way his request for information had been handled, specifically the public authority's decision to rely on sections 35(1)(b) and 43(2) FOIA.
10. During the course of the Commissioner's investigation, specifically on 27 April 2018, the public authority disclosed most of the information from the submissions that had previously been withheld in full.
11. The public authority also subsequently sought to rely on the exceptions at regulations 12(4)(e) and 12(5)(e) EIR to the extent that the Commissioner considered that the withheld information was "environmental information" within the meaning of the EIR.

Reasons for decision

Withheld information

12. As mentioned, the withheld information is contained in submissions from HM Treasury officials to Ministers. There are 11 submissions in total, each of which has been partially withheld. A significant quantity of information has been released from the submissions. The withheld information includes information considered to be commercially sensitive to Ford, an automobile manufacturing company.

Applicable legislation – FOIA or EIR.

13. The Commissioner has first considered whether the public authority was entitled to consider the request under the terms of the FOIA rather than the EIR.
14. Environmental information is defined in regulation 2(1) EIR¹. By virtue of section 39 FOIA, environmental information is exempt from disclosure under the FOIA². In practical terms therefore, once requested information is caught by the definition in regulation 2(1), the request should be considered under the EIR rather the FOIA.
15. The public authority argued that the withheld information is caught by the FOIA rather than the EIR because "Vehicle Excise Duty (VED) is a tax on vehicle ownership."
16. The Commissioner considers that the withheld information constitutes environmental information by virtue of regulation 2(1)(c). The submissions relate to proposals on VED rates based on a number of factors including vehicle engine size and CO₂ emissions. Consequently, the Commissioner has concluded that the submissions are on measures likely to affect the elements and factors as well as on measures designed to protect the elements.
17. In view of the Commissioner's decision that the request should have been handled under the EIR, she has only considered whether the public

¹ <http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made>

² <http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made>

authority was entitled to rely on the exceptions at regulations 12(4)(e) and 12(5)(e).³

Regulation 12(4)(e)

18. The public authority considers that this exception applies to all of the withheld information.
19. The exception at regulation 12(4)(e) states:

“...a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.”
20. The public authority has explained that the submissions are internal submissions between HM Treasury officials and Ministers and were not shared outside of Government. They are therefore internal communications for the purpose of regulation 12(4)(e).
21. The Commissioner is satisfied that the withheld submissions including any attached communication which originated externally constitutes internal communication within the meaning of regulation 12(4)(e). The public authority was therefore entitled to engage the exception.

Public interest test

22. In common with other exceptions, the exception at regulation 12(4)(e) is qualified by the public interest test set out in regulation 12(1)(b) EIR. The Commissioner has therefore considered whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the withheld information.
23. The complainant has argued that, “given the passage of time since the withheld information was compiled, there is little public interest in withholding the information. There is, on the other hand, a significant public interest in understanding the full basis on which the decisions were taken.”

³ For the avoidance of doubt, the public authority also applied regulation 13 (personal data) to the information it had originally withheld under section 40 FOIA (personal data). However, the Commissioner has not considered the applicability of this exception because the complainant has not disputed the application of section 40.

24. The public authority has relied on the submissions it originally provided to the Commissioner in support of the public interest in relying on sections 35(1)(b) and 43(2) FOIA. They are summarised below.
25. It acknowledged the general public interest in openness and transparency, and noted that a large amount of information had been released pursuant to the request for that reason.
26. However, the withheld information relates to Ministerial communications. It includes draft submissions from one Minister to another, direct references to the views and opinions of Ministers and recommendations to Ministers concerning their interaction with other Ministers. The withheld information reveals the views of Ministers on a government decision which if disclosed would undermine Collective responsibility, a central tenet of the UK constitution. Although these views were expressed nearly 20 years ago, the relevant issues are still prevalent today and still generate media and public interest. Therefore, premature disclosure without an overriding reason would act to undermine government unity, and could have a negative impact on the effectiveness of government. It added that information of the type requested by the complainant would typically be considered for release to the National Archives after 20 years⁴.
27. It added that it was important Ministers have the space to consider and exchange views freely and frankly when making decisions. If they were constrained in expressing their views, there would be an impact on the quality of decision-making which would not be in the public interest.
28. The public authority pointed out that the withheld information also includes commercial information that had been provided in confidence and detailed analysis of commercially sensitive information, including internal discussion about the information. It submitted that there was a strong public interest in protecting this information because disclosure would inhibit the public authority's ability to engage openly with stakeholders in future, and would also undermine the competitiveness of Ford's commercial operations. It is in the public interest for the public authority to maintain relationships with stakeholders that have an interest in government policies that affect their business sector. Routine disclosure of such information could deter such stakeholders from freely providing views in future. Such an outcome would negatively impact on the quality of decision-making.

⁴ In line with the provisions in section 63 FOIA and regulation 17 EIR.

Balance of the public interest

29. The Commissioner has inspected the small amount of information withheld by the public authority on the basis that disclosure would undermine Collective responsibility and is satisfied that there was a strong public interest in withholding it.
30. Collective responsibility is the long standing convention that all Ministers are bound by decisions of the Cabinet and carry joint responsibility for all government policy and debates. Ministers may express their own views freely and frankly in Cabinet and committees and in private, but once a decision is made they are all bound to uphold and promote that agreed position to Parliament⁵.
31. The Commissioner shares the view that there is a significant public interest in not undermining Collective responsibility because of the fundamental importance of the general constitutional principle. Clearly, a significant passage of time could reduce the significant weight of the public interest in not undermining the principle. However, the fact that some of the former Ministers to which the withheld information relates are still politically active increases the weight of the strong public interest in the circumstances of this case in preserving Collective responsibility. Revealing the relevant withheld information while these individuals are still politically active could seriously damage this fundamental constitutional principle.
32. The Commissioner also accepts that there could be a chilling effect on free and frank discussions if Ministers felt views they have expressed in the course of debates on policy proposals could be revealed in the absence of any overriding public interest in preserving the principle of Collective responsibility. There is a strong public interest in Ministers being able to share views with other Ministers and officials in a free and frank manner.
33. The Commissioner is not persuaded that there is a stronger public interest in withholding the information withheld on the basis that it would inhibit the public authority's ability to engage openly with stakeholders in future and would also undermine the competitiveness of Ford's commercial operations. The age and content of the withheld communication is significant here. In the Commissioner's view, the information which was over 17 years old at the time of the second request in July 2017 does not reveal any obvious current sensitivities.

⁵ This principle is set out at paragraph 2.1 of the Ministerial Code (May 2010)

Stakeholders such as Ford are aware that since the FOIA came into force in 2005, communications with public authorities cannot be withheld indefinitely. There must be demonstrable evidence of the likelihood of prejudice in order to withhold information in the public interest. The Commissioner considers that the prejudicial effect of disclosing the withheld communication has weakened considerably over time particularly because most of what it reveals has been overtaken by events.

34. The Commissioner has therefore concluded that on balance, the public interest in maintaining the exception is stronger in respect of the withheld information relating to Ministerial communications. The Commissioner has also concluded that the public interest in not maintaining the exception and therefore in disclosure is stronger in respect of the withheld information relating to Ford's commercial interests.

Regulation 12(5)(e)

35. The public authority considers that this exception applies to the information relating to Ford's commercial interests. The Commissioner has already concluded pursuant to the application of regulation 12(4)(e) that the public interest in disclosing this information is stronger. However, she has decided to also consider the application of this exception because it is specifically designed to protect commercial interests, and different tests have to be met in order to successfully engage it.
36. The Commissioner considers that four criteria have to be met in order to engage this exception, namely; the withheld information has to be commercial or industrial in nature, it has to be subject to a duty of confidence provided by law, the confidentiality has to be required to protect a legitimate economic interest, and that economic interest, and thereby its confidentiality, has to be adversely affected by disclosure.
37. The Commissioner accepts that the withheld information is commercial in nature, relating as it does to Ford's commercial interests.
38. The Commissioner also accepts that at the time the information was provided, there was an expectation that it would be held in confidence pursuant to ongoing discussions on VED in relation to Budget 2000.
39. In order to satisfy the third criterion, namely; the confidentiality has to be required to protect a legitimate economic interest, the Commissioner considers that disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.

40. In addition to its submissions, the public authority provided a copy of an exchange it had with Ford in which the latter expressed the view that the withheld information should not be disclosed.
41. Having carefully considered Ford's view, the Commissioner has found no reason to depart from her original view that disclosure is unlikely to prejudice Ford's commercial interests. In the Commissioner's view, "would adversely" sets a high threshold. Therefore, it is not enough that disclosure might cause some harm to an economic interest. There must be demonstrable evidence that on the balance of probabilities, it is more probable than not that disclosure of the withheld information would adversely affect Ford's economic interests. Some of Ford's comments are merely assertive without clearly spelling out how disclosure of the information that has actually been withheld, despite the passage of time, would adversely affect its economic interests. The rest of the comments were not deemed applicable by the public authority in the circumstances.
42. For the reasons above, the Commissioner has concluded that the fourth criterion has also not been met.
43. The Commissioner has therefore concluded that the exception is not engaged. In view of her decision, she has not gone on to conduct a public interest test pursuant to regulation 12(1)(b).

Right of appeal

44. 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

45. 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.
46. 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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