

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 20 August 2019

Public Authority: Department for Transport
Address: 33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant requested information about meetings between ministers at the Department for Transport ("the DfT") and the Society of Motor Manufacturers and Traders. The DfT provided some information, but redacted part of the documents under regulation 13 – third party personal data, and other parts under regulation 12(4)(d) – materials in the course of completion and/or regulation 12(4)(e) – internal communications.
2. The Commissioner's decision is that the DfT correctly redacted the withheld information under regulation 13 and regulation 12(4)(d) respectively. It was not necessary for her also to consider regulation 12(4)(e).
3. The Commissioner does not require the DfT to take any steps.

Request and response

4. On 9 May 2018, the complainant wrote to the DfT to request information of the following description:

"I would... like to see details of all ministerial meetings at the Department for Transport with the Society of Motor Manufacturers and Traders between 1 April 2018 and the present day."

The details I would like to see are:

- *date and location;*
- *people in attendance;*
- *agendas;*
- *minutes;*
- *briefing notes;*
- *post-meeting communications between DfT and SMMT, including any attachments”.*

5. On 7 June 2018, the DfT explained that it required more time to respond due to the complexity and volume of the request. The DfT stated that its full response was then issued on 30 July 2018, although this was not received by the complainant. The complainant contacted the ICO in early August about the non-response, following which she was provided with an undated copy.
6. In its response, the DfT disclosed some information falling within the scope of the request but redacted the remainder, citing the following exceptions of the EIR:
 - regulation 12(4)(d) – materials in the course of completion
 - regulation 12(4)(e) – internal communications
 - regulation 12(5)(e) – prejudicial to the course of justice
 - regulation 13 – third party personal data
7. The complainant requested an internal review on 19 October 2018. The DfT sent her the outcome of its internal review on 16 November 2018. It corrected its position and stated that no information had, in fact, been redacted under regulation 12(5)(e). It reiterated, however, that the redactions it had made were covered by the exceptions at regulations 12(4)(d), 12(4)(e) and/or 13 respectively, and that the balance of the public interest favoured maintaining the exceptions.

Scope of the case

8. The complainant contacted the Commissioner about the outcome of the internal review on 21 December 2018 to complain about the part refusal of her request for information.

9. The following analysis covers whether the DfT correctly redacted some information under the relevant exceptions of the EIR as detailed above.

Reasons for decision

Regulation 2(1) - is the information environmental?

10. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...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..."

11. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
12. The Commissioner has produced guidance¹ to assist public authorities and applicants in identifying environmental information. The

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https://ico.org.uk/media/fororganisations/documents/1146/eir_what_is_environmental_information.pdf

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, which the EIR enact.

The withheld information

13. The Commissioner notes that the withheld information consists of redactions made to the following five documents:
 - Document 1: Government briefing note prepared for Chris Grayling, Secretary of State for Transport, and Greg Clark, Secretary of State for Business, Energy and Industrial Strategy prior to a roundtable meeting with the Society of Motor Manufacturers and Traders (SMMT);
 - Document 2: Submissions prepared for consideration by ministers at the Office for Low Emission Vehicles (OLEV);
 - Document 3: Two emails between OLEV and the SMMT dated 27 April 2019;
 - Document 4: Two emails between OLEV and the SMMT dated 23 – 24 April 2018;
 - Document 5: Email summarising the roundtable views of the SMMT, sent by the DfT to OLEV, dated 17 April 2018.
14. The Commissioner has considered this information in light of the definition at regulation 2(1). It relates to the government's strategy on low and zero emission vehicles. The Commissioner is satisfied that the government strategy, which has since been published as *The Road to Zero: Next steps towards cleaner road transport and delivering our Industrial Strategy* ("the Road to Zero Strategy")², is a measure affecting, or likely to affect, the elements and factors of the environment, particularly relating to emissions. She agrees that the five documents are information "on" this measure.
15. The information therefore falls within the definition of environmental information at regulation 2(1)(c) of the EIR, and the Commissioner is satisfied that the DfT considered the request under the correct access

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/739460/road-to-zero.pdf

regime. She has therefore considered whether the exceptions cited by the DfT have been correctly applied to the redacted information.

Regulation 13 - personal data

16. This exception has been applied to individuals' names and contact details in documents 2 – 5 inclusive. No redactions were made to document 1 under this exception.
17. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
18. In this case, the relevant condition is contained in regulation 13(2A)(a)³. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
19. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then regulation 13 of the EIR cannot apply.
20. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

21. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
23. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

³ As amended by Schedule 19 Paragraph 307(3) DPA.

24. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
25. As stated, the exception has been applied to individuals' names and contact details. The Commissioner is satisfied that this information both identifies and relates to the relevant individuals. This information therefore falls within the definition of personal data in section 3(2) of the DPA.
26. The fact that the redacted information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
27. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

28. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

29. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

Lawful processing: Article 6(1)(f) of the GDPR

30. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies. Processing must also be generally lawful.
31. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and

freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"⁴.

32. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-

- **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

33. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

34. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

35. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial; however, trivial interests may be more easily overridden in the balancing test.

36. In this case, the Commissioner considers that the general interest in transparency in government provides a legitimate interest in disclosure

⁴ Article 6(1) goes on to state that:- "*Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks*".

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA) provides that:- "*In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second subparagraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted*".

in this case. She has therefore considered whether disclosure is necessary to achieve this legitimate aim.

Is disclosure necessary?

37. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
38. In this case, one redaction has been made to document 2 (the submissions) under this exception: the name of the employee at OLEV who sent the submissions for consideration. With regard to documents 3, 4 and 5, which are email correspondence, the names of the senders and recipients of the emails have been redacted. The redacted names all relate to employees at the DfT and/or OLEV and, in one case, at the SMMT.
39. The information falling within the scope of the complainant's request relates to the shaping of discussions on policy between the organisations in question. Throughout the five documents, the names of the senior officials who have responsibility for policy-making in this case have been disclosed, including the name of the senior official signing off document 2.
40. Having considered the information, the Commissioner does not consider that it is necessary in this case to disclose the redacted names and contact details to achieve the legitimate aim of transparency in government.
41. Since disclosure is not necessary, the Commissioner has not gone on to consider the balancing test. There is no lawful basis for this processing and it would, therefore, be unlawful and does not meet the requirements of principle (a).
42. Given the above conclusion that disclosure would be unlawful, the Commissioner does not need to go on to consider separately whether disclosure would be fair or transparent.

The Commissioner's view

43. The Commissioner has therefore decided that the DfT was entitled to redact the individuals' names and contact details in documents 2 – 5 under regulation 13(1), by way of regulation 13(2A)(a).

Other redacted information

44. The DfT considers that the remainder of the withheld information is exempt from disclosure under regulation 12(4)(d) and/or regulation 12(4)(e) of the EIR.
45. The exceptions have been applied to parts of the following documents:
- Document 1, the briefing note for Chris Grayling and Greg Clark prior to a roundtable meeting with SMMT members and vehicle manufacturers, which summarises the views of those members/manufacturers and the government's likely approach;
 - Document 2: submissions for consideration by OLEV ministers;
 - Document 4: an email relating to a specific manufacturer that had not attended the roundtable meeting; and
 - Document 5: a summary of the members/manufacturers' views from the meeting.
46. The Commissioner has considered regulation 12(4)(d) first.

Regulation 12(4)(d) – materials in the course of completion, unfinished documents or incomplete data

47. Regulation 12(4)(d) states that a public authority may refuse to disclose information to the extent that the request relates to:
- material which is still in the course of completion;
 - unfinished documents; or
 - incomplete data.
48. The exception is class-based, which means that it is engaged if the information in question falls within its scope. If the information in question falls into one of the three categories, then the exception is engaged. It is not necessary to show that disclosure would have any adverse effect in order to engage the exception. However, regulation 12(4)(d) is a qualified exception, so the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
49. The fact that the exception refers both to material in the course of completion and to unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be

finished, it may be part of material which is still in the course of completion. The DfT has argued that this is so in this case.

50. The DfT advised the Commissioner that the requested information is information created as part of the process of formulating and developing policy and that it therefore considers it to be material in the course of completion.
51. The DfT has explained that government policy on working towards its emissions targets was not finalised until after the date of the request. The Government's Road to Zero Strategy, referenced previously, was published on 9 July 2018.
52. The Commissioner has reviewed the information. Since the documents cannot be said to be unfinished, nor to comprise incomplete data, she has considered whether (as argued by the DfT) they comprise materials in the course of completion.
53. In this case, it is evident that the contents of the documents have been collated, drafted and presented for the purposes of consideration in formulating Government policy (specifically, the Road to Zero Strategy, unpublished at the date of the request). They include suggested approaches to policy-making. The Commissioner is satisfied that, in line with her published guidance on this exception⁵, the information is within the class of materials in the course of completion.
54. The Commissioner accepts that the exception at regulation 12(4)(d) is engaged. She has therefore gone on to consider the public interest.

The balance of the public interest

55. Regulation 12(4)(d) is a qualified exception and is, therefore, subject to the public interest test at regulation 12(1)(b), which states that information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

The DfT's view

56. The DfT explained that it recognised that disclosure could enhance public understanding on the relevant topics and would facilitate the accountability and transparency of government decisions.

⁵ https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf

57. However, the DfT considered that the balance of the public interest lay in maintaining the exception since, in its view, disclosure could affect its ability to bring its policy-making to a successful conclusion. The DfT considers that there is a greater public interest in the Government being able to formulate policy effectively and efficiently.
58. It explained that the Government needs to be able to discuss and develop potential policy ideas. It stated that *"if these options or discussions are released before the policy has been finalised and agreed by ministers, resources may need to be diverted to answering queries on them"*.
59. The DfT considered that its thinking would become *"less imaginative and radical"* if government officials were not able to think freely. It explained that the Government had previously had discussions with stakeholders in the course of formulating its related policies *Making the Connection* (2011) and *Driving the Future Today* (2013), and had continued with this practice in developing the Road to Zero Strategy. The DfT explained that options being discussed with stakeholders at this stage of the process included some which, in practice, were *"unlikely to be implemented"*. The Commissioner understands from this that the DfT considers that its free thinking and exploration of bold ideas could be inhibited by the disclosure of the information: this is often referred to as a "safe space" argument.
60. Relating to this, the DfT explained that the switch to zero emissions vehicles is *"an immense challenge to the government, industry, drivers and the wider public"* and that consequently there was *"great complexity in delivering the strategy"*, meaning that the Government needs to *"develop and sense-test potential solutions... recognising that many will be unworkable or too difficult to implement"*.
61. Also regarding the need for a "safe space", the DfT argued: *"[the] government should have space to think in private when reaching decisions and generating policy options. The removal of the safe space would have a significant detrimental effect on the Government's ability to negotiate future policy positions that optimise industry buy-in while maximising environmental objectives. If the options and factors considered in arriving at the positions when developing policy are made public, there is a risk that officials may be give undue weight to potential public and industry reactions to approach to future proposals, to the detriment of good policy making"*.

In addition, the DfT considers that the release of the information could be misleading for the public, since the documents within scope of the request *"were just one part of the discussions that the government had with a wide range of stakeholders"*. It is concerned that the disclosure of

the information "*might have suggested that these were the only stakeholders that the government was talking to about the options of the strategy*" which, it stated, was not the case.

The complainant's view

62. The complainant considers that the public interest test has been incorrectly applied. She considers that the Road to Zero Strategy is a matter of high public interest, both with regard to tackling climate change and air quality.
63. The complainant has commented that: "*as the Committee on Climate Change has warned, the UK is making insufficient progress to meet its legally binding carbon reduction targets*". She considers that, since transport is the biggest emitter in the economy, understanding the influence that the motor industry has on government policy is of "*paramount public importance, especially as it is known that the car industry has lobbied against carbon regulation on previous occasions*".
64. The complainant therefore considers that "*full release of these documents would aid public understanding of this relationship*".
65. With regard to air quality, the complainant considers that "*the car industry has illustrated that it does not take this matter of public health seriously, since the 'dieseldate' scandal emerged three years ago*" and that it is therefore "*imperative to better understand the influence it has on government policy*".
66. The complainant has stated that a cross-party group of MPs considers that the Government's target date of 2040, by which the production of petrol and diesel cars should have ceased, is too late. She considers that "*the release of these documents may shed light on this decision or other decisions of significant weight*".

The balance of the public interest: the Commissioner's decision

67. The Commissioner has considered the balance of the public interest in the disclosure of the information which was withheld under the exception. In doing so, she is mindful of the date of the request, which was around two months before the publication of the Road to Zero Strategy.
68. The Commissioner considers that there is certainly a strong public interest in the formulation of the Government's approach to achieving its

stated aim to "*lead the world in the developing, manufacturing and using zero emission road vehicles*"⁶, which the withheld information relates to.

69. Considering the information as a whole, the Commissioner is not persuaded by the DfT's argument that disclosing only one part of the discussions which it had when formulating its policy lends much weight in favour of maintaining the exception. The Commissioner's published guidance, referenced previously, sets out her view that this argument is unlikely to carry significant weight because it should generally be possible for a public authority to provide context when disclosing information.
70. The withheld information includes information on the government's intended approach, both in consulting with the motor industry, and, more generally, in achieving certain targets at various points before 2040 (the published date by which the government intends to have phased out the sale of petrol and diesel cars). It also includes the summarised views of the SMMT members and vehicle manufacturers, presented for consideration by ministers before the meeting (document 1) and summarised in an email following the meeting (document 5).
71. It is evident, and unsurprising, that the government considered it important to consider the views of the motor industry in shaping the Road to Zero Strategy. The DfT has not argued, specifically, that disclosure could create a chilling effect. However, the Commissioner considers it to be relevant to her considerations to weigh up whether the stakeholders may have felt less free to express their views had they been aware that these views would be summarised and disclosed in response to an EIR request.
72. The Commissioner is not aware whether the manufacturers' views held prior to the roundtable meeting were a matter of public record. However, it is evident from the withheld information that the views they expressed at the roundtable meeting were provided freely and without expectation that they would be disclosed.
73. The Commissioner considers that this lends weight in favour of the exception being maintained. It is to be expected that the government would consult with relevant industry when formulating policy, and in her view, industry representatives may speak less candidly if there is an

⁶ <https://www.gov.uk/government/publications/reducing-emissions-from-road-transport-road-to-zero-strategy>

expectation that their views will be disclosed, leading to less effective discussions taking place.

74. However, against this is the complainant's concern that "lobbying" has taken place by the motor industry to an undue extent. The Commissioner agrees that disclosure of the information would aid public understanding of the relationship between the DfT and the motor industry; it is, in any event, in the public interest to determine whether the Government takes note of the views of relevant industry players in formulating policy.
75. Regarding the Government's internal policy discussions, the DfT has argued that it needs a "safe space" for these to take place away from public scrutiny, and that disclosing this material would harm that safe space.
76. The Commissioner has determined in previous decisions that effective policy-making depends on good decision-making, which depends on sound evidence and candid communications to enable full consideration of all the options. Policy decisions, such as in relation to the Road to Zero Strategy, need thorough evaluation before being implemented. This process requires all parties to have confidence that relevant exchanges will not be disclosed prematurely. The Commissioner has considered the impact of disclosure on this process, and therefore the weight of these arguments, in this case.
77. She is satisfied that the "safe space" argument carries weight in this case due to the Government's consideration of a wide range of options. On a matter of national importance such as vehicle emissions, it is likely that the publication of the Government's ongoing views and discussions would attract publicity, and the Commissioner agrees that, in this case, it is likely that resources would have had to have been diverted in dealing with this.
78. It is also the Commissioner's view that, in certain cases, if the process of formulating policy on the particular issue is still going on when the request is received, it may be that disclosure of material in the course of completion at that stage would make it difficult to bring the process to a proper conclusion.
79. In this case, the request was made two months prior to the publication of the Road to Zero Strategy and the Commissioner considers that this is relevant in this case. Discussions were ongoing at the date of the request, and the Commissioner considers that disclosure of the information at that date would have diverted resources away from concluding the process effectively.

80. While the Commissioner agrees that there is a significant public interest in the disclosure of the information, in this case she considers that this is, albeit narrowly, outweighed by the public interest in the exception being maintained.
81. She has therefore determined that the DfT correctly redacted the withheld information under the exception at regulation 12(4)(d). In light of this conclusion it has not been necessary to go on to also consider the application of regulation 12(4)(e).

Right of appeal

82. 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@justice.gov.uk

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

83. 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.
84. 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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