

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

Date: 20 August 2019

Public Authority: Department for Environment, Food and Rural Affairs (DEFRA)

Address: Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested information on the reasons for the delay in the sign-off of the Air Quality Expert Group Report on Potential Impact of Shale Gas Extraction in the UK. Defra provided some information but withheld internal emails on this subject under the exception for internal communications (Regulation 12(4)(e)).
2. The Commissioner's decision is that the exception is engaged but the public interest favours disclosing the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information, ensuring that any personal data is redacted under the terms of the Data Protection Act 2018.
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. On 2 August 2018 the complainant made a request to Defra in the following terms:

"The Air Quality Expert Group Report on Potential Impact of Shale Gas Extraction in the UK was compiled in 2015 but not published until 27th July 2018. A DEFRA spokesman is reported to have explained the delay in publication by reference to 'completion of sign-off procedures.'

Please detail such sign-off procedures and all written and documentary evidence of their application, including email correspondence between committee members and any and all contact with other parties that have made a contribution, formal or informal, to the sign-off process. It is recognised that this evidence will likely include testimony from individuals whose identity will be protected by redaction but will nevertheless be expected as part of the disclosure."

6. Defra responded on 3 September 2018 and refused the request as manifestly unreasonable under regulation 12(4)(b) of the EIR.
7. The complainant responded on the same date to make a refined request for information in the following terms:

1) "What formal sign-off procedures were required to be completed before the AQEG report was approved for publication? Were those sign-off procedures documented before / at commencement of the AQEG's work? If so please provide a copy.

2) Which Government Departments, Agencies and Non-Departmental Public Bodies were required to formally sign-off before publication of the report? Please confirm the dates on which each of such sign-offs were received.

3) Were any other third parties requested to approve the report before publication was authorised? If so, please identify with dates.

4) Who gave final authorisation for the report to be published and who determined the date on which it was to be made available for public access? Please confirm the dates on which such decisions were taken and communicated.

5) Please provide copies of all correspondence between the AQEG and all other parties, relating to sign-off (or comment on) the report, during the nine months leading up to its eventual publication on 27th July 2018."

8. Defra responded on 19 October 2018. For Q1 Defra explained the Air Quality Expert Group (AQEG) has no formal sign-off process and gave

some background information on how reports are finalised. For Q2 Defra provided information to answer the question asked. For Q3 Defra confirmed no approval was sought from third parties and for Q4 Defra provided dates and the names of individuals.

9. For Q5 Defra provided information but redacted some details on the basis of regulation 12(3) and 13(1) as they constituted third party personal data. Defra also withheld some information as it engaged regulation 12(4)(e) as it constituted internal communications between Defra's Chief Scientific Adviser and communications between Defra officials.
10. The complainant asked for an internal review on 26 October 2018 focussed on Defra's reliance on regulation 12(4)(e) to withhold the communications. Following intervention by the Commissioner, Defra provided its internal review response on 16 May 2019 upholding its position.

Scope of the case

11. The complainant contacted the Commissioner following the internal review on 16 May 2019 to confirm he wanted to proceed with his complaint about the way his request for information had been handled.
12. The Commissioner considers the scope of her investigation to be to determine if Defra has correctly withheld information relevant to Q5 on the basis of the cited exception – regulation 12(4)(e).

Reasons for decision

Regulation 12(4)(e) – internal communications

13. Regulation 12(4)(e) states:

For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that...

(e) the request involves the disclosure of internal communications.

14. The Commissioner's public guidance on this exception¹ defines a communication as encompassing any information which someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it.
15. The EIR does not provide a definition of what is meant by 'internal'. However, the Commissioner's guidance provides clarification on the scenarios where communications can be defined as such. Such a scenario is where the communications have taken place solely within a public authority.
16. Regulation 12(4)(e) is a class based exception. This means that there is no requirement to consider the sensitivity of the information in order to engage the exception. However, the exception is subject to a public interest test under regulation 12(1)(b), and the exception can only be maintained should the public interest test support this.
17. The withheld information represents email communications between Defra officials and between officials and the Chief Scientific Adviser (CSA). The subject of these communications is, broadly, the publication of the report and the length of time between the report being finalised and the proposed publication date of the report.
18. Having examined the withheld information, and considered the specific circumstances of its creation, the Commissioner is satisfied that it can be properly characterised as communications for the purposes of this exception.
19. As referenced previously, the EIR does not define the meaning of 'internal'. Consequently, in the absence of a definition, a judgment must be made that considers the context of the communications. In this case the information comprises emails that were sent between Defra officials and other Defra employees, including the Permanent Secretary and CSA for the purposes of their duties. The Commissioner is therefore satisfied that the communications were 'internal' to Defra, and that regulation 12(4)(e) is engaged.
20. Where regulation 12(4)(e) is engaged, it is subject to the public interest test required by regulation 12(1)(b). The test is whether in all the

¹ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

21. When carrying out the test the Commissioner must take into account a presumption towards the disclosure of the information, as required by regulation 12(2).

Public interest arguments in favour of disclosing the withheld information

22. Defra recognises there is a public interest in disclosure of information concerning shale gas extraction as this is a sensitive issue of major environmental importance.
23. The complainant argues that the three years taken between the report being finalised and being signed-off for publication is a matter of public interest in itself. He argues that without transparency of the procedures the relevant topics of debate and areas of contention that presumably led to the delay cannot be scrutinised.
24. The complainant considers that public officials work in full knowledge of the FOIA and EIR and this should not guide their decision-making. He does not accept that disclosure would therefore impact on the candour of debate or the ability to provide free and frank advice.
25. In addition to this, the complainant maintains there is a strong public interest in the information. He argues the report relates to matters of public health and identifies areas of concern that need to be fully examined. The topic of shale gas remains a very sensitive and controversial issue with high profile in the media and to the public. The delay in the publication of the report attracted a great deal of scepticism and criticism and there is a clear interest in understanding the background discussions and considerations that resulted in the publication of the report in its final form.

Public interest arguments in favour of maintaining the exception

26. Defra argues there is a strong public interest in withholding the information as ministers and government officials and public authorities should have the necessary 'safe space' to think in private and formulate their decision making. The role of CSA includes providing advice and opinion to those within the policy development and delivery areas which is free and frank. The emails contain discussions between the CSA and Defra's air quality team which are frank and robust discussions on the report prior to publication. Defra argues that disclosing this correspondence would impact on the candour of debate the CSA engages in and would therefore impact on the CSA's ability to fulfil their role effectively in ongoing and future areas of policy and evidence giving.

27. Defra has also stated that policy officials may be less candid in expressing their views if they knew that their communications would be disclosed after a decision has been reached. Defra staff are aware that members of the public may request access to any information that the department holds and that the EIR places an emphasis on presumption in favour of disclosure. Defra argues that in light of this it makes available much of the scientific research, underlying data and associated evidence it uses to make policy decisions on the appropriate publicly accessible platforms.
28. Defra considers its arguments are particularly strong in relation to advice provided by its CSA as he combines his government role with a position at a University so must remain able to give full, frank and impartial advice to Ministers and officials.

Balance of the public interest arguments

29. The Commissioner considers this exception will encompass a wide range of internal communications. However, public interest arguments should be focussed on the protection of internal deliberation and decision making processes as well as on the content of the information itself.
30. The Commissioner is of the opinion that the need for safe space and the need for internal deliberation and discussion carries significant weight whilst the issue is still live, whilst ideas are in development and whilst issues are being debated in order that a final decision can be reached. However, once the public authority has made its decision and published it the need for safe space will diminish and this argument will carry little weight in the balance of the public interest test.
31. The Commissioner notes that the shale gas extraction report was published by the time of the request. Although the request was made only a short while afterwards, the final report had been made public so there was no longer a need for a safe space.
32. The Commissioner notes that in some circumstances there can be a continuing need for safe space after decisions are made to, for example, properly promote, explain and defend its key points. However, it is the Commissioner's opinion that it is for the public authority to explain why such safe space is still needed after a decision is reached based on the facts of the case. It is also the Commissioner's view that once the decision is announced there is likely to be increased public interest in scrutinising and debating the details of the report and it is noted in this case that the report was published only a few weeks prior to the request.

33. The Commissioner notes that Defra has argued that disclosure could result in a chilling effect whereby the CSA and, to a lesser extent, officials may be less free and frank in future discussions. This argument will carry greater weight where it can be shown that this chilling effect will apply to future discussions on the subject matter at hand rather than as an argument that disclosure would impact all future discussions. Defra has not specifically linked its arguments to the information in this case but rather has presented more general arguments relating to the quality of future discussions.
34. In addition to this, chilling effect arguments will carry greater weight when the issue at hand is still live. The Commissioner does accept that such arguments continue to carry weight even when the issue at hand is closed but the information is very closely related to other matters which are live.
35. In this case the Commissioner recognises that the issue at hand is closely connected to the government's position on 'fracking' and that the report that was published was based on expert opinions on the impact on air quality of shale gas extraction. The report could be seen to be relevant to providing input into the government's position on fracking in the long term. However, as the report itself states, the area is rapidly developing and reports can become rapidly outdated and the delay between the report being finalised and published (which is the reason for the request) suggests that the report is not likely to be as informative in developing wider government policy. The issue at hand cannot be said to still be live, the report was finalised some time before the request was made and there does not appear to be any room for further internal deliberation on the content of the report.
36. Although the Commissioner has said that the chilling effect argument will still carry weight if the issue at hand is closely connected to wider issues which are still live, the Commissioner is of the opinion that in practice it would be hard for a public authority to argue that there would be a chilling effect on *all* future discussions. Staff involved in discussions on the publication of reports are expected to be impartial and robust in meeting the responsibilities of their roles and not easily deterred from expressing their views by the possibility of future disclosure. It can also be argued that due to the sensitive topic and the public interest in all aspects of fracking that the public is going to want to scrutinise and analyse the decisions made, why and what information influenced those decisions and, in this case, why there was a long delay before the report was published.
37. The Commissioner does not consider Defra's public interest arguments in favour of maintaining this exception are compelling enough or carry the weight Defra has described to warrant non-disclosure. There are

stronger public interest arguments in favour of disclosure in this case. The public interest in openness and transparency, the significant public interest and sensitivity in the issue of fracking and the government position on this, the reasons for the delay in the report publication and the public interest in providing access to information which sheds light on this to assist in understanding more clearly why the delays occurred carry significant weight in this case.

38. The Commissioner has therefore decided in this particular case that the public interest in favour of maintaining the exemption is outweighed by the public interest in favour of disclosure.

Right of appeal

39. 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

40. 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.
41. 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

Jill Hulley
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