

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

Date: 9 October 2019

Public Authority: Department for Business, Energy & Industrial Strategy ('BEIS')

Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant requested the Office of Government Commerce ('OGC') Gateway July 2017 Review on smart metering.
2. The Commissioner's decision is that BEIS correctly considered the request under the EIR and regulation 12(4)(e) – internal communications, is engaged in respect of the withheld information. Nevertheless, she has decided that the public interest favours disclosure. BEIS also applied regulation 13(1) – personal data, to some of the withheld information. The Commissioner finds that regulation 13(1) is engaged only in respect of some of the information withheld in reliance of this exception. The Commissioner finds BEIS in breach of regulation 11(4) for the failure to provide the complainant with its reconsideration within 40 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose in full the Review of July 2017 with the exception of the names of junior staff/officials.
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.

Background

5. On 20 August 2017 the complainant wrote to BEIS and requested information in the following terms:

“Now that I have won the case that reports on smart metering by the Cabinet Major Projects Authority (and its successor) are environmental matters..., please would you send me the ones after that of May 2012.”
6. BEIS responded on 30 October 2017. It stated that it held seven OGC Gateway Reviews spanning the time period April 2013 to July 2017. It provided two reviews from July 2013 and June 2014 with redactions in reliance of regulation 12(4)(e) – internal communications, 12(5)(b) – course of justice and 13(1) – personal information. It advised that the April 2013 Review was already subject to an internal review and was being considered separately and the remaining four Reviews of March 2015, March 2016, November 2016 and July 2017 were withheld in entirety in reliance of regulations 12(4)(e) and 13(1).
7. The complainant requested an internal review of this decision which omitted to name the Review of July 2017 as part of the internal review. Consequently, BEIS did not include the July 2017 Review in its internal review.
8. Following her investigation of the handling of the above request, of 20 August 2017, the Commissioner issued a decision notice¹ on 8 April 2019 in respect of the Reviews of March 2015, March 2016 and November 2016.

Request and response

9. On 6 August 2018 the complainant wrote to BEIS in the following terms:

“I have now referred your silly games to the ICO. Would you please send me the 2017 report.”
10. BEIS interpreted this as a separate request for the July 2017 Review and responded on 28 September 2018 with a refusal notice in reliance of regulation 12(4)(e) and regulation 13(1) to withhold the entirety of the July 2017 Review.

¹ FER0723473

11. On 28 September 2018, during the Commissioner's investigation in respect of the Reviews of March 2015, March 2016 and November 2016, the complainant asked for an internal review with respect to BEIS' response regarding the Review of July 2017.
12. Following an internal review BEIS wrote to the complainant on 22 February 2019. The review found that all of the information within the July 2017 Review was covered by the exceptions in regulation 12(4)(e) or regulation 13(1), and the public interest in maintaining these exceptions outweighed the public interest in disclosure.

Scope of the case

13. The complainant contacted the Commissioner on 8 April 2019 to complain about the way his request for information had been handled. As with his earlier case the complainant remained dissatisfied with the responses provided by BEIS.
14. BEIS reconsidered its responses to the complainant whilst preparing its submission to the Commissioner. On 17 May 2019 BEIS wrote to the complainant advising that it had determined that some of the information previously withheld in reliance of regulation 12(4)(e) could now be provided because the public interest favoured disclosure.
15. The Commissioner considers the scope of her investigation to be BEIS' application of regulation 12(4)(e) and 13(1) to withhold the remaining information in the Review of July 2017. At the time of compliance with the request, the relevant legislation in respect of personal data was the Data Protection Act 2018 ("the DPA 2018").

Reasons for decision

The applicable access regime – FOIA or the EIR?

16. The Commissioner notes that the appropriate legislative framework for information regarding smart meters was the subject of a Tribunal Appeal in 2017, following her decision notice FS50495646.² The EIR was determined to be the appropriate legislation in that case.

² https://ico.org.uk/media/action-weve-taken/decision-notice/2014/963464/fs_50495646.pdf

17. The Commissioner is satisfied that the information in the scope of the request in this case is substantially the same as in the previous cases referenced above and therefore comprises environmental information falling within regulation 2(1)(c).

Regulation 13 – personal data

18. Regulation 12(3) provides that third party personal data can only be disclosed in accordance with regulation 13, which sets out the detail of the exception. Regulation 13(1) 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.
19. 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').
20. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then regulation 13 of the EIR cannot apply.
21. 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?

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

“any information relating to an identified or identifiable living individual”.

23. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information withheld by BEIS under regulation 13(1) comprises the names, and the roles of contributors including staff internal to BEIS and external individuals. BEIS advised the Commissioner that a brief sentence regarding the

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

SRO, the Programme Director and the Permanent Secretary also comprised personal information. The Commissioner accepts that this is third party personal data in accordance with regulation 13(1).

24. In its submission to the Commissioner BEIS set out five categories of the individuals concerned as follows:
 - a) Junior civil servants internal to BEIS;
 - b) Senior civil servants internal to BEIS who were interviewed during the review;
 - c) Senior civil servants external to BEIS who were interviewed during the review;
 - d) Senior third parties who were interviewed during the review; and
 - e) Senior civil servants/public servants external to BEIS who were part of the review team.
25. The fact that information constitutes the personal data of an identifiable living individual 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. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

26. 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”.

27. 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.
28. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

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

29. 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.
30. The Commissioner considers that the lawful basis most applicable is basis (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".

31. 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:-
 - i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
 - ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
32. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.
33. 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. 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.
34. BEIS explained its view that there is a legitimate interest in knowing who has participated in reviews in order to aid transparency and accountability and can add to the public understanding of the circumstances of the case. BEIS also advised that there are legitimate interests in third parties being willing to participate in reviews, as reviewers or as interviewees, and to feel able to be candid in their expression of views.
35. In this case, in addition to the general principle of transparency and accountability of public authorities conducting major projects of significant impact on the general public, the specific transparency and accountability of the July 2017 Review would be assisted by the knowledge of who has participated in it. Knowledge of those involved and their expertise can provide valuable insight into the review of this project of significant national importance.
36. In considering the test of "necessity" the Commissioner considers that '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.

37. BEIS confirmed to the Commissioner that it is prepared to disclose the names of senior civil servants internal to BEIS (category b above). In regard to the other categories BEIS provided the Commissioner with the following:

"For individuals in category a, our view is that disclosure would not promote the legitimate interests in any meaningful way.

For individuals in categories c and d, who were interviewed as part of the OGC Gateway™ Review process. Our view is that disclosure is not necessary because the July 2017 Review can be understood without knowing the identity of the individuals interviewed by the review team. While the interviews will inform the review team, the Review Team Leader is responsible for leading the review team and delivering the review and its report (i.e. the July 2017 Review). Accordingly, the July 2017 Review is the review team's report to the Senior Responsible Owner.

For individuals in category e, our view is that disclosure is not necessary because the criteria and process for becoming a reviewer is set out in published Infrastructure and Projects Authority (IPA) and Cabinet Office guidance on gov.uk."

38. The Commissioner acknowledges that the Review may be understood without the knowledge of who has taken part in the review process. However, she is also aware that in considering the content and state of the implementation of smart metering with knowledge of the senior individuals and experts involved, would provide assurance and confidence in the Review.
39. The final stage of the three part test set out above, is to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the EIR in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
40. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to their professional role or their private life, and the purpose for

which they provided their personal data. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to the individual.

41. The Commissioner notes that the junior officials concerned are not in public facing roles and therefore have an expectation that their names will not be put into the public domain. The Commissioner accepts that even though the information relates to their public, rather than private, life the individuals would have a reasonable expectation that this would not be disclosed, based upon established custom and practice. This leads the Commissioner to conclude that disclosure in this category would be unfair.
42. In respect of other redacted names and roles of senior civil servants external to BEIS who were interviewed during the review (category c), senior third parties interviewed during the review (category d) and senior civil servants/public servants external to BEIS who were part of the review team (category e); the Commissioner considers that the senior professional status of these individuals is such that they should have an expectation of disclosure of their personal data, whether or not they are internal or external to BEIS. Furthermore she has concluded that disclosure would not be unfair in these circumstances.
43. The Commissioner notes that BEIS agreed to the disclosure of the personal data of senior civil servants involved in the Reviews covered in the earlier case, referenced in paragraph 8 above. In this current case BEIS has provided the Commissioner with categories of the individuals involved, set out in paragraph 24. The Commissioner notes that all but one of the categories is identified as "senior".
44. BEIS explained that it had not contacted the individuals in categories c and d to seek their consent for disclosure as it considers that they could not give an 'informed consent' because they will not have seen the July 2017 Review. When being invited to be interviewed, the interviewees were told:

"The review team will ask questions that are related to the programme with an aim to get your opinions and insights into programme progress. The review team will feed its understanding from the interviews into a review report, which is delivered to the SRO (Senior Responsible Owner) on the last day of the review. Everything in the report is non-attributable."

The template letter sent to them advises:

"You can speak freely and frankly because everything in the review report is non-attributable, confidential and will not be quoted in the report."

45. The Commissioner notes that any comments or information provided by the interviewees or the team members is not attributed to the individual. She therefore doubts that disclosure of names from categories c and d would result in any less free and frank contributions or in reticence to contribute.

46. In respect of category e the Commissioner notes that the reviewers come from a "pool of accredited assurance reviewers from both civil service and industry". The Commissioner was advised that the reviews they carry out are purely advisory. BEIS considers that disclosure of the names of the reviewers:

"...could make it less likely that reviewers will be willing to volunteer, especially in relation to certain topics. It will also mean that the reviewer becomes publically linked to a subject-matter with which they have no day-to-day connection."

47. Again, for individuals in category e consent for disclosure was not sought. BEIS relies on IPA guidance which assures the individuals concerned that:

"Should a report be released under FOI, any names of the review team will be redacted."

48. BEIS considers that the individuals from all categories, except category b, have a reasonable expectation that their personal data would not be disclosed. It concluded:

"For individuals in category a, who are junior officials, we do not consider that disclosure would promote the legitimate interests in any meaningful way. For individuals in categories c, d and e, we consider breach of the reasonable expectations of confidence, outweighs the legitimate interests that might be promoted by the disclosure of the information. Any such promotion of legitimate interests would be limited by the nature of the information, and the possible adverse impact on participation in future reviews."

49. The Commissioner is not convinced that assurances given in respect of the non-disclosure of the names and roles of those holding senior roles or expert posts is appropriate in the circumstances of the Reviews in respect of smart meters. She is mindful of the content of the July 2017 Review, which does not attribute comments to specific individuals, and is not convinced that participation in such Reviews would be adversely effected.

50. In the circumstances of this case the Commissioner considers there to be a compelling legitimate interest in disclosure of the personal data of those senior individuals involved in the Review. Based on the above factors, the Commissioner has determined that there is sufficient

legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and the disclosure of the information would therefore be lawful.

51. Following her determination above, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it follows that, for the same reasons, disclosure will be fair. The requirement for transparency is met because, as a public authority, BEIS is subject to the EIR.
52. In this instance, the Commissioner has decided that BEIS has failed to demonstrate that the exception at regulation 13(1) is engaged in respect of the majority of the personal data contained in the Review, excluding that of junior staff (designated category a).

Regulation 12(4)(e) – internal communications

53. Regulation 12(4)(e) of EIR 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.”

54. The Commissioner's published guidance on this exception addresses what constitutes internal communications. For the purposes of this exception all central government departments are deemed to be one public authority. Essentially, an internal communication is a communication that stays within one public authority. As the Commissioner notes in her guidance the term “internal communications” is not defined in the EIR and is normally interpreted in a broad sense.
55. BEIS explained to the Commissioner that the OGC Gateway Reviews ('the Reviews') are undertaken by the IPA. The IPA arranges and manages independent assurance reviews of major government projects. Although the IPA is part of the Cabinet Office the Reviews are prepared for BEIS. The Commissioner understands that the primary purpose of the Reviews is strategic assessment of the outcomes and objectives of programmes in terms of their contribution to a department's overall strategy. The Reviews are often required for formal HM Treasury approvals or business case approval points and provide support and constructive challenge to SROs.
56. Although the Commissioner notes that the Reviews are not produced internally by BEIS, in the circumstances explained to her, she accepts that the documents are in effect internal communications for BEIS. The Commissioner therefore accepts that the information falls within the scope of regulation 12(4)(e).

The public interest

57. 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 determine 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.
58. The Commissioner notes that BEIS provided further information to the complainant following its consideration of the withheld information during her investigation. However, this further disclosure did not satisfy the complainant.
59. BEIS described the remaining withheld information as information which:
- “...covers a variety of live smart metering issues subject to influence and change, which Government officials need to discuss, review and test away from external interference and distraction. Disclosure of live issues could also have impacts on external stakeholders and policy outcomes and on future reviews.”

Arguments in favour of disclosing the information

60. BEIS advised that it had applied a presumption in favour of disclosure as required by regulation 12(2) and went on to explain its consideration of the arguments in favour of disclosure.
61. BEIS explained its view that there is some public interest in disclosure to promote the transparency and accountability of public authorities, create greater public awareness and understanding of environmental matters such as the roll-out of smart meters and more effective public participation in environmental decision making.
62. BEIS advised the Commissioner:
- “We considered that disclosing the full picture will always carry some weight as it will remove any suspicion of ‘spin’.”
63. BEIS also advised that it considered:
- “...there may also be an argument that disclosure would encourage better advice and more robust, well-considered decision making on key policies (such as that covered in the July 2017 Review) in future.”

64. BEIS also explained its consideration, as detailed in the Commissioner's guidance, that civil servants and other public officials charged with giving advice are expected to be impartial and robust in their responsibilities, not easily deterred from expressing their views by the possibility of future disclosure. Also acknowledging that this possibility may lead to better discussion and advice.
65. BEIS also advised the Commissioner that it had considered the public interest arguments set out in her decision notice FER0723473, including:
- This nationwide project is so significant that there is a great weight of public interest in disclosure to consider.
 - The public at large is an important 'stakeholder' as the population as a whole has an interest or concern in this Programme.
 - Transparency is the best way of securing the public's trust in the ability of the government to execute ambitious and far-reaching projects.
 - The public could be reassured by the disclosure of information which demonstrates that the Programme is being monitored, discussed and developed.
 - The effect of disclosure and the promotion of transparency could mean that reviewers would have a greater incentive to be candid and complete in carrying out their functions in the knowledge that their actions might at some stage be subject to public scrutiny.
 - The public interest is served by knowing how a project has been implemented and is being implemented. Equally, such disclosure would contribute towards the debate on the smart metering scheme.

Arguments in favour of maintaining the exception

66. BEIS explained its view that the public interest arguments in favour of maintaining the exception focus on allowing public authorities the necessary safe space for discussion.
67. BEIS advised that the withheld information covers a variety of live smart metering issues subject to influence and change which Government officials need to discuss, review and test away from external interference and distractions. It added that disclosure of live issues could also have "impacts on external stakeholders and policy outcomes and on future reviews."
68. BEIS explained to the Commissioner that the "live issues" covered in the July 2017 Review requiring this 'safe space' are subject to influence and change.

69. BEIS considers that:

"...a premature release and public debate of the Reviews at this time would risk damaging the confidence of those⁴ stakeholders and their ability and commitment to deliver key parts of the Smart Metering Implementation Programme."

70. BEIS considers that disclosure of the Review could harm the IPA assurance process as an effective and prompt peer-to-peer review process which relies on open and frank discussions being conducted during the interview phase, including with external stakeholders.

71. BEIS referenced the National Audit Office's review of the Smart Metering Implementation Programme which was published in November 2018⁵. BEIS considers that this review would better inform the public rather than the July 17 Review.

72. BEIS explained that the Reviews:

"... are not designed for immediate publication. If they were intended to be public facing documents that would change the nature of the reviews."

73. BEIS also explained that there are several documents published in the public domain covering the issue of smart meters. It pointed to the annual progress reports on the smart meter roll-out published on GOV.uk, with the most recent being published in December 2018⁶. The BEIS Committee carried out an inquiry into the roll-out of smart meters in January 2019⁷. The Commissioner notes the content of the NAO report⁸ discussed at Committee presents points not covered in the

⁴ Energy suppliers and other industry stakeholders

⁵ <https://www.nao.org.uk/report/rolling-out-smart-meters/>

⁶ <https://www.gov.uk/government/publications/smart-metering-implementation-programme-progress-report-2018>

⁷ <https://www.parliament.uk/business/committees/committees-a-z/commons-select/business-energy-industrial-strategy/news-parliament-2017/smart-meters-rollout-evidence-17-19/>

⁸ <https://www.nao.org.uk/press-release/rolling-out-smart-meters/>

December 2018 annual report. BEIS advised the Commissioner of the several consultations on smart meters which have taken place all resulting in the publication of information into the public domain.

74. BEIS concluded that the public interest in maintaining the exception outweighs the public interest in disclosure.

Balance of the public interest

75. The Commissioner notes that there is no automatic public interest in withholding information because it falls within a class-based exception. Neither should there be a blanket policy of non-disclosure for a particular type of internal document. Public interest arguments should be focussed on the protection of internal deliberation and decision making processes.
76. With regard to the arguments advanced by BEIS, the Commissioner considers that these can be categorised as the arguments generally known as safe space and chilling effect arguments. The Commissioner notes that the arguments currently advanced by BEIS understandably reflect arguments made in the earlier cases relating to smart meters, referenced above.
77. BEIS explained:
- “The maintenance of the safe space is a crucial factor in the public interest balance and in parallel to the safe space considerations, we are aware of the potential chilling effect of the release of material in the July 2017 Review, i.e. that relevant officials and external stakeholders could be unwilling to partake in discussion or reviews because of concerns about a premature release of details and a public debate that picks over contributions to developing thinking.”
78. The Commissioner accepts that often significant weight should be given to safe space arguments – i.e. the concept that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction – particularly where an issue is live and the requested information relates to that issue.
79. The Commissioner is aware that public authorities often argue that disclosure of internal discussions would inhibit free and frank discussions in the future and that the loss of frankness and candour would damage
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the quality of discussions or advice leading to poorer decision making. This chilling effect cannot be simply dismissed. However, as referenced by BEIS, civil servants and other public officials are expected to be impartial and robust in meeting their responsibilities and not easily deterred from expressing their views. This is particularly the case when the views expressed are not attributed to particular individuals.

80. Having considered the previous cases concerning smart meters the Commissioner is familiar with the arguments advanced by BEIS and welcomes the greater detail provided on this occasion. She has determined that the matter is finely balanced.
81. The Commissioner understands that BEIS considers several of the issues concerned with the roll-out of smart meters require a safe space for discussion. However, she also notes that the roll-out has been on-going for over ten years with consumers being contacted by their energy suppliers to encourage the installation of smart meters during this time. The Commissioner is also aware of frequent advertising across various media.
82. There is much information in the public domain, as referenced by BEIS. The Commissioner has considered whether this adds a significant weight to maintaining the exception as the public is able to quite easily access this information.
83. The Commissioner can accept that the implementation programme is on-going and therefore 'live'. However, notwithstanding this, the Commissioner's view is that this much promoted, nationwide project is so significant that there is a great weight of public interest in disclosure to consider.
84. BEIS has concerns regarding any negative impact on key stakeholders resulting from disclosure with such stakeholders no longer feeling confident about sharing information with Government if the information is 'prematurely' released.
85. The Commissioner is not persuaded that the key stakeholders referenced by BEIS would be negatively impacted in this way. Relevant, open discussion is in the interests of these stakeholders. She is unsure how disclosure would impact on their confidence. Secondly, the Commissioner feels that the public at large is an important 'stakeholder' as the population as a whole has an interest or concern in this Programme.
86. In the Commissioner's view, a legitimate argument exists which says that transparency is the best way of securing the public's trust in the ability of the government to execute ambitious and far-reaching projects. The smart meter project may benefit from greater transparency. Consumers are clearly keen to save energy if this results

in financial benefit and are likely to be pre-disposed to support the project if they are fully informed.

87. The Commissioner considers that, as the public is aware of the issues involved with the Programme, it could be reassured by the disclosure of information which demonstrates that the Programme is being adequately monitored, discussed and developed. Disclosure could therefore reassure the public that the Review system does work and that the reports represent a thorough form of review of an ongoing project.
88. The Commissioner also considers that the effect of disclosure and the promotion of transparency could mean that reviewers would have a greater incentive to be candid and thorough in carrying out their functions in the knowledge that their actions might at some stage be subject to public scrutiny. The Commissioner is cognisant of the findings of the Tribunal on the issue of the disclosure of a gateway review relating to the ID cards programme – *Office of Government Commerce (OGC) v Information Commissioner* (EA/2006/0068 & EA/2006/0080)⁹, a case that was remitted back to the First-Tier Tribunal following a High Court judgment.
89. As in her decision notice FS50495646 previously referenced at paragraph 10, following the Tribunal's approach, the Commissioner similarly considers in this case, that the public interest is served by knowing how a project has been implemented and is being implemented (paragraph 159). Equally, the Commissioner is satisfied that disclosure would contribute towards the debate on the smart metering scheme.
90. The Commissioner is cognisant of the presumption in favour of disclosure as provided for by regulation 12(2). After much deliberation she finds that the public interest in maintaining the exception does not outweigh the public interest in disclosing the information. Consequently, she finds that the public interest favours disclosure of the information withheld in reliance on regulation 12(4)(e).

Regulation 11 – Representations and reconsideration

91. The EIR regulation 11(4) provides:
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⁹ [http://www.informationtribunal.gov.uk/DBFiles/Decision/i293/OGC%20v%20IC%20\(EA-2006-0068%20&%200080\)%20Decision%2019-02-09.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i293/OGC%20v%20IC%20(EA-2006-0068%20&%200080)%20Decision%2019-02-09.pdf)

"A public authority shall notify the applicant of its decision under paragraph 3 as soon as possible and no later than 40 working days after the date of receipt of the representations."

92. The complainant asked for an internal review of the outcome of his request on 28 September 2018. BEIS did not provide the results of its review until 22 February 2019, some 102 days later.
93. BEIS did not offer an explanation for this delay. The Commissioner considers that a period of five calendar months to conduct the internal review is excessive and considers this to be an unsatisfactory period of time.
94. The Commissioner therefore finds BEIS in breach of regulation 11(4).

Right of appeal

95. 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

96. 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.

97. 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

Susan Hughes
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