

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

Date: 31 May 2023

Public Authority: Department for Energy Security & Net Zero
("DESNZ")

Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant has requested a spreadsheet breaking down the CO2 emissions savings of policies published in the net zero strategy. DESNZ refused the request and withheld the information in reliance of EIR regulation 12(4)(e) – internal communications.
2. The Commissioner's decision is that the exception at EIR regulation 12(4)(e) is appropriately engaged and the balance of the public interest favours maintaining the exception.
3. The Commissioner does not require further steps.

Request and response

4. On 19 October 2021 the complainant wrote to the Department for Business, Energy & Industrial Strategy¹ ("BEIS") and requested information in the following terms:

"On a press briefing call at 2pm on 19 October 2021, Sarah James, your co-director of clean growth, referred to BEIS having a spreadsheet breaking down the CO2 emissions savings of policies published that day in the net zero strategy. She said BEIS had taken a decision not to publish that document.

Please could you supply me with the spreadsheet, under FOI or EIR rules, whichever are most appropriate. Allowing the wider public to scrutinise the estimated impact of the measures you have published is clearly in the public interest, so they can see if the government is on track to meeting its legally-binding carbon targets. No reason was given for why the spreadsheet is not being published. Moreover, there is a very recent precedent for the government breaking down emissions savings like this, such as in this report last November:

<https://assets.publishing.service.gov.uk>"

5. BEIS responded on 29 November 2021. It stated that it held the requested information but was withholding it in reliance of EIR regulation 12(4)(e) – internal communications.
6. In requesting an internal review the complainant explained:

"..you have provided sectoral and overall emissions savings breakdowns in the technical annex of the public version of the net zero strategy, and it is not clear why a policy/measure-level should be any different; and the government has clear legal obligations under section 14 of the Climate Change Act to show how its proposals and policies will meet the UK's carbon budgets - without providing bottom-up figures of the estimated emissions savings of policies, independent scrutiny is hampered"

¹ On 7 February 2023, under a Machinery of Government Change, the Department for Business Energy and Industrial Strategy ("BEIS") began the transition into three separate departments, including the Department for Energy Security and Net Zero ("DESNZ"). The request in this decision was made to BEIS, however this notice will be served on DESNZ as the appropriate authority.

7. Following an internal review BEIS wrote to the complainant on 29 December 2021 upholding its initial response advising that the public interest favoured maintaining the exception.

Scope of the case

8. The complainant contacted the Commissioner on 4 January 2022 to complain about the way their request for information had been handled. They explained:

"I would be happy if the public body published the data without publishing the full spreadsheet - I simply want to see the estimated emissions savings figures for individual policies in the public domain so they can be scrutinised."

9. The Commissioner considers the scope of his investigation is to determine whether the application of regulation 12(4)(e) to withhold the requested information is correct.

Reasons for decision

Is the requested information environmental?

10. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;

- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
11. The Commissioner is satisfied that the information concerned, the spreadsheet identified in paragraph 4 comprises environmental information falling within regulation 2(1)(b) & (c) as it concerns factors and measures namely policies concerning emissions.

Regulation 12(4)(e) – internal communications

12. Regulation 12(4)(e) states that information is exempt from disclosure if it involves 'the disclosure of internal communications'. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Rather, as long as the requested information constitutes an internal communication then it will be exempt from disclosure.
13. The Commissioner has reviewed the withheld information and is satisfied that the spreadsheet comprises an internal communication. He notes his previous decision notice IC-148516-Q1P3² on a very similar request for the same information. As in that case, he considers that the exception at regulation 12(4)(e) is engaged.

Public interest test

14. As with the other exceptions under the EIR, when regulation 12(4)(e) is engaged, the public authority must still carry out the public interest test in order to decide whether the information should be withheld. Under regulation 12(1)(b), the public authority can only withhold the information if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Furthermore, under regulation 12(2), it must apply a presumption in favour of disclosure.

²<https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4023835/ic-148516-q1p3.pdf>

15. DESNZ explained arguments in favour of the transparency of policy discussions which included increasing public accountability and allowing the public to assess and influence the quality of decision making on policies in relation to net zero.
16. DESNZ advised the Commissioner that government requires space to decide when and how to publish information:

“... balancing the public interest in transparency with the protection of a policy and decision making space which facilitates candid and frank discussions on policy detail, commercial sensitivity and the risk of disclosing inaccurate information.”
17. On 18 July 2022 a High Court judgement required BEIS to publish a report under section 14 of the Climate Change Act with adequate detail including the emissions projections of individual proposals and policies which make up the package to meet carbon budgets. Accordingly the Carbon Budget Delivery Plan³ (“CBDP”) sets out emissions analysis for each quantifiable proposal and policy.
18. Following the publication of the Net Zero Strategy in 2021 the Carbon Budget Delivery Plan (“CBDP”) was published on 30 March 2023. DESNZ explained:

“This was the result of an extensive exercise across government, involving senior officials and Ministers, to agree the presentation of the package of proposals and policies to strike the right balance between HMG’s legal obligations under the Climate Change Act 2008 (CCA) and the need for public transparency with the imperative to preserve a ‘safe space’ for policy development and design... Further, this document provides a comprehensive, up to date and accurate elucidation of HMG’s proposals and policies to enable the carbon budgets to be met. This is more detailed than what was published in the Net Zero Strategy and includes delivery risk assessments and expected timescales over which proposals and policies are expected to take effect.”
19. DESNZ’s view is that the CBDP facilitates public understanding and scrutiny of HMG’s plans to meet its legally-binding carbon budget targets.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1147369/carbon-budget-delivery-plan.pdf

20. DESNZ advised that the need for a safe space is particularly relevant in this case because the information covers a variety of live internal policy issues which government needs to discuss, review and test away from external interference. It explained:

“Whilst the Net Zero Strategy has already been published, much of the development of the underlying proposals and policies listed within the spreadsheet is still occurring, as is to be expected given the length and complexity of a long-term transition over multiple decades. A number of policies are yet to be consulted on, fully designed, agreed and/or implemented.

... In contrast, we consider that disclosure of the information requested would risk damaging the internal decision-making process. This is because government officials and public authorities should have a safe space within which to think through and develop policy.”

21. DESNZ stressed the importance of not disclosing partial analysis on policies in an early stage of development because of the risk of inhibiting the ability of government to present or explain policies in a way to secure the necessary public or industry support to enable their delivery. It added:

“This consequently jeopardises future carbon savings because of possible opposition to policies forcing their abandonment – and is particularly pertinent when some of the proposals or policies in question are controversial, such as policies to incentivise industry decarbonisation, or taxation measures or levies. These would elicit strong public reactions and as such have been carefully presented and explained in the CBDP.”

22. DESNZ also referenced the possibility of a chilling effect on officials resulting in less frank and candid views if their on-going thinking may be made public. It considers that this is likely to have an adverse impact on the quality of decision making.

23. Furthermore DESNZ considers that:

“...releasing potentially misleading policy information – whether because it is premature or outdated, as in the case of the information at hand – could provide unhelpful or misleading signals to the public, markets and investors about the direction of policy, which could lead to sub-optimal decision-making by those making capital investments, and could undermine ongoing commercial negotiations between government and industry.”

Balance of the public interest

24. The Commissioner considers that the underlying rationale for the exception at regulation 12(4)(e) is to protect a public authority's need for a private thinking space. He considers that the extent to which disclosure would have a detrimental impact on internal processes will be influenced by the particular information in question and the specific circumstances of the request.
25. The Commissioner has considered the arguments provided by both parties. He recognises the legitimate public interest in disclosing information that would inform the public about the significantly important policies and proposals to attain Net Zero. He is mindful that access rights under the EIR are designed to support public access to environmental information and public participation in decision making.
26. The Commissioner is satisfied that there is a strong public interest in protecting DESNZ's ability to communicate internally in a "safe space". The Commissioner's opinion is that the need for a safe space is strongest when the issue is still live, as in this case, at the time of the request. The policies and proposals were not finalised but were under discussion and development.
27. The Commissioner considers that the quality of decision-making in regard to determining policies to achieve Net Zero is of the most significant importance. He accepts that at the time of the request disclosure of the requested information would have created a risk to delivering crucial emissions savings by restricting the safe space for policy making consultation and development.
28. He notes the complainant's reference to section 14 CCA and the obligations on government to demonstrate how its proposals and policies will meet the UK's carbon budgets. Clearly the High Court decision reiterated this requirement in 2022 which resulted in the CBDP earlier this year.
29. The Commissioner has studied both the spreadsheet and the CBDP and accepts that the latter provides a clearer understanding albeit with potentially less detail. He appreciates that from the time of the request to the published CBDP the complainant has waited almost 18 months to receive related information, not the specifically requested spreadsheet or simply the emissions savings figures for individual policies as explained in paragraph 8.
30. Notwithstanding this the Commissioner's view is that disclosure of information on the projected emissions reductions associated with individual policies in the early stages of formulation and development would risk damaging the internal decision-making process and inhibit future policy development.

31. The Commissioner accepts the valid arguments advanced in favour of disclosure, however, in the circumstances of this case he does not consider them to outweigh the public interest in maintaining the exception, as set out above. In assessing this balance the Commissioner has taken into account the presumption in favour of disclosure contained in the EIR at regulation 12(2).
32. The Commissioner's decision is that on balance the public interest favours maintaining the exception at regulation 12(4)(e).

Right of appeal

33. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

34. 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.
35. 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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