

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

**Decision notice**

**Date:** 19 October 2023

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

**Address:** 1 Victoria Street  
London  
SW1H 0ET

**Decision (including any steps ordered)**

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1. The complainant has requested information on induced seismicity from UK shale gas exploration and production. DESNZ confirmed that it held some of the requested information but was withholding it in reliance on EIR regulation 12(4)(e) – internal communications, regulation 12(5)(b) – course of justice, regulation 12(5)(e) – commercial confidentiality and regulation 12(3) – personal data.
2. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of regulation 12(4)(e).
3. The Commissioner does not require further steps.

## Background

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4. The government issued a moratorium on fracking operations on 2 November 2019<sup>1</sup>.
5. On 21 February 2021, in response to a Parliamentary Question the Secretary of State for Business, Energy and Industrial Strategy ("BEIS") advised that the moratorium applied only to operations that required hydraulic fracturing consent.
6. In April 2022 the government commissioned the British Geological Survey to advise on the latest scientific evidence around shale gas extraction. Its final report was published on 22 September 2022<sup>2</sup>
7. On 22 September 2022 the moratorium on associated hydraulic fracturing was lifted<sup>3</sup> with a press release stating:

"To bolster the UK's energy security, the UK government has today lifted the moratorium on shale gas production in England, and confirmed its support for a new oil and gas licensing round, expected to be launched by the North Sea Transition Authority (NSTA) in early October."
8. Following a change in Prime Minister and Secretary of State for BEIS on 27 October 2022 a statement<sup>4</sup> from the Secretary of State re-instated the moratorium:

"As the Prime Minister set out when entering office, and in the House yesterday, the Government supports the core ambitions set out in the 2019 manifesto. The Government will therefore revert to a precautionary approach and only support shale gas exploration if it can be done in a way that is sustainable and protects local communities. We will be led by the evidence on whether this form of exploration can be done in a way which acceptably manages the risk to local communities."

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<sup>1</sup> <https://www.gov.uk/government/news/government-ends-support-for-fracking>

<sup>2</sup> <https://www.gov.uk/government/publications/review-of-the-geological-science-of-shale-gas-fracturing#full-publication-update-history>

<sup>3</sup> <https://www.gov.uk/government/news/uk-government-takes-next-steps-to-boost-domestic-energy-production>

<sup>4</sup> <https://questions-statements.parliament.uk/written-statements/detail/2022-10-27/hcws346>

## Request and response

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9. On 20 December 2022, the complainant wrote to BEIS<sup>5</sup> and requested information in the following terms:
- “Based on your comments I would like to refine the request to the following:
1. Documents produced by the BEIS chief science advisor, and provided to BEIS ministers/SoS, on the matter of induced seismicity from UK shale gas exploration and production, including any recommendations on an appropriate regulatory framework for seismicity from hydraulic fracturing between the 25th of August 2022 and the 30th of October 2022.
  2. Any and all documents provided by BEIS civil servants to the BEIS SoS, Mr Grant Shapps MP, from the 23rd of October to the 30th of October 2022 on the matter of UK shale gas.”
10. DESNZ responded on 10 February 2023. It stated that that it did not hold information within the scope of point 1 of the request but some information in the scope of point 2 was held. BEIS went on to withhold that information under EIR regulation 12(4)(e) – internal communications.
11. Following an internal review DESNZ wrote to the complainant on 3 May 2023. It erroneously cited regulation 12(4)(d) – information in the course of completion and regulation 12(5)(c) – intellectual property rights. DESNZ has confirmed to the Commissioner that it wished to rely on regulations 12(4)(e) – internal communications, 12(5)(b) – course of justice and 12(5)(e) – commercial confidentiality. At the time of the Commissioner’s investigation DESNZ also cited regulation 12(3) – personal data.
12. DESNZ clarified to the Commissioner that it considers that the entirety of the withheld information falls within the exception provided by regulation 12(4)(e). The other exceptions cited are applied in addition, to specific elements of the information.

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<sup>5</sup> 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 & Net Zero (“DESNZ”). The request in this case was made to BEIS, however this notice will be served on DESNZ as the appropriate authority.

## Scope of the case

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13. The complainant contacted the Commissioner on 24 May 2023 to complain about the way their request for information had been handled. They explained:

"We disagree with the conclusions of the internal review. We contest that the disclosure of the requested information is in the public interest, the issue is not 'live', documents released to us do not breach confidentiality clauses because we (i.e. the industry) provided them and failure to disclose internal legal advice does not adversely affect the course of justice."

14. The Commissioner considers that the scope of his investigation is to determine whether DESNZ is correct in its application of the exceptions provided by regulations 12(4)(e), 12(5)(b), 12(5)(e) and 12(3).

## Reasons for decision

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### Is the requested information environmental?

15. 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);
16. The Commissioner has seen the withheld information and is satisfied that it falls within the definition of environmental information at regulation 2(1)(c) as it relates to shale gas policy. Accordingly he has considered the complaint under the EIR.

### **Regulation 12(4)(e) – internal communications**

17. 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.
18. The Commissioner has reviewed the withheld information and is satisfied that the limited information consists of communications between the Secretary of State and BEIS officials. The information clearly comprises internal communications. The Commissioner therefore considers that the exception at regulation 12(4)(e) is engaged.

### **Public interest test**

19. 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), a presumption in favour of disclosure must be applied.
20. DESNZ explained that it had applied a presumption in favour of disclosure in considering the public interest test. It considered that in favour of disclosure was increasing the accountability of government and "...allowing the public to assess and influence the quality of decision making on policies such as those in relation to this policy area."
21. In favour of maintaining the exception DESNZ explained:
- "...the underlying rationale behind the exception in Regulation 12(4)(e) is to allow public authorities the necessary space to think in private and this is particularly relevant to live policy issues under development by

the department. While the decision to reinstate the moratorium on fracking has been made, the discussion regarding the moratorium covers policy areas that are still live and in development. These areas include energy security, UK fuel sector emissions, and infrastructure planning reform issues, for which Government officials still need to discuss, review, and test away from external interference and distractions.”

22. DESNZ added that there may also be a ‘chilling effect’ if the withheld information was disclosed as those officials advising on this policy area may be less frank and candid in giving their views in the future if their on-going thinking may be made public. DESNZ considered that this would be likely to have an adverse impact on the quality of internal debate.
23. In requesting an internal review the complainant listed the following points with regard to the public interest:
  - “1. That the release of the documentation related to the decision to reimplement the moratorium is in the public interest.
  2. That the public interest in disclosing the information outweighs the public interest in maintaining the “safe space” exception.
  3. That even if the public interest in disclosing the information does not outweigh the interest in maintaining the “safe space” exception, the exception is no longer applicable as the issue is no longer live, given the policy decision to reimplement the moratorium on the 27th October 2022.”

### **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 is mindful that access rights under the EIR are designed to support public access to environmental information and public participation in decision making.
26. In his decision notices the Commissioner has often provided his view that 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 by the possibility of future disclosure. However, safe space arguments are likely to be at their strongest when closely

related to very recent government policies, as in this case. He notes that at the time of the request the withheld information had been very recently created only two months earlier.

27. The Commissioner is satisfied that there is a strong public interest in protecting DESNZ's ability to communicate internally in a "safe space" and for decisions to be based on the most full and frank advice.
28. The Commissioner notes the complainant's view that because the moratorium was re-implemented the policy regarding shale gas is settled. The Commissioner understands that the decision to re-instate the moratorium on fracking has been made. However, having seen the withheld information, he notes that the content also covers policy areas that are still live and in development.
29. The Commissioner would also advise the complainant that disclosure of requested information is not only a disclosure to the requester but to the world at large. The complainant's comment, set out above in paragraph 13 that; "documents released to us do not breach confidentiality clauses because we (i.e. the industry) provided them", is not a factor in the balance of the public interest. If it were the case that all the information had been provided by the complainant it would still not provide a substantive argument for disclosure under the EIR to the complainant or the general public.
30. The Commissioner considers that the quality of decision-making in regard to determining policies with regard to shale gas is of great public importance. He is aware of the significant coverage in the media of the subject matter, the impacts on the environment and the protests regarding fracking. He also notes the detailed information already in the public domain as referenced in paragraph 6, footnote 2. His view is that disclosure of the withheld information would risk damaging the internal decision-making process and potentially inhibit future policy development.
31. In balancing the public interest he must determine whether disclosure of the requested information best serves the public interest. In the circumstances of this case the Commissioner considers that the arguments advanced in favour of disclosure are outweighed by the public interest in maintaining the exception. 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).
33. As the exception at regulation 12(4)(e) covers the whole of the withheld information he has not considered the exceptions at regulations 12(5)(b), 12(5)(e) and 12(3).

## Right of Appeal

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34. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

35. 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.
36. 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**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**



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