

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

Decision notice

Date: 24 October 2012

Public Authority: The Department for Business Innovation & Skills

Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. On 1 July 2011 the complainant requested information relating to particular meetings and correspondence between Ministers, Special Advisers, Senior Civil Servants and Energy Companies. The Department for Business Innovation & Skills (DBIS) provided the complainant with some of the requested information, but refused to provide some of the information under regulation 12(4)(b), regulation 12(4)(e), regulation 12(5)(e) and regulation 13 of the Environmental Information Regulations 2004 (EIR).
2. The Commissioner's decision is that DBIS has correctly applied regulation 12(4)(e) and regulation 13 to make redactions to the information requested at part 1 of the request. The Commissioner considers that DBIS correctly applied regulation 12(4)(b) to the information requested at parts 2 and 3 of the request.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 1 July 2011, the complainant wrote to DBIS and requested information in the following terms:
 1. Minutes, notes, records, action-points, briefings from the following meetings:

- a. Vince Cable – November 2010 – RWE N-Power – “to discuss energy and low-carbon”.
 - b. Mark Prisk – November 2010 – Scottish and Southern Energy Plc. – “to discuss engineering”;
2. Schedule of BIS Ministers/Special Advisors/senior civil servants' meetings with the following energy companies from May 2010 to June 2011; Iberdrola/Scottish Power, Centrica/British Gas, EDF Energy, Scottish and Southern Energy, RWE N-Power and E.ON.
3. Any correspondence, including emails and minutes/notes/briefings from meetings between BIS Ministers'/Special Advisors/Senior civil servants and the following energy companies from May 2010 to June 2011; Iberdrola/Scottish Power, Centrica/British Gas, EDF Energy, Scottish and Southern Energy, RWE N-Power and E.ON, concerning electricity market reform.
5. DBIS responded on 23 September 2011 and explained that it was not possible to provide all of the information requested at points 2 and 3 of the request as regulation 12(4)(b) EIR was applicable. It explained that gathering the information requested about meetings between DBIS, senior civil servants and energy companies would require a general search across the whole Department to search through the information held for any material which meets the request criteria. It said that this would involve a significant cost and diversion of resources. DBIS suggested that the complainant may wish to refine the request by narrowing its scope by being more specific about what information they particularly wish to obtain. It suggested that the complainant could for example limit the time of the request to a shorter period, specify a particular company covered by the request or provide details of any particular areas of energy reform that the complainant was interested in. DBIS did also try to provide the complainant with some information which it specifically created to try to go some way to answering these parts of the request. In terms of the rest of the request DBIS provided the complainant with some information but withheld some information under regulations 12(4)(e), 12(5)(e) and 13.
6. Following an internal review DBIS wrote to the complainant on 23 January 2012. It maintained its original position.

Scope of the case

7. The Commissioner has considered whether DBIS handled the complainant's request in accordance with the EIR. Specifically, he has looked at whether DBIS is entitled to rely on regulation 12(4)(b),

regulation 12(4)(e), regulation 12(5)(e) or regulation 13 as a basis for refusing to provide the information requested.

Reasons for decision

Regulation 12(4)(b)

8. Under regulation 12(4)(b), "a public authority may refuse to disclose information to the extent that – the request for information is manifestly unreasonable".
9. DBIS has applied regulation 12(4)(b) to parts 2 and 3 of the request.
10. DBIS explained that to search all senior civil servants diaries and correspondence for the period of May 2010 to June 2011 would involve searching 204 senior civil servants diaries, personal files, DBIS's electronic filing system and correspondence for over a year. It estimated that this would take between 153 and 204 hours, allowing for those searches to take between a minimum of 45 minutes to an hour. It said that in line with the ICO FOI Policy Knowledge Base lines to take, policy reference LTT147 notes that the FOI Fees Regulations may be a useful starting point to ascertain what costs would be involved. By way of comparison with the Freedom of Information Act (FOIA) cost guidelines, using the estimate of £25 per hour the total cost would be between £3,800 and £5,100 and would take up a significant amount of time.
11. It said therefore that the original request would place a substantial and unreasonable burden on the resources of DBIS. It therefore concluded that the request was manifestly unreasonable.
12. The Commissioner considers that the fees regulation used under FOIA are a useful comparison to help to determine whether a request could be classified as manifestly unreasonable under EIR. He would however clarify that simply because a request would exceed the FOIA cost limit would not necessarily mean that it would be deemed manifestly unreasonable under EIR. However in this case, due to the breath of information requested it is clear that searching for information across an entire department is going to take a considerable amount of time at a considerable expense. At best, in this case, DBIS has estimated it would cost £3,800 equivalent to 152 hours to comply with parts 2 and 3 of the request as they stand. The cost limit under FOIA is £600 for central government departments which is equivalent to 24 hours work. The costs in this case would therefore significantly exceed the FOIA cost limit.

13. In a previous decision notice, case reference FS50154310, the complainant requested items relating to the maintenance of a septic tank that served his property and was the responsibility of the local Council. The public authority initially refused the requested under section 12 of FOIA. However, the Commissioner decided that the majority of the information was environmental and should be dealt with under the corresponding regulations. The Commissioner considered the FOI Fees Regulations as a starting point in his assessment on whether the requests (for environmental information) would be unreasonably costly for the public authority to deal with. The Commissioner was content that the public authority's estimate of 54 hours 32 minutes was reasonable, and considered this in light of the appropriate limit of 18 hours under the FOI fees regulations, noting that such a large search would seriously disrupt the everyday work of the PA and was therefore manifestly unreasonable. The Commissioner went on to consider the balance of the public interest, he considered that in that case, the release of information would promote accountability and transparency in public services. However, the Commissioner found that the time it would take in responding to the request would divert a disproportionate amount of the public authority's resources from its core functions (paragraph 47), and furthermore, the fact that very few people were directly served by the sewage plant indicated a limited level of public interest in disclosure. Although acknowledging the specific presumption in favour of disclosure at 12(2) of EIR, in light of the arguments set out above, the Commissioner concluded that on balance, the public interest in maintaining the exception under 12(4)(b) outweighed the public interest in disclosing the information, and therefore, the cost of complying with the request was manifestly unreasonable.
14. The Commissioner also notes that in this case, DBIS not only provided the complainant with advice and assistance as to how the request might be refined, it also focused its searches to the areas of the department which have the most contact with the energy companies, including the relevant civil servants so that it could provide some information within the scope of the request to the complainant. The Commissioner is also aware that the complainant did submit a refined request to DBIS on 24 February 2012 to which DBIS is currently in the process of responding to.
15. Taking into account the above, using the FOIA cost limit as a guide and the wide wording of parts 2 and 3 of the request, he considers that these parts of the request are manifestly unreasonable.
16. The Commissioner has therefore gone on to consider the balance of the public interest in this case.

Public interest arguments in favour of disclosure

17. DBIS has explained that it recognises that there is a public interest in being able to scrutinise government decisions, and that in this case there is a public interest in understanding what energy companies discuss with Ministers on energy pricing and related issues.
18. DBIS also said that it recognised that there is a strong public interest in energy pricing as it affects the whole population, however it has indicated that the redacted information contains very little on gas and electricity pricing.

Public interest arguments in favour of maintaining the exception

19. The Commissioner considers that there is a very strong public interest in not putting an unreasonable burden upon a public authority's resources. He considers that complying with parts 2 and 3 of this request would place an unreasonable burden upon DBIS's resources, even taking into account that DBIS is a central government department. The Commissioner considers that this would not be in the public interest.

Balance of the public interest

20. In this case the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception. The Commissioner therefore considers that regulation 12(4)(b) was correctly applied to parts 2 and 3 of the request.

Regulation 12(4)(e)

21. DBIS has applied regulation 12(4)(e) to make redactions to the information requested at part 1 of the request. Regulation 12(4)(e) states that, "a public authority may refuse to disclose information to the extent that - the request involves the disclosure of internal communications."
22. In this case DBIS has explained that the documents where redactions were made under regulation 12(4)(e) were all internal communications. It clarified that the documents were either briefing notes to Ministers or internal notes of meetings. It said that these documents were prepared by DBIS for its own internal use, partly to inform Ministers for their meetings with the companies, and also for the purposes of policy making.
23. Upon viewing the redacted information the Commissioner accepts that it does fall under regulation 12(4)(e).

24. Information withheld under regulation 12(4)(e) is subject to the public interest test and in accordance with regulation 12(2) the starting point is to apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosure

25. DBIS has explained that it recognises that there is a public interest in being able to scrutinise government decisions, and that in this case there is a public interest in understanding what energy companies discuss with Ministers on energy pricing and related issues.
26. DBIS also said that it recognised that there is a strong public interest in energy pricing as it affects the whole population.

Public interest arguments in favour of maintaining the exception

27. DBIS explained that the businesses are important DBIS stakeholders and have an active interest in many areas of the Government's work. In view of this it said that DBIS Ministers and Senior Civil Servants meet with a broad range of businesses at regular intervals. It explained that it is important for DBIS to be in touch with business and meets with them regularly to understand their issues. It said that it is therefore in the public interest that major stakeholders are able to meet with Ministers and have full and frank discussions.
28. DBIS said that Government is keen to understand businesses' concerns and issues and to consult with them during the policy making process. It explained that this is important to ensure that policies are not being developed in isolation. However, the Government ensures that there is no undue influence from businesses and that all issues are taken into consideration fairly. It said that it was in the public interest for the Government to be able to consult with businesses in this way during the policy making process.
29. In particular DBIS explained that it is in the public interest that it meets with stakeholders and companies from all sectors including the energy sector and is able to discuss freely and frankly the issues which impact on those sectors. If companies felt inhibited in this, Ministers were not fully briefed on the issues, or the issues were not fully recorded, this would impact on the development and implementation of policies and have a detrimental effect on those sectors. It said that this would not be in the public interest.
30. DBIS also recognised that these energy companies are significant investors and employers, and that DBIS must also consider the impact of the disclosure of information. If DBIS is not aware of the challenges facing companies, some of which may be extremely sensitive and not for

public consumption, it would not be able to understand what policies are required to support growth. Major stakeholders, such as energy companies, are important investors in the UK, and their investment is critical to securing growth and jobs across the economy. It is therefore important that Government understands clearly what their investment plans are, what the barriers to investment and growth are, and whether the Government can provide support to encourage growth. It said again that it was very much in the public interest that it is able to do this.

31. DBIS explained that it needs to be able to brief Ministers and record the notes of meetings between Ministers/civil servants and stakeholders with a view to that information being used to develop policy. Whilst it is clear that the briefing notes for the meetings were internal documents, it must also be stated that the notes of the meetings were not written as formal minutes to be shared amongst all attendees, but were made and used by officials in order to carry out their official business. It is also clear from the minutes that the views provided by the companies are full and frank and provided in confidence. If the energy companies thought that the discussions of these meetings would be shared, discussions would not be so useful.
32. DBIS noted that the complainant drew comparisons with events such as the emails released relating to the Fukushima crisis and the resignation of Dr Liam Fox, claiming that there was heightened public concern over the influence of private organisations over policy development. DBIS stated that those events are unconnected to the information at hand, and the meetings that were held with energy companies are not comparable to those events. These energy companies are important stakeholders and as stated above it is crucial that they are able to meet with Ministers and civil servants and speak frankly and candidly.
33. DBIS argued that issues relating to energy and Electricity Market Reform are very much live and ongoing issues, for example it said that the Electricity Market Reform policy is still being developed and forms part of the Energy Bill. The Queen's Speech announced an Energy Bill 'to reform the electricity market to deliver secure, clean and affordable electricity and ensure prices are fair.' The draft Bill was published on 22 May 2012 for Pre-Legislative Scrutiny to enable swift passage of well considered legislation this session. The legislation will reach the statute book in 2013 so that the first low-carbon projects can be supported under its provisions in 2014. It is very important that officials and stakeholders are able to provide free and frank advice and opinions to Ministers on such subjects. The release of these internal communications would expose this information and advice to comment and speculation which would cause officials to be less willing to provide such advice in future, and result in stakeholders being less forthcoming in their discussions with Ministers. Energy companies remain a regular

topic in the press regarding the pricing of energy. Although none of the documents deal with the pricing of energy, the sensitivities surrounding energy companies remain. If energy companies felt that everything they said to the Department would be published, they would be less willing to come in and discuss the issues they face.

34. DBIS concluded that, on balance, the public interest in favour of disclosure is outweighed by the public interest in favour of withholding the information. If this exception were not available this would have a negative impact on the development of good policy and on the ability of civil servants to brief Ministers effectively.

Balance of the public interest

35. The Commissioner considers that there is a strong public interest in disclosure of information which will help the public understand the reasons behind Government decision making. He also considers that there is a particularly strong public interest in disclosure of information relating to discussions between the Government and major energy companies as this affects the vast amount of the population.
36. However the Commissioner also considers that there is a very strong public interest in the Government being able to work with energy companies when developing and implementing policy in this area as experts in the field. Furthermore there is live and ongoing policy development in this area which will require the type of robust discussion between the Government and energy companies such as DBIS has described above. The Commissioner considers that it is very much in the public interest that this type of discussion is conducted in a candid, open and frank manner.
37. Taking all of the public interest arguments into account, and upon viewing the withheld information, the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exception in this case.
38. The Commissioner therefore considers that DBIS were correct to redact the information which has been withheld under regulation 12(4)(e).
39. The Commissioner is aware that DBIS has applied regulation 12(5)(e) to some of the information also redacted under regulation 12(4)(e). As the Commissioner considers that regulation 12(4)(e) was correctly engaged he has not gone on to consider the application of regulation 12(5)(e) any further.

Regulation 13

40. Regulation 13 provides that, "To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data." One of those conditions is where any of the data protection principles would be breached.
41. In this case DBIS has redacted the names of some staff at the energy companies. In one instance DBIS sought consent to release the name which was not given. DBIS said that this lack of consent coupled with the fact that the individual is not in a Director-level position at the relevant energy company led it to conclude that it would not be fair and lawful to release this name. In another instance a name was handwritten on a letter by a DBIS official in relation to organising a meeting and it believed that in this case the individual would not expect their name to be revealed. This was because the individual had no involvement in the issues the complainant has asked about, so it did not consider it would be fair and lawful to do so. It clarified that the individual in question did not attend the meeting and was only involved in organising it.
42. DBIS did say that upon reviewing the information again, it became apparent that some senior civil servants' names were redacted under 12(4)(e) as they formed part of internal communications. However it considered that these names should have been released. These names were disclosed during the course of the Commissioner's investigation.
43. The Commissioner considers that disclosure of the names of the energy company staff, where the staff either were not involved in discussions and were mentioned from an organisation point of view or where staff were not at a very senior level would not be fair. This is because those individuals work for private companies and although those companies do work closely with the Government, the Commissioner does not consider that those individuals would expect their names to be released. Furthermore the Commissioner does not consider that there is a legitimate public interest in disclosure of the names of particular employees as it would not add anything further to public understanding of discussions and Government decisions in this area.
44. The Commissioner therefore considers that DBIS was correct to make the redactions under regulation 13.

Right of appeal

45. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

46. 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.
47. 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

Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF