

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

Date: 2 February 2015

Public Authority: Department for Communities and Local Government

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested information from the Department for Communities and Local Government ("the authority") about internal meetings relating to planning guidance for shale gas sites, correspondence relating to planning permission for shale gas sites, and information on meetings and correspondence involving oil and gas companies also relating to the latter issue. The authority said that the information was not held. There is an exception under the Environmental Information Regulations 2004 ("the EIR") when information is not held. The Commissioner's decision is that the exception under regulation 12(4)(a) applies in this case and he does not require the authority to take any steps.

Request and response

2. On 26 June 2014, the complainant requested information from the authority in the following terms:

"1) I am seeking information on meetings internal to DCLG involving the following officials:

- a. Sir Bob Kerslake*
- b. Nick Boles*

in relation to planning guidance for shale gas sites.

Please ensure you provide all documentation generated in such meetings, including:

- I. Any meeting minutes*
- II. Correspondence in relation to meetings*
- III. Meeting readouts*
- IV. Briefing notes*
- V. Or other meeting memoranda*

I am requesting meetings taking place in the period beginning 1st August 2013 to 31st January 2014

2) I am also seeking correspondence internal to DCLG involving Sir Bob Kerslake or Nick Boles, which relates to planning permission for shale gas site.

Please ensure that your search for correspondence includes:

- I. Email correspondence (including attachments)*
- II. Memos*
- III. Reports*
- IV. Briefing documents or the equivalent*
- V. Letters*
- VI. Telephone records or any notes made during and after telephone calls*
- VII. Correspondence includes any other type of correspondence frequently used by the department, including text messages and private emails*
- VIII. Correspondence that is stored on cloud services such as Dropbox*

I am requesting correspondence generated from 1st August 2013 to 31st January 2014.

3) Please also provide all information/documents generated in or around meetings and correspondence between Nick Boles/Bob Kerslake and oil and gas drilling companies, which relate to planning permission for shale gas sites.

I am requesting correspondence generated between 1st August 2013 and 31st January 2014”.

3. The authority replied on 21 July 2014 and said that it held no information falling within the scope of the request.

4. On 14 August 2014, the complainant requested an internal review because he did not accept that the authority held no information.
5. The authority completed its internal review on 11 September 2014. It said that it wished to maintain its position.

Scope of the case

6. The complainant contacted the Commissioner on 16 September 2014 to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the authority had correctly said that no information was held.

Reasons for decision

Regulation 12(4)(a)

7. Regulation 5(1) of the EIR provides a general right of access to recorded environmental information held by public authorities. Public authorities should make environmental information available within 20 working days unless a valid exception applies. Regulation 12(4)(a) of the EIR provides an exception when the information requested is not held by a public authority.
8. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. He will also consider the actions taken by the authority to check that the information was not held and he will consider if the authority is able to explain why the information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held. He is only required to make a judgement on whether the information was held "on the balance of probabilities".¹
9. This case involves the issue of "fracking". This technique involves injecting liquid at high pressure to fracture rocks and extract gas trapped within them. The complainant told the Commissioner that he made the above request following fracking reforms which came into

¹ This approach is supported by the Information Tribunal's findings in *Linda Bromley and Others / Environment Agency* (31 August 2007) EA/2006/0072

force in early 2014 following a consultation by the authority in 2013. The Commissioner has briefly outlined below the background to this matter below.

10. The government proposed new plans to remove the requirement to notify each owner and tenant individually of onshore oil and gas applications, and changes to planning application fees. The authority consulted on these plans in September and October 2013. It was reported in the media that there had been overwhelming opposition to the planned changes following a consultation². Subsequently, the House of Lords Secondary Legislation Scrutiny Committee produced a report³ (28 January 2014) in which the authority was criticised for, amongst other matters, rushing the process inappropriately given that the policy "might very well be seen as a new and contentious policy". The committee highlighted a number of shortcomings regarding how the reforms had been presented to Parliament and said that it was not persuaded that the authority had "adequately thought through its implementation of the underlying policy". The authority is reported in the newspaper article referred to above as having said that it disagreed with the comments and that the reforms were considered to be "small" and "technical".
11. Against the background described above, the complainant told the Commissioner that he considered it "inconceivable" that the authority could claim that no information falling within the scope of his requests was held.
12. In its initial response to the complainant, the authority said that it had consulted colleagues, diaries and paper and electronic records to check that no information was held. In its internal review, the authority elaborated on the searches that had been carried out. It said that the private offices of Nick Boles MP and Sir Bob Kerlake had been consulted. It described that diaries would have been consulted confirming that there were no relevant meetings. In relation to Sir Bob Kerlake's private office, the authority described that all relevant emails are saved in a folder called "Shale gas". For completeness, the authority also searched the permanent secretary's email inbox using the search term "shale gas". It clarified that no physical search had taken place as all correspondence is saved electronically. The authority said that Nick

² <http://www.telegraph.co.uk/news/earth/energy/fracking/11124212/Fracking-under-homes-99-per-cent-opposed-to-law-change.html>

³ <http://www.publications.parliament.uk/pa/ld201314/ldselect/ldsecleg/124/12403.htm>

Boles MP had left the authority and it was therefore not possible to outline the specific searches that would have been conducted in relation to his private office.

13. As part of his investigation into this complaint, the Commissioner asked the authority if it could explain why no information was held and respond to the complainant's comments that this was not credible in the circumstances. The authority responded and explained more about the roles of the individuals named in the request, as well as adding some perspective to its own role in the matter of shale gas.
14. It said that Sir Bob Kerslake is the authority's Permanent Secretary and was, at the time of the request, the Head of the Home Civil Service. It said that Sir Bob Kerslake is the most senior civil servant in the authority. He supports the Secretary of State who heads the authority and who is accountable to Parliament for the authority's actions and performance. He must make sure the department spends the money allocated to it appropriately and is responsible for the day-to-day management of the department and its civil servants. In general, he has no involvement in day to day planning policy and casework matters.
15. Nick Boles MP was at the time of the request the Planning Minister in the authority. Planning ministers support the Secretary of State who has a quasi-judicial role in the planning system. The Ministerial Code, issued by the Cabinet Office on behalf of the Prime Minister in May 2010⁴, sets out a number of principles which must be observed in relation to the general requirement that ministers undertake their official duties in a way that upholds the highest standards of propriety. Owing to their quasi-judicial role, the authority said that ministers should not meet to discuss, comment on, or become involved in live planning applications because to do so could be seen to prejudice their consideration in event of a case being referred to them for their own decision, for example on appeal.
16. The authority said that it does not take the lead on shale gas policy matters as that is a matter for the Office for Unconventional Gas and Oil which sits within the Department of Energy and Climate Change's Energy Development Unit. The Unit is responsible for encouraging and overseeing energy development in the UK, including licensing oil and

⁴ <https://www.gov.uk/government/publications/ministerial-code>

exploration and production. The authority further explained that the extraction of unconventional gas and oil is governed by a comprehensive framework, the implementation of which is the responsibility of a number of government departments and agencies which either grant various forms of permissions and licences or have to be consulted. It said the authority's own role in the matter of shale gas is somewhat limited. It said it provides the spatial planning element of the regulatory framework for the extraction of unconventional gas and oil and provides planning policy in the form of the National Planning Policy Framework and accompanying planning guidance. Mineral planning authorities undertake their roles in relation to planning for the extraction of unconventional gas and oil within the context of the planning policy and guidance published by the authority.

17. The authority referred to the planning guidance it had published and said that in line with its normal procedures, such guidance would be drafted by officials who have relevant expertise in their own policy area and a thorough knowledge of government policy. It said that the draft guidance would be cleared at senior civil service level before being sent to ministers for approval. There would not usually be any involvement from the Permanent Secretary.
18. The authority added some further perspective by acknowledging that although shale gas has received considerable media attention, as highlighted by the complainant, it is only one of several high profile planning matters that are very contentious including possible airport expansion, gypsy and traveller sites, wind turbines, incinerators and the Thames Tideway Tunnel. It said that there are currently no shale gas applications before the Secretary of State, and this was the case at the time of the request as well. At present there are only two live shale gas planning applications in England. The authority said that the level of contentiousness associated with shale gas extraction in general is not in itself an indication of what planning matters are at hand or communicated about.
19. In the above context, the authority said that it wished to maintain that the information requested was not held and was never likely to be held. However, the authority nonetheless provided some further information to the Commissioner about the checks and searches made to confirm that this was actually the case.
20. The authority said that following the complaint to the Commissioner, it had arranged for a new and comprehensive search to be undertaken of the diaries of Sir Bob Kerslake and Nick Boles MP, in the latter case this involved archived material as Nick Boles MP is now a minister at the Department for Education and Skills. It also expanded the search terms to include "fracking". No meetings were identified. The authority

confirmed that all relevant meetings would be entered into the diary with sufficient detail to identify what the meeting was about. In addition, the authority said that it had consulted widely about the request. It said it had spoken again to members of staff in each private office. It said the relevant business planning area had been contacted and the private office staff members of the current Planning Minister Brandon Lewis MP, as well as staff members based in the Permanent Secretary's Office and records management staff. The authority confirmed that all relevant information would be saved electronically and not on personal drives. It said that it had searched again in its electronic records, and had used the wider search term "fracking" but no relevant information was found. The authority said that if hard copy information was received, it would be scanned and saved on to a shared drive. The authority also added that it did not consider that any information had been destroyed.

21. As set out above, the Commissioner will consider disputes over whether information is held "on the balance of probabilities". The Commissioner has found the authority's arguments above persuasive. The authority has been able to give a thorough account of the nature of the searches conducted, and it is clear that these have been conducted on more than one occasion. The response provided to the Commissioner indicates that the searches have been thorough and appropriate. The authority has confirmed that no information has been destroyed. Furthermore, the authority has been able to give a reasoned account as to why the information was not held based on the roles of those concerned, the wider context of the authority's involvement and the nature of the background issue.
22. It appears that the complainant may have made assumptions about the level of involvement the planning minister and the Permanent Secretary would have been likely to have in these matters. These are understandable assumptions to make given the contentious nature of the issue and the lack of clarification provided by the authority when it responded to the complainant's request. However, the authority has now provided detailed clarification on the reality of the decision-making processes in the authority and has explained why it was not very likely that information would be held of the nature requested in the first place. It has made it clear that planning guidance would be produced by officials with relevant expertise in the area concerned and would subsequently be cleared at senior civil service level before ministerial approval. Furthermore, there is generally no reason for the Permanent Secretary to become involved. In relation to planning decisions, the authority has put its role into the appropriate wider context and highlighted the Ministerial Code which sets out rules relating to maintaining the highest standards of propriety. The Ministerial Code and the role of the authority and ministers indicate greater limitations than

may have been appreciated by the complainant when making the request and provide perspective in relation to the information that is likely to be held given the limiting focus of the requests on the specific involvement of the then Planning Minister and the Permanent Secretary.

23. The authority has also acknowledged that the issue of fracking, and planning issues connected to it, is contentious. There are obvious concerns about the environmental impact and the handling of the particular reforms that form the background to these requests did result in criticism from the Lords Committee towards the end of January 2014. Nonetheless, the authority has explained that the level of contentiousness associated with a particular matter is not in itself an indication of the type of information that might be generated and who may be involved, for the reasons outlined above.
24. In view of the above, the Commissioner accepts that regulation 12(4)(a) of the EIR applies on this occasion since there is no evidence available to the Commissioner to indicate that the information requested was actually held by the authority.

Right of appeal

25. 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@hmcts.gsi.gov.uk

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

26. 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.
27. 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

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