

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 1 November 2021

Public Authority: Department for Environment, Food & Rural Affairs

Address: Nobel House
17 Smith Square
London
SW1 P3JR

Decision (including any steps ordered)

1. The complainant has requested minutes of a meeting that the Department for Environment, Food & Rural Affairs ('DEFRA') held relating to the England Peat Strategy.
2. DEFRA refused to provide the information citing regulation 12(4)(e) (internal communications) of the EIR as its basis for doing so.
3. The Commissioner's decision is that DEFRA was entitled to rely upon regulation 12(4)(e) as a basis for refusing to disclose the information and that the public interest favoured maintaining the exemption.
4. The Commissioner requires the public authority to take no steps.

Request and response

5. On 13 November 2020 the complainant wrote to DEFRA and requested information in the following terms:

"1. In response to my request for any agendas and/or minutes for the England Peat Strategy Roundtable discussions, which took place in August this year, you informed me that "no formal agendas or minutes were produced ahead of the roundtables." Could you please confirm for me whether any minutes, notes or other records of the roundtables were produced either during or after the roundtables? And, if so, please provide me with copies of those minutes, notes or other records.

2. Please provide me with copies of the responses to the England Peat Strategy Policy Discussion Document from the following organisations (all of whom were listed as respondents in your reply ref EIR202/27561):

- *Melcourt Industries Ltd*
- *Hill Farmer and Tenant Farmers Association*
- *Substrate Associates Ltd*
- *South west Water*
- *Northumbrian Water*
- *G's Group Holdings*
- *Moorland Association*
- *Country Land and Business Association*
- *Game and Wildlife Conservation Trust*
- *Yorkshire Water*
- *The National Farmers' Union*
- *The Association for Renewable Energy and Clean Technologies*
- *Water UK*
- *Westland Horticulture Ltd*
- *United Utilities*
- *Confor*
- *Northumberland FRS*
- *BASC*
- *UK Mushroom Growers Association*
- *British Leafy Salads Association*

3. I was unable to find the England Peat Strategy Policy Discussion Document on the Defra section of the gov.uk website, or via a search of consultations. Could you please inform me where this document was published, and in what way you made a call for responses, as it does not appear to have been promoted in the same manner as other consultations."

6. On 14 December 2020 DEFRA responded and disclosed information in response to part 3 of the request but withheld information in response to part 1 under regulation 12(4)(e) (internal communications) and in response to part 2 under 12(5)(d) (confidentiality of proceedings).
7. Following an internal review DEFRA wrote to the complainant on 19 March 2021. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 21 March 2021 to complain about the way that their request for information had been handled.
9. In line with her established processes, the Commissioner wrote to DEFRA and requested that it reconsider the way in which it had handled this request.
10. Having done so, DEFRA wrote to the complainant on 25 October 2021 and disclosed information, the consultation responses, in response to part 2 of the request. Within this disclosure, DEFRA redacted personal information of third parties under regulations 12(3) and 13(1) and (2A) (personal information) of the EIR.
11. The Commissioner then wrote to the complainant and asked them to confirm if they would like the Commissioner to investigate DEFRA's new reliance upon regulations 12(3) and 13(1) and (2A). The Commissioner explained that, if she did not hear otherwise, her investigation would focus solely on DEFRA's application of regulation 12(4)(e).
12. The complainant did not respond. Therefore the Commissioner believes the scope of her investigation to be to determine whether DEFRA is entitled to rely upon regulation 12(4)(e) as a basis for withholding the requested information in response to part 1 of the request.

Reasons for decision

Would the requested information be environmental?

13. Regulation 2(1) of the EIR defines environmental information as information relating to:

'(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, England Peat Action 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;'

14. The withheld information is a copy of the minutes taken on two meetings which took place at DEFRA on 17 August 2020 and 20 August 2020. These discussions took place as part of the development of policy relating to the England Peat Action Plan.¹
15. The England Peat Action Plan outlines the government's vision to '*create and deliver a new ambitious framework for peat restoration in England. The Commissioner notes the aim of the England Peat Action Plan is to restore peatlands to their natural state which, in turn, 'could make a significant contribution to achieving our targets on reducing carbon emissions, as well as having other benefits for water quality, nature and flood mitigation.'*
16. Having reviewed the withheld information ('the minutes') the Commissioner is satisfied that this information represents '(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).'*' The Commissioner has therefore assessed this case under the EIR.
17. The EIR contains exceptions from the duty to disclose information but there is a presumption in favour of disclosure. This presumption of disclosure stems from the Aarhus Convention on access to environmental information. The principle behind the Aarhus Convention was to enable citizens to participate in decision making about environmental matters by giving them powerful rights of access to the information used to inform such decision-making.
18. Since the EIR is based upon, and guided by the Aarhus Convention, the Commissioner considers that there is a high burden on all public authorities to demonstrate to the Commissioner why an exception under the EIR has been properly engaged.

¹ [England Peat Action England Peat Action Plan - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/england-peat-action-plan)

Regulation 12(4)(e) – Internal communications

19. Regulation 12(4)(e) of the EIR states:

*"A public authority may refuse to disclose information to the extent that-
(e) the request involves the disclosure of internal communications"*

20. The Commissioner's guidance on regulation 12(4)(e)² defines the concept of communications as *'broad and will encompass...letters, memos, and emails, but also notes of meetings or any other documents if these are circulated or filed so that they are available to others.'*
21. Expanding on this, the guidance defines internal communications as *'a communication that stays within one public authority. Once a communication has been sent to someone outside the authority, it will generally no longer be internal.'*
22. DEFRA has confirmed to the Commissioner that the minutes have not been shared outside government; they were put on Defra's internal electronic records for officials to share notes as part of the development of policy relating to the England Peat Action Plan.
23. Regulation 12(4)(e) is a classed based exception which means that the public authority does not need to consider the sensitivity of the information in order to engage the exception.
24. The Commissioner is satisfied that the minutes represent both environmental information and internal communications. Therefore, the exception is engaged.
25. The exceptions from the duty to disclose information under the EIR are subject to the public interest test set out in regulation 12(1)(b). The Commissioner has therefore gone on to consider whether the public interest in maintaining regulation 12(4)(e) outweighs the public interest in disclosing the information. She has done so with the high burden referred to in paragraph 18 in mind.
26. The Commissioner's guidance says that public interest arguments in relation to regulation 12(4)(e) should be focussed on the protection of internal deliberation and decision-making processes. These factors must then be balanced against the public interest in disclosure. Ultimately, the Commissioner believes that public interest arguments *'should always*

² [Internal communications \(regulation 12\(4\)\(e\)\) \(ico.org.uk\)](https://ico.org.uk/for-organisations/guide-to-the-information-commissioner/regulation-12-4-e-internal-communications)

relate to the content and sensitivity of the particular information in question and the circumstances of the request.'

Public interest

Public interest in maintaining the exemption

27. DEFRA has stated that *'disclosure of the documents would lead to a loss of frankness and candour, which could in turn damage the quality of advice and weaken collaborative stakeholder relationships, leading to poorer decision making and policy delivery.'* This is what is known as the chilling effect.
28. DEFRA's arguments appear to rely upon the effects and prejudice that disclosure of the minutes, at the time of writing this notice, would cause. The Commissioner is sceptical of DEFRA's use of the chilling effect argument in this way. The Commissioner does not consider the minutes particularly sensitive and she is not convinced that the chilling effect is particularly likely or likely to have severe consequences. Ultimately, civil servants should be well aware of the possibility that all internal communications are subject to the EIR and FOIA. The Commissioner expects officials to be robust and not easily deterred from providing advice or discussing controversial matters.
29. DEFRA has also stated that disclosure *'would adversely affect our relationships with the stakeholders engaged in the roundtable as they will not have agreed that these quotes are attributable to them, or that they are accurate representations of their position.'*
30. Again, the Commissioner is not convinced by this argument. The first page of the minutes lists the attendees at the meetings many of whom represent bodies also subject to the EIR and FOIA. Furthermore, this information could easily be redacted in line with regulation 13 as DEFRA did before disclosing the consultation responses.
31. Furthermore, the minutes of the meeting do not, for the most part, attribute a particular opinion or discussion to a particular attendee. Therefore, the chilling effect argument is weakened.
32. The Commissioner acknowledges DEFRA's concerns. However, she is mindful that there is no provision under the EIR or FOIA to withhold information that the public authority is concerned is inaccurate. It is DEFRA's responsibility to ensure that minutes are an accurate representation of the meeting to which they relate and DEFRA may wish to disclose a contextual explanation alongside the minutes if it is concerned that this is not the case.
33. Furthermore, if this is the case then, since the minutes are an internal communication within DEFRA, disclosure may actually allow the

aforementioned stakeholders the opportunity to clarify any misunderstanding that may have occurred.

Public interest in disclosure

34. The Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction.
35. DEFRA has explained that the meetings in question directly informed the England Peat Action Plan. DEFRA has elaborated that *'The England Peat Action Plan is not a standalone policy but is a broad strategy for a range of active policies that sit underneath it, which are now in development stage.'*
36. The weight assigned to the safe space arguments depend on the circumstances of the specific case, including the timing of the request, whether the issue is still live, and the content and sensitivity of the information in question. Although the request was made three months after the minutes were created it is clear that the matter and issues discussed in the meeting were still very much live and under discussion. The England Peat Action Plan was not published until 18 May 2021.
37. The Commissioner's guidance states that *'the public interest in preserving this safe space for government officials to operate is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public. Once an initial announcement has been made there is also likely to be increasing public interest in scrutinising and debating the details of the decision.'* The Commissioner notes that, at the time that the request was made, no policy decisions relating to the government's approach to its peat strategy had been announced.

Balancing the public interest

38. The Commissioner notes that the England Peat Action Plan is just one of many policies that feeds into the government's Net Zero strategy³. The Commissioner considers that the topic of climate change and matters pertaining to aligned government policy will be live for many years. The Commissioner believes that any information that informs the

³ [Government's Net Zero Strategy is a major step forward, CCC says - Climate Change Committee \(theccc.org.uk\)](https://www.theccc.org.uk)

government's approach to climate change brings with it a significant amount of public interest.

39. At the same time, the safe space in which officials work to debate, formulate and discuss policies relating to climate change must be preserved. As previously discussed, the weight that a safe space argument will carry is dependent on the circumstances of the specific case, including the timing of the request, whether the issue is still live, and the content and sensitivity of the information in question.
40. The Commissioner acknowledges that much of the information contained within the minutes replicate the consultation responses and the England Peat Action Plan, both of which are now in the public domain. However, the question the Commissioner must ask is would disclosure of the minutes, at the time that the request was made, compromise the safe space needed for robust consideration of the policy.
41. Having reviewed the minutes the Commissioner is satisfied that disclosure at the time that the request was made may have created expectations for the England Peat Action Plan and potentially pre-empted, or committed DEFRA, to a particular action. Had the minutes been disclosed at the time of the request, DEFRA may have had to divert resources away from policy formulation and development to deal with the reaction to this disclosure.
42. The Commissioner considers it worth reiterating at this stage that the consultation responses were not originally withheld under regulation 12(4)(e) but 12(5)(d) (confidentiality of proceedings). DEFRA is not trying to claim that a safe space was required to assess stakeholder opinions. However, a safe space was required in order to formulate and develop its own policy.
43. The Commissioner considers the balance of the public interest very fine in this instance. However, she must consider the circumstances at the time that the request was made. The Commissioner understands the need for robust scrutiny and deliberation regarding government policy. However, this is likely to follow after the publication of a policy once government has been afforded a safe space to formulate that policy.
44. Whilst the Commissioner acknowledges the significant public interest in the government's approach to climate change, she does not consider that disclosure of the minutes would have justified the potential impact on DEFRA's safe space.
45. Therefore the Commissioner is satisfied that, at the time of the request, the public interest favoured maintaining the regulation 12(4)(e) exception.

Other matters

46. As previously discussed, when applying regulation 12(4)(e), a public authority must make its decision with the specifics of the case in mind; including the timing of the request, whether the issue is still live and the content and sensitivity of the information in question.
47. The Commissioner does not consider the minutes to be particularly sensitive or novel compared to the information that has been released into the public domain since the handling of the request. Furthermore, whilst the Commissioner recognises that the England Peat Action Plan feeds into the government's Net Zero strategy, which is due to conclude in 2050, DEFRA must be mindful not to rely upon a seamless web of policy formulation and development as a basis for automatically refusing to disclose internal communications.
48. Though the Commissioner notes DEFRA's decision not to disclose the minutes at any point during the stage of this investigation, she notes that it may be appropriate for DEFRA to do so in response to a later request for information.

Right of appeal

49. 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

50. 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.
51. 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

Alice Gradwell
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