

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

**Date:** 26 September 2024

**Public Authority:** Department for Energy, Security and Net Zero

**Address:** 3-8 Whitehall Place  
London  
SW1A 2AW

**Decision**

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1. The complainant requested information concerning a specific policy change. The Department for Energy, Security and Net Zero (“DESNZ”) refused to disclose the requested information, citing regulations 12(4)(e) and 12(5)(b) of the Environmental Information Regulations 2004 (“EIR”) as a basis for non-disclosure. The Commissioner’s decision is that regulation 12(4)(e) is engaged in relation to the entirety of the requested information, however the balance of the public interest is in favour of disclosure.
2. In relation to regulation 12(5)(b), it is the Commissioner’s decision that it is engaged in relation to part of the requested information and that the balance of public interest favours maintaining the exception.
3. The Commissioner requires DESNZ to take the following step to ensure compliance with the legislation:
  - Disclose the requested information other than the part to which regulation 12(5)(b) applies.
4. DESNZ must take this step within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Background to request

5. The requested information relates to the decisions announced on 20 September 2023 by the previous Prime Minister to amend policies in the Carbon Budget Delivery Plan ("CBDP") published in March 2023.
6. This relates to decisions made by the Secretary of State for Energy Security and Net Zero in relation to a package of decarbonising home heating policies and a decision made by the Secretary of State for Transport in relation to a new petrol and diesel car and van sales policy for the period 2030-2035.

## Request and response

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7. On 22 December 2023, the complainant made the following request for information:
  - a. A copy of any documents, analysis or correspondence setting out the projected effects of the announced policy changes and produced by the Department for Energy Security and Net Zero before the September Announcement was made.
  - b. the analysis undertaken by the Secretary of State for Energy Security and Net Zero along with the Prime Minister (referred to by the Prime Minister on 21 September 2023 on the Today programme);
  - c. A copy of any cross-department assessment (as part of a periodic review or otherwise) of the impact of the policy changes in the September Announcement - produced either before or after the September Announcement.
8. DESNZ responded to the request on 24 January 2024. It stated that it held the requested information but refused to disclose it, citing regulation 12(4)(e) of the EIR.
9. The complainant sought an internal review of DESNZ's handling of the request on 16 February 2024. A response to this was provided on 15 March 2024. The reviewer upheld the application of regulation 12(4)(e).
10. DESNZ has since informed the Commissioner that it now considers that regulation 12(5)(b) also applies to part of the requested information.

## Reasons for decision

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11. On the basis of their complaint to the Commissioner, this reasoning covers whether the requested information is environmental information and, if so, the Council's application of regulations 12(4)(e) and 12(5(b) of the EIR to the request.
12. The requested information concerns the effects of environmental policy changes. As such the Commissioner is satisfied that the information is environmental information under regulation 2(1)(a) and 2(1)(c) of the EIR<sup>1</sup>.
13. Under regulation 12(4)(e) of the EIR, a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. This exception covers all internal communications and the sensitivity of the information is not a consideration for the exception to be engaged.
14. If information represents an internal communication, the exception will apply. For the purpose of regulation 12(4)(e), a 'communication' is meant to be interpreted broadly. It covers any information someone intends to communicate to others, including communications by letter, memo, email and spreadsheet. An internal communication is a communication that stays within the public authority. Once a communication has been sent to someone outside the authority, it is generally no longer captured under this exception.
15. In its response of 24 January 2024 to the complainant's request, DESNZ stated:-

"We have taken your request to mean all the documents and advice presented to Ministers that have referred to any and various impacts and policy issues engaged by the September announcement both before and since announcement as well as any official-level documents that supported this work that is not already in the public domain. We assess that this information engages Regulation 12(4)(e) of the EIRs. Regulation 12(4)(e) provides that "a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications".

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<sup>1</sup> <https://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made>

16. Having viewed the withheld information, the Commissioner accepts that it can be categorised as internal communications as it has been presented to Ministers and has not gone outside DESNZ. The information therefore engages regulation 12(4)(e) of the EIR.

### **The public interest test**

17. As he is satisfied that regulation 12(4)(e) is engaged, the Commissioner has gone on to consider the public interest test attached to the application of this exception, as required by regulation 12(1)(b) of the EIR. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
18. When carrying out the public interest test the Commissioner must take into account a presumption in favour of disclosure of the information which is required by regulation 12(2).

### **Public interest arguments in favour of maintaining the exception**

19. DESNZ has informed the Commissioner that it is vital that Ministers have frank and candid advice on decarbonisation progress being made. It states that the principle that public authorities should have a 'safe space' to think in private is especially relevant to this case as the information covers a variety of internal policy issues related to the decarbonisation of the UK economy, as part of a transition spanning multiple decades.
20. It is DESNZ's position that disclosure of related information would affect this 'safe space' and may also lead to a 'chilling effect' leading to less candid internal discussions which will result in less robust and effective decision-making.

### **Public interest arguments in favour of disclosure**

21. The Commissioner accords significant weight to the argument that public authorities should be open, transparent and accountable about important issues affecting the public.
22. DESNZ accepts that disclosure of the information, i.e providing copies of the documents surrounding the September announcement could enhance the public's understanding of the Government's progress on decarbonisation. DESNZ accepts that allowing the public to assess and influence the quality of decision making on policies such as those in relation to net zero is an important factor in favour of disclosure of the requested information.

## Balance of public interest arguments

23. The complainant argues that the 'safe space' and 'chilling effect' arguments in this case have diminished as the issue is no longer 'live' since the September 2023 announcement. They have also stated, in relation to the 'chilling effect' argument that:-

"Further, in light of the importance of the policy decision and the level at which it was made, it is particularly expected that the relevant officials and advisers would be impartial and robust in their advice despite the possibility of public scrutiny of their thinking."

24. It is the complainant's position that such arguments are far outweighed by the public interest in disclosing the information requested in light of the importance of the issues, its impact, and in furtherance of the statutory objective of transparency under the Climate Change Act 2008 (CCA), citing the case of R (Friends of the Earth & Others) v Secretary of State for Business Energy and Industrial Strategy [2022] EWHC 1841 (Admin), the "Net Zero Judgment" in which the Court recognised that the CCA 2008 contains a statutory objective of transparency in how the net zero targets are to be met.
25. The Commissioner is aware that disclosure of the requested information would inform the public of the likelihood of the legal climate change targets set by the Court in the above case on the Secretary of State being met.
26. The Commissioner does not consider that 'safe space' and 'chilling effect' arguments automatically carry much weight in principle. The weight accorded to such arguments depends 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.
27. DESNZ has made submissions to the Commissioner regarding the above arguments, some of which are confidential. These relate to the fact that the policy and decision-making processes are ongoing, therefore the need for frank and candid discussion in a safe space continue to apply. The Commissioner accepts the safe space arguments, however he is less convinced by the 'chilling effect' arguments, i.e. that there is a risk that officials will self-censor in order to avoid disclosure into the public domain. The Commissioner considers that such officials should be sufficiently robust and confident in their thinking that such self-censure would not be necessary.

28. The Commissioner is aware that, following the case cited in paragraph 21 above, the Government is obliged to publish a package of policies by May 2025, which will include an assessment of policies the Government adopts in the policy areas in question. The policies finally adopted, and their carbon impact will therefore be made publicly available in due course.
29. The Commissioner is aware that Government evidently requires space to decide when and how to publish information. However, the Commissioner has had to balance the necessity for the protection of policy and decision-making processes, involving frank and candid discussions, against the public interest in transparency, the actual statutory requirement for transparency, and the fact that the topic of 'net zero' continues to be a topic of great interest, generating much ongoing public debate and discussion.
30. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure. Having considered all of the arguments advanced by both the complainant and DESNZ, the Commissioner's conclusion is that the public interest in disclosure outweighs the public interest in maintaining the exception. He considers that the public interest is very finely balanced in this case, however the fact that the policies to which the information relates are highly topical and relevant and continue to generate much public discussion and debate, together with the presumption in regulation 12(2) of the EIR, tips the balance in favour of disclosure.
31. As the Commissioner is satisfied that regulation 12(4)(e) is engaged in relation to all of the requested information, but considers that the public interest in disclosure outweighs that in maintaining the exception, he gone on to consider DESNZ's application of regulation 12(5)(b) to part of the requested information.

### **Regulation 12(5)(b) – the course of justice**

32. Regulation 12(5)(b) of EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
  - the course of justice, ability of a person to receive a fair trial or
  - the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.

33. 'Adversely affect' means there must be an identifiable harm to or negative impact on the interests identified in the exception. Furthermore, the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect. 'Would' means that it is more probable that not, i.e. a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.
34. Regulation 12(5)(b) is subject to the public interest test under regulation 12(1)(b) and the exception can only be maintained if the public interest test supports this.

### **Legal professional privilege (LPP)**

35. The principle of LPP is based on the need to ensure that communications between a client and their legal adviser will be treated in confidence and not revealed without the client's consent. It is fundamental to the English legal system that a client can speak freely and frankly with their legal adviser to obtain legal advice based on full knowledge of all the relevant circumstances of the case. In the absence of LPP, those with legal knowledge would have an unfair advantage in litigation over those without it.
36. The principle of LPP is based on the need to ensure that communications between a client and their legal adviser will be treated in confidence and not revealed without the client's consent. It is fundamental to the English legal system that a client can speak freely and frankly with their legal adviser to obtain legal advice based on full knowledge of all the relevant circumstances of the case. In the absence of LPP, those with legal knowledge would have an unfair advantage in litigation over those without it.
37. The 'course of justice' element covers a wide range of information which includes material covered by LPP. Therefore, disclosing information subject to LPP could undermine the general principles of LPP, in turn having an adverse effect on the course of justice relating to a person's ability to receive a fair trial.
38. A public authority can take into account the general effect on the course of justice in terms of undermining LPP. However, unlike in FOIA where section 42 (LPP) is class-based, it is not enough to merely show that the information is covered by advice privilege and comprises communications between the public authority and its legal representative to engage the exception. There is more a public authority must do to engage regulation 12(5)(b). This was recognised in the case of Department for Communities & Local Government (DCLG)



v Information Commissioner & William Robinson [2012] UKUT 103 (AAC) when the Upper Tribunal said:

"...it would be possible to conclude that the course of justice would not be adversely affected if disclosure were to be directed only by reason of particular circumstances, (e.g. that the legal advice is very stale), such that there would be no undermining of public confidence in the efficacy of LPP generally" and "whether regulation 12(5)(b) is engaged, in the case of information protected by LPP, must be decided on a case by case basis."

39. For regulation 12(5)(b) to be engaged, a public authority must also demonstrate that disclosure of the requested information would adversely affect the course of justice and the balance of the public interest favours maintaining the exception.
40. DESNZ has stated that elements of the information presented in the Ministerial advice consist of legally privileged information pertaining to policy decisions which are presently under legal challenge. Disclosure of this information would therefore involve public access to privileged information whilst the litigation is still live and ongoing. This would undermine the level playing field upon which legal challenges ought to be carried out and would detrimentally affect the course of legal proceedings and the course of justice generally.
41. The Commissioner is satisfied that the information comprises confidential communications between the client and their professional legal advisors, made for the dominant purpose of providing legal advice, and is therefore covered by LPP on the basis of advice privilege. He is satisfied that the privilege has not been lost and that the legal advice remains confidential and subject to LPP.
42. In addition, the Commissioner's established view is that disclosure of information subject to LPP will have an adverse effect on the course of justice.
43. Having examined DESNZ's arguments, the Commissioner agrees that it is inevitable that disclosure of privileged information would adversely affect the course of justice, particularly given that the advice is current. He has not identified any special or unusual factors at play for this not to be the case and therefore finds that the exception at regulation 12(5)(b) is engaged.



### **The public interest test**

44. Regulation 12(1)(b) requires that where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner is mindful that regulation 12(2) requires public authorities to apply a presumption in favour of disclosure.

### **Arguments in favour of disclosure**

45. The Commissioner accords significant weight to the argument that public authorities should be open, transparent and accountable about important issues affecting the public. DESNZ accepts that allowing the public to assess and influence the quality of decision making, including the legal advice sought and received, on policies such as those in relation to net zero, is an important factor in favour of disclosure of the information.

### **Arguments in favour of maintaining the exception**

46. The Commissioner notes that DESNZ has not made any public interest arguments in favour of maintaining the exception which are specific to regulation 12(5)(b).
47. However, the Commissioner notes that the disclosure of legal advice would defeat the ability of DESNZ to consult its legal advisers in confidence. There is a strong argument that any fear of obtaining legal advice due to disclosure could affect the free and frank nature of legal exchanges. The Commissioner considers that, if legal advice was routinely disclosed, it could lead to less candid discussions and potentially undermine the quality of advice given or decisions made.

### **The Commissioner's decision**

48. LPP is a fundamental principle of justice, and it is the Commissioner's well-established view that the preservation of that principle carries a very strong public interest. The principle exists to protect the right of clients to seek and obtain advice from their legal advisers so that they can take fully informed decisions to protect their legal rights.
49. There will always be a strong argument in favour of maintaining LPP because of its very nature and the importance of it as a long-standing common law concept. The Information Tribunal recognised this in the case of *Bellamy v The Information Commissioner and the DTI* (EA/2005/0023) when it stated that: "...there is a strong element of public interest inbuilt into privilege itself. At least equally strong

countervailing considerations would need to be adduced to override that inbuilt interest... It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...”.

50. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, such as circumstances where substantial amounts of public money are involved, where a decision will affect a substantial amount of people, or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency.
51. The Commissioner has made his decision in this case based on the contents of the information and on the evidence he has regarding DESNZ's police and decision-making processes.
52. The Commissioner is satisfied that the factors described in paragraph 50 above are not present to such an extent that could lend the required weight to overturn the strong public interest in maintaining the exception. He therefore considers that the balance of the public interests favours the exception being maintained.

## **Right of appeal**

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53. 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@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)

54. 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.
55. 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**

**Deirdre Collins**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**