

Environmental Information Regulations 2004 (EIR) Decision notice

Date: 8 June 2015

Public Authority: DEFRA
Address: Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant requested information from the Department for Food, Environment and Rural Affairs (DEFRA) relating to a report on fracking/shale gas, the report having been published with redactions.
2. DEFRA refused to provide a copy of the full un-redacted report by virtue of regulation 12(4)(e) (internal communications) and regulation 12(4)(d) (unfinished documents, incomplete data) of the EIRs and section 35(1)(a) of the FOIA (formulation and development of government policy).
3. The Commissioner has determined that the withheld information is all environmental information and that the EIR is the correct regime to consider this request. Having considered the matter his decision is that DEFRA has incorrectly withheld the information.
4. The Commissioner requires DEFRA to take the following steps to ensure compliance with the legislation:
 - disclose to the complainant an unredacted copy of the report.
5. The public authority must take these steps within 35 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.

Request and response

6. On 20 August 2014 the complainant wrote to DEFRA and requested information in the following terms:

"A DEFRA report into fracking last week has had a large number of sections deleted (approximately 63) and information redacted. This is a nonsense, how can a proper public debate on the positives and negatives of fracking take place if there is immediate and internal censorship and secrecy on the dangers and negatives of fracking..... I request that DEFRA look again at all the hidden sections and consider releasing them as soon as possible".
7. DEFRA responded on 13 November 2014, confirming that it considers the request to be for a copy of the full un-redacted report. It refused to provide that information, citing the following exemptions/exceptions as its basis for doing so:
 - regulation 12(4)(e) (internal communications) of the EIRs;
 - regulation 12(4)(d) (unfinished documents, incomplete data) of the EIRs; and
 - section 35(1)(a) of the FOIA (formulation and development of government policy).
8. The complainant requested an internal review on 26 November 2014. Following the Commissioner's intervention, DEFRA sent the outcome of its internal review on 2 February 2015. It upheld its original position.

Scope of the case

9. Following earlier correspondence about the timeliness of DEFRA's response, the complainant contacted the Commissioner on 4 February 2015 to complain about the way his request for information had been handled.
10. He told the Commissioner:

"There is a huge public interest in this matter and the lack of information only serves to heighten public concern".
11. The Commissioner notes that DEFRA told the complainant:

"The information that you have requested comprises both 'environmental information', as defined in regulation 2(1) of the

EIRs, and other information and so your request falls under both the EIRs and the FOIA”.

12. During the course of the Commissioner’s investigation, DEFRA confirmed that the disputed information relates to the redactions applied to a draft report on fracking with the title ‘Shale Gas Rural Economy Impacts’. DEFRA confirmed that the redacted version of the paper is in the public domain. The withheld information in this case comprises an un-redacted copy of the report.
13. It correspondence with the Commissioner DEFRA explained why it considers that both EIR and FOIA apply in this case. However, it told the Commissioner that if any of the information withheld by virtue of section 35 of FOIA was considered to be environmental, then it would consider that that information should also be withheld under the EIR, specifically regulations 12(4)(d) and (e).
14. It also confirmed that it considered a further exemption applies in this case, namely section 40(2) of FOIA (personal information). The complainant subsequently confirmed that he considers it appropriate to redact such information.
15. The Commissioner has first considered under which regime(s) the withheld information falls to be considered. The following analysis then covers DEFRA’s application of regulations 12(4)(d) and (e) of EIR and, if appropriate, section 35 of FOIA, to the withheld information.

Reasons for decision

Is the information environmental?

16. DEFRA told the complainant:

“Since some of the sections of the paper are environmental we have considered these under EIR while other sections that are not environmental information, we have considered under FOIA”.

17. Information is ‘environmental information’ if it meets the definition set out in regulation 2 of the EIR. If the information satisfies the definition in regulation 2 it must be considered for disclosure under the terms of the EIR rather than the FOIA.
18. In this case DEFRA told the Commissioner that it deemed the information to be environmental where its subject matter fell within any of the areas listed under regulation 2(1)(a)-(f) of the EIR. It told him:

"In most cases where the EIR has been cited regulation 2(1)(b) is relevant as the content concerns 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 regulation 2(1)(a)".

19. The Commissioner has considered the nature of the information sought by the complainant - a report about the possible impact of shale gas exploration and drilling on rural communities.

20. Regulation 2(1)(a) covers the state of the elements of the environment, including water, soil, land and landscape. Regulation 2(1)(c) provides that information is environmental where it is on:

"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 [2(1)](a) and (b) as well as measures or activities designed to protect those elements".

21. In this case, DEFRA told the Commissioner that the withheld information relates to:

"the Government's policy on the process of hydraulic fracturing or 'fracking' for shale gas from underground shale strata".

22. Having considered the report, the Commissioner is satisfied that the information requested by the complainant constitutes environmental information under regulation 2(1)(c). He has reached this conclusion on the basis that the information relates to research carried out in order to inform and/or influence a measure - government policy on fracking - an activity likely to affect several of the elements of the environment referred to in 2(1)(a). He is satisfied that the subject matter of the report is intrinsically linked to the overall policy on fracking and information on that measure, for example the extent to any decision to promote fracking may impact the rural economy. DEFRA had sought to consider the report at a granular level and isolate different parts of the report as environmental information. In this case the Commissioner does not consider that to be the right approach, it is important to consider the report as a whole, influencing a measure.

23. The Commissioner considers that the withheld information is all environmental information and that the EIR is the correct regime to consider this request.

Regulation 12(4)(e) internal document

24. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. It is subject to a balance of public interest test.
25. By virtue of regulation 12(8), communications between government departments will constitute internal communications for the purpose of the exception at regulation 12(4)(e).
26. In correspondence with the complainant, DEFRA described the draft Rural Economy Impacts paper as *'an internal document that is not analytically robust'*.
27. Similarly, DEFRA told the Commissioner that the paper was commissioned for deliberation within Government. DEFRA went on to explain that the draft paper:

"was intended as a literature review to inform early policy considerations within Defra. In this context the paper was communicated to Defra policy officials with an interest in shale gas policy and shared within Government".
28. At his request, DEFRA provided the Commissioner with details of those individuals to whom the draft paper was distributed.
29. The Commissioner's published guidance on this exception¹ addresses the issue of internal communications. Essentially, an internal communication is 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.
30. Having considered the distribution list provided by DEFRA, the Commissioner notes that it included individuals at two executive non-departmental public bodies (NDPBs) sponsored by DEFRA.
31. As is made clear in his guidance, the Commissioner does not accept that communications between government departments and NDPB's constitute internal communications.

¹ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

32. It follows that the Commissioner is not satisfied that regulation 12(4)(e) is engaged.

Regulation 12(4)(d) incomplete data

33. Regulation 12 (4)(d) provides a public authority with an exception to its duty to disclose environmental information where the information sought relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
34. If the information in question falls into one of those categories, then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception - but any adverse effects of disclosure may be relevant to the public interest test.
35. The Commissioner's guidance on regulation 12(4)(d) states that a document may be unfinished for the purposes of the exception where the authority is still working on it at the time of the request or because work on it ceased before it was finalised and there is no intention to finalise it. Draft documents will similarly engage the exception because a draft of a document is by its nature an unfinished form of that document. A draft version of a document will still be considered an unfinished document even if the final version of the document has been published.
36. The Commissioner recognises that one of the aims of the exception is to provide a public authority with some protection from having to spend time and resources explaining or justifying ideas that are not, or may never be, final.
37. In correspondence with the complainant, DEFRA described the withheld information as an unfinished document and told him that the draft paper was not '*analytically robust*'. It told him that the report has not been published and that it has no plans to do so.
38. In correspondence with the Commissioner DEFRA provided the following explanation to justify its use of the exception at regulation 12(4)(d):
- "The withheld information comes within the ambit of this exception because it is an unfinished draft document. All work on this paper has been discontinued and it remains in an unfinished state".*
39. During the course of his investigation, DEFRA provided the Commissioner with a copy of the withheld report. The Commissioner notes that the date on the report predates the date of the request by some months.

40. From the evidence he has seen, and taking account of DEFRA's submissions, the Commissioner is satisfied that the exception is engaged.

The public interest

41. As he is satisfied that regulation 12(4)(d) 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.
42. When carrying out the test the Commissioner must take into account a presumption in favour of disclosure of the information which is required by regulation 12(2).
43. During the course of his investigation, the Commissioner invited DEFRA to explain in detail the arguments it considered for and against disclosure, the weight it gave to each argument and how it reached its final determination.
44. In response, DEFRA confirmed that, rather than wishing to add anything further, it was relying on the public interest arguments it had provided to the complainant.

Public interest arguments in favour of disclosing the requested information

45. In favour of disclosure, the complainant stated:

"A sensible sustainable way forward is required and all information needs to be released to ensure transparency and good choice of solutions for our energy needs going forward".

46. The complainant further argued that the weight of public interest in favour of disclosure is strengthened in this case because of what he considers are legitimate concerns about the way DEFRA acted with regard to the report. In his view:

"it is not constructive or sensible to use taxpayers money to pay for a report on fracking and then remove the sections which mention disadvantages and areas of concern".

47. In correspondence with the complainant, DEFRA told him that it recognised that there is a public interest in disclosure of information concerning policy development in relation to shale gas. It acknowledged that:

"Government policy and the public debate on shale gas are very live issues with a high profile".

Public interest arguments in favour of maintaining the exemption

48. Arguing in favour of maintaining the exemption, DEFRA told the complainant that the withheld information relates to a policy that is still being developed. It said that government needs a safe space in which to formulate and develop policy. In the context of an unfinished document, such as the withheld information in this case, it told him:

"Disclosure of the withheld information would have a negative impact on the ongoing discussions about and development of this policy, by discouraging ministers and civil servants from considering information from all relevant sources, including where that information is not at a final stage (i.e. it is unfinished, incomplete)".

49. In favour of withholding the information at issue, and with reference to the unfinished nature of the paper, DEFRA said:

"Similarly, as the withheld information is in incomplete, draft form, disclosure would have a prejudicial effect on the public debate, and would, therefore, mislead and artificially distort the public debate thus hindering the formulation and development of government policy in relation to shale gas whilst not helping public understanding of the issues".

50. DEFRA told the Commissioner that the draft report contains examples of conjecture, with many of the claims *"vague in nature and not supported by appropriate evidence"*. It explained that, as such, they were presented as possible areas for future consideration to inform policy development that were never intended as considered DEFRA positions or statements of fact.

51. DEFRA acknowledged that the debate around shale gas is one that is of interest to the public. However, it considered that disclosure of the draft report would likely mislead and undermine public debate on the wider policy and undermine the development of legitimate Government policy.

52. With reference to the timing of the request, DEFRA told the Commissioner that:

"Release of inaccurate and potentially misleading information at this time would have been disproportionately damaging".

53. In support of its withholding of the information, DEFRA noted that there is *'extensive information'* publically available on the subject matter at issue and that the underlying data on which the report is based is in the

public domain. In that respect the Commissioner accepts that DEFRA has released details of the third party resources on which the paper was based. He also acknowledges that other information on fracking is available, for example through documents published by other government departments.

54. In DEFRA's view, there is no further public interest to be served by disclosure of the withheld information.

Balance of the public interest

55. There is always a general public interest in disclosing environmental information, derived from the purpose of the EIR. In that respect regulation 12(2) specifically states that a public authority shall apply a presumption in favour of disclosure. In addition, there may be an argument for informing public debate on the particular environmental issue that the information relates to.
56. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.
57. A key factor in assessing the weight of public interest arguments is the extent to which the information itself would inform public debate on the issue concerned. There is always an argument for presenting a full picture of how a decision was made or a policy position was arrived at. If disclosing incomplete material or draft documents would support this then it increases the weight of the argument for disclosure. On the other hand, information may be within the scope of a request but nevertheless shed little light on the issue itself. In that case the weight of the argument for disclosure may be less than it otherwise would be.
58. The Commissioner acknowledges that, if the effort involved in correcting a misleading impression (for example, in answering a large volume of queries from the public) would be so great that it would actually hinder the public authority from completing the work of which the unfinished or incomplete information is a part, this may be a public interest argument for maintaining the exception. However, in this case he is satisfied that the draft report was last worked on some time before the request in this case was made. He therefore considers that DEFRA had had a reasonable period of time in which to consider the report and whether or not to continue with it.

59. Furthermore, the Commissioner gives limited weight to the argument that the information at issue is misleading and/or confusing. In particular, he considers that DEFRA's submissions fail to specify why it is unable to provide a statement accompanying disclosure that explains that the information may be inaccurate or misleading and why.
60. In his view it would not be impossible, or require a disproportionate effort, for DEFRA to correct any misleading or inaccurate impression that may arise from disclosure. In other words, DEFRA could provide an explanation about the context of the report, for example regarding the substance of the research and why any elements of the research were subsequently rejected.
61. The Commissioner accepts that the subject matter relates to broader ongoing policy development. However, the information does not contain an exchange of frank views or advice. The information is a summary and assessment of existing evidence.
62. The Government's policy towards fracking for shale gas is a matter of considerable public interest. Fracking offers considerable economic opportunities and there is a public interest in the UK being able to exploit the benefits. There is significant expert opinion supporting the case that the risks from fracking are acceptable and manageable. However, public concern remains, and this is understandable given the novel and environmentally invasive nature of fracking.
63. In this case, the Commissioner considers that there is a strong public interest in understanding the full detail of the research that has been carried out and how it has been considered. For example he acknowledges the public interest in how existing, publically available, information about issues associated with fracking has been reviewed and summarised. There is a strong public interest in the public understanding what research has been rejected. In some circumstances there may be little public interest in the disclosure of discontinued research but in the context of the public debate about fracking at the time of the request the public interest is strong.
64. The Commissioner also recognises that, at the time of the request, the report was partially available and there was a public interest in the full picture being available.
65. The Commissioner takes the view that disclosure - of a selection of research material presented in a particular way, albeit material that is no longer being worked on - would provide the public with an understanding of, and inform the debate on, how government policy on fracking is evolving and how the rural economy impact has been assessed. There was a strong public interest in understanding any

research conducted related to fracking, particularly on impacts that could affect the public.

66. Having considered the matter the Commissioner is not satisfied that the strength of DEFRA's arguments is sufficient to outweigh the weight of the public interest arguments in disclosure.

Regulation 5(2) – time for compliance

67. Regulation 5(2) of the EIR requires a public authority to respond to a request as soon as possible and no later than 20 working days after the date of the receipt of request.
68. In this case DEFRA failed to comply with this requirement by issuing its response outside of the 20 working days specified.
69. Similarly, regulation 11 requires a public authority to communicate the outcome of the review to the applicant within 40 working days of receiving their complaint. In this case, DEFRA failed to respond within the statutory timeframe.
70. The Commissioner acknowledges that DEFRA told the complainant it was taking action to address the issues that lead to the delays. The Commissioner welcomes this approach and expects that, in future, DEFRA will conform to the timescales laid down by the legislation.

Right of appeal

71. 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

72. 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.
73. 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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