

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

Date: 8 July 2022

Public Authority: Department for Business, Energy & Industrial Strategy

Address: 1, Victoria Street,
London
W1H 0ET

Decision (including any steps ordered)

1. The complainant has requested information regarding the Prince's consent and the passing of The Energy Act 2013.
2. The Commissioner's decision is as follows:
 - The requested information is environmental information which the Department for Business, Energy & Industrial Strategy should have originally considered under the EIR. However it later correctly relied upon regulation 12(4)(b) not to provide the complainant with the information he had requested.
 - As the Department for Business, Energy & Industrial Strategy wrongly handled the request under FOIA, the Commissioner has found there to have been a breach of regulation 14 of the EIR.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Background

4. In 1337, the Duchy of Cornwall was created¹ by Edward III for his son, Prince Edward. The charter ensured that each future Duke of Cornwall would be the eldest surviving son of the monarch and the heir to the throne. So the current Prince of Wales is also Duke of Cornwall.
5. By convention, the Prince's consent is sometimes needed for proposed legislative provisions that would affect the Duchy of Cornwall.

Request and response

6. On 2 May 2020, the complainant wrote to the Department for Business, Energy & Industrial Strategy ("the public authority") and requested information in the following terms:

"My request concerns the granting of Prince's consent for The Energy Act 2013 (formerly the Energy Bill). The then Secretary of State for Energy and Climate Change Edward Davey signified prince's consent for the bill at its third reading in the House of Commons on 4 June 2013.

Please note that the reference to Ed Davey and the Secretary of State in the questions below should include the Secretary of State himself, his Principal Private Secretary (ies), his private secretary(ies) and anyone in his private office able to correspond on his behalf.

Please note that the reference to the Prince of Wales in the questions below should include the Prince himself, his Principal Private Secretary (ies), his private secretary (ies) and anyone in his private office able to correspond on his behalf.

Please note that the reference to written correspondence and communications in the questions below should include all traditional forms of correspondence such as letters and faxes, all emails irrespective of whether they were sent through private or official accounts and any messages sent through encrypted messaging services. Please note that I am only interested in information generated between 1 July 2012 and 1 July 2013.

¹ <https://www.legislation.gov.uk/aep/Edw3/11/0>

1.... During the aforementioned period did Ed Davey the then Secretary of State write to the Prince of Wales seeking Prince's consent for the Energy Act 2013 (then known as the Energy Bill).

2.... If the answer to the question one is yes can you please provide a copy of this correspondence and communication.

3.... Did the Prince reply to this request for Prince's consent?

4.... If the answer to question three is yes can you please provide a copy of this correspondence and communication.

5.... If the Prince's and the Secretary of State continued to exchange correspondence and communications on the issue of Prince's consent for this particular bill can you please provide copies of this correspondence and communications. Please provide copies of the Prince's correspondence to the Secretary of State and the Secretary of State's correspondence to the Prince.

If relevant documentation has been destroyed can you state when it was destroyed and why. In the case of destroyed correspondence and communications can you provide details of the author(s), the recipient(s) and the dates generated. In the case of each destroyed piece of correspondence and communications can you please provide a brief outline of its contents. If destroyed correspondence and communications continues to be held in another form can you please provide a copy of that correspondence and communication. If relevant documentation has been transferred to an archive, can you please identify that archive."

7. On 3 June 2020, the public authority responded. It refused to provide the requested information. It cited the following exemption as its basis for doing so:

- FOIA, Section 12 (costs)

8. On the 30 June 2020, after conducting an internal review (as requested by the complainant), the public authority informed the complainant that it upheld its original decision.

Scope of the case

9. The complainant contacted the Commissioner on 1 July 2020 to complain about the way his request for information had been handled.

10. In correspondence with the Commissioner, the complainant drew the Commissioner's attention to his belief as to the environmental nature of his request. The Commissioner considered this preliminary point and put it to the public authority, whether on further reflection, they would now consider the requested information was environmental information for the purposes of the Environmental Information Regulations (EIR).
11. The public authority replied (on 20 January 2022) that after further consideration it did now recognise that the request was one for environmental information and that the appropriate legislative regime was the EIR. However they asked the Commissioner to read across its FOIA section 12 arguments to support its now reliance on regulation 12(4)(b) (manifestly unreasonable) EIR. As complying with the complainant's request would involve a significant cost and diversion of resources for its officials and its other work and would therefore be manifestly unreasonable to answer.
12. The Commissioner considers he has to determine whether the public authority new reliance on regulation 12(4)(b) is correct.

Reasons for decision

13. Regulation 2(1) of the EIR defines environmental information as any information in any material form on:

'(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, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)'

14. As stated in the complainant's preamble to his request for information his request is concerned with the granting of Prince's consent for The Energy Act 2013 (formerly the Energy Bill).
15. Part 1 of that Act gives the Secretary of State a power, by order, to set or amend a decarbonisation target range – being a target range for the level of carbon intensity of the electricity generation sector in the United Kingdom. Carbon intensity is a measure of the amount of carbon dioxide (or other greenhouse gases) produced per unit of electricity generated. This is clearly legislation that falls within regulation 2(1)(c) read together with regulation 2(1)(a) as it pertains to legislation affecting or likely to affect the elements and factors of the “state of the elements of the environment” and omissions. The Commissioner is therefore satisfied that they correct legislation to determine this matter is the EIR.
16. Regulation 5(1) states that: “a public authority that holds environmental information shall make it available on request.”

Was the request manifestly unreasonable?

Regulation 12(4)(b) of the EIR – manifestly unreasonable request

17. The public authority had previously provided the Commissioner with submissions relating to its original reliance on section 12 FOIA and asks that these submissions be considered in the context of regulation 12(4)(b).
18. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. A request can be refused as manifestly unreasonable either because it is considered to be vexatious, or on the basis of the burden that it would cause to the public authority.

Public authority's submissions

19. The request focuses on the granting of Prince's consent for the Energy Act 2013 and correspondence and communications between the then Secretary of State for the DECC² or his office staff and HRH the Prince of Wales and his private office staff. It should be noted that the request involves information that was 7 years old at the time of the request and that, on 14 July 2016, there was a Machinery of Government (MoG) change through which DECC was disbanded.
20. Paper and electronic records of DECC were transferred to the Department of Business, Innovation and Skills (BIS) and both departments were later formed into what is now the Department for Business, Energy and Industrial Strategy (BEIS). There is no central record held by BEIS of correspondence or communications for times when Prince's consent is sought or provided for Bills.
21. In order to comply with the request, it would be required to search archived records held in a number of different locations. The locations and estimated search times, based on samplings, are as follows;
 - 1) Mailboxes of DECC Secretary of State, Ed Davey and his office staff. There are two mailboxes related to Secretary of State, Ed Davey

Total contents of the mailboxes dated between 1 July 2012 and 1 July 2013 = 2,869 items.

 $2,869 \times 3 \text{ minutes} = 8,607 \text{ minutes}$ or 143 hours and 45 minutes as an estimate of the time to search for the requested information.

This search was then narrowed to only include emails (excluding calendar entries) dated between 1 July 2012 and 1 July 2013 = 405 items.

 $405 \times 3 \text{ minutes} = 1,215 \text{ minutes}$ or 20 hours and 25 minutes

A search was also carried out using appropriate search terms during the period of the request.

Total = 240 items \times 3 minutes = 720 minutes or 12 hours
 - 2) Paper records

² Department of Energy and Climate Change

During the period covered by this request, DECC were using a combination of paper and electronic records. Any paper records held by DECC were transferred during the MoG and are now held in archives by BEIS. For the purpose of this sampling, the department's records management staff have also conducted a search of paper holdings.

There are 10 boxes of unstructured papers titled "exDECC Ministerial papers" held in archives, which it would need to search for assurance on whether there was information held. It estimates that the total number of documents contained in these boxes amounts to between 2,000 and 5,000 individual documents. To examine these records alone, in addition to the time taken by records management staff to examine the paper file mentioned above would amount to between an estimated 6,000 minutes and 15,000 minutes or 100-250 hours.

3) Electronic records

In addition to mailboxes and paper records, electronic records previously held by DECC were also transferred to BEIS. The public authority's records management and knowledge and information staff have conducted sampling of these records to demonstrate the volume of potential records held. Knowledge & Information staff conducted searches on the electronic records management system (SharePoint) for relevant information for the period of the FOI request.

Two searches were conducted to identify any records which contained the appropriate search terms.

Search 1

This returned a result of 74,551 individual items. Due to this large number a second search was conducted to refine the parameters.

Search 2

This identified 2,064 individual items. It estimates to open each of these and examine them for relevance to the request and extract any records found would take: $2,064 \times 3 \text{ minutes} = 6,192 \text{ minutes}$ or 103 hours and 20 minutes. In addition to this search the public authority's records managers conducted a search of digital documents held in an archived area. This revealed a Policy folder for this Bill, which may hold information in scope of the request. However, this area contains 97.3 GB of information. The most likely place within this area to find

relevant information could be the "legislation and regulation" part of this site which is still 840 MB and contains 76 folders. It is difficult to estimate the time it would take to identify any information in scope of this FOI request in this material, as there are no active policy officials in the public authority who would know how to navigate this site but given the volume of records overall it assesses this time to be considerable.

22. Using the sampling above it estimates that even after the searches (and time taken already) for its staff to conduct this sampling, it would take in excess of a further 391 hours to identify whether it holds information within scope of the complainant's request, locate and extract it, even if the most restricted searches were conducted and longer if all possible records were examined.

Commissioner's Considerations

23. Regulation 12(4)(b) is designed to protect public authorities from exposure to a disproportionate burden in terms of the amount of time and resources that a public authority has to expend in responding to a request. In effect, it is similar to section 12 of FOIA, where the cost of complying with a request exceeds the appropriate limit.
24. Under the FOIA, the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations") specify the appropriate limit for the amount of work required which is £600 for central government departments, beyond which a public authority is not obliged to comply with a request.
25. The Fees Regulations provide that the costs associated with the activities involved in dealing with a request (determining whether the requested information is held; finding the information, or records containing the information; retrieving the information or records; and extracting the requested information from records) should be worked out at a standard rate of £25 per hour per person. For central government departments, where the appropriate limit is set at £600, this is the equivalent of 24 hours work.
26. However, the EIR differ from the FOIA in that under the EIR there is no specific cost limit set for the amount of work required by a public authority to respond to a request.
27. While the Fees Regulations relate specifically to the FOIA, the Commissioner considers that they nevertheless provide a useful point of reference where the reason for citing regulation 12(4)(b) of the EIR is the time and costs that would be incurred in dealing with a request. However, the Fees Regulations are not the determining factor in

assessing whether the exception applies. Furthermore, this EIR provision is subject to a balance of public interest test.

28. Regulation 12(4)(b) sets a robust test for an authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is “manifestly” unreasonable, rather than simply being “unreasonable” per se. The Commissioner considers that the term “manifestly” means that there must be an obvious or clear quality to the identified unreasonableness.
29. The Commissioner’s guidance on regulation 12(4)(b) states that public authorities may be required to accept a greater burden in providing environmental information than other information.
30. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will consider the following factors:
 - the proportionality of the burden on the public authority’s workload, taking into consideration the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services;
 - the nature of the request and any wider value in the requested information being made publicly available;
 - the importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue;
 - the importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue;
 - the context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester;
 - the presumption in favour of disclosure under regulation 12(2) of the EIR; and
 - the requirement to interpret the exception restrictively
31. As stated above, the public authority has outlined why it would take in excess of 391 hours to identify whether it holds the information within scope of the complainant’s request, locate and extract it. This is even if only the most restricted searches were conducted and longer if all records were examined.

32. The Commissioner has viewed the search terms the public authority used to conduct relevant sample searches and he has considered the nature of those searches. His view is that the terms used were appropriate, and the sample searches undertaken were reasonable ones to use.
33. The Commissioner considers that even if the public authority had grossly overestimated the time it would take to provide the requested information, by fifty percent, then it would still require over 150 hours to meet the complainant's request for information. The Commissioner stresses that he does not consider that the public authority has grossly overestimated the time and only uses this suggestion to highlight how long it would take to meet request even if one allowed for a huge margin of error in estimating the time to be taken.
34. Considering the size of the public authority, the issues at hand the Commissioner is of the view that the cost in time and use of resources for the public authority to meet this request for environmental information would be clearly manifestly unreasonable. The Commissioner therefore finds that the exemption is engaged and therefore went on to consider the public interest test.

Public interest test

35. Regulation 12(4)(b), like most EIR exceptions, is subject to a public interest test and therefore a public authority may be required to take on a manifestly unreasonable request if there are strong public interest factors in favour of disclosure.
36. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions.
37. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019), 'If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...' and 'the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations' (paragraph 19).
38. The Commissioner recognises that it would be in the public interest for it to know what part, if any, the Prince's consent was a factor in The Energy Act 2013. This being an argument for not maintaining the exception.
39. However the public authority opines that given that the Bill referred to has now progressed through parliament and is now an Act it is difficult

to see what value and purpose there is to this request that would outweigh the public interest in maintaining the exception.

40. Additionally the Commissioner notes there is also a strong public interest in protecting public authorities from requests that impose a manifestly unreasonable burden – especially where that burden will divert the public authority's resources to an unreasonable extent.
41. For the reasons covered above, the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. In that the request is so manifestly unreasonable, due to the amount of resources needed to meet it, that it outweighs the public interest in the provision of the information requested. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(b) was applied correctly and the public authority can rely on the regulation to refuse to comply with the request.

Regulation 14

42. Regulation 14 of the EIR requires that where a public authority refuses to disclose information under an exception, this is stated in writing within 20 working days.
43. The complainant submitted his request to the public authority on 2 May 2020, but it did not rely on regulation 12(4)(b), not to provide the requested information, until 20 January 2022. This delay represents a breach of regulation 14.

Regulation 9 – advice and assistance

44. Regulation 9(1) of the EIR states that:

"A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants."

45. In this regard the Commissioner knows that the public authority, in its refusal letter dated 3 June 2020, explained to the complainant how he could modify the request to make it more manageable. It advised him that he could reasonably refine his request to limit it to a specific email account. In the context of this matter the Commissioner considers that the public authority has taken reasonable steps to provide adequate advice and assistance to the complainant to assist him to extract information from it that would have been relevant to him. Accordingly the Commissioner considers that the public authority has met its regulation 9 obligation.

Right of appeal

46. 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

47. 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.

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

Gerrard Tracey
Principal Adviser FOI
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF