

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

**Date:** 20 September 2022

**Public Authority:** Department for Environment, Food and Rural Affairs

**Address:** Nobel House  
17 Smith Square  
London  
SW1P 3JR

**Decision (including any steps ordered)**

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1. The complainant has requested copies of submissions to a plastics consultation. By the date of the decision notice the Department for Environment, Food and Rural Affairs ("DEFRA") had disclosed all but one of the submissions, but relied on both Regulation 12(5)(e) – commercially confidential – and Regulation 12(5)(f) – impact on provider – to withhold the remaining submission.
2. The Commissioner's decision is that DEFRA has correctly engaged both Regulation 12(5)(e) and Regulation 12(5)(f), but only in relation to some of the information it is withholding. Neither exception applies to the remaining information. Where the exception is engaged, the combined public interest of maintaining both exceptions outweighs the public interest in disclosure. DEFRA also breached Regulation 11(4) of the EIR as it failed to complete an internal review (reconsideration) within 40 working days.
3. The Commissioner requires DEFRA to take the following steps to ensure compliance with the legislation.
  - Disclose the entire submission, with the exception of the information specified in the Confidential Annex to this notice.

4. DEFRA 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**

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5. On 9 May 2021 the complainant requested information of the following description:

“We request under the Freedom of Information Act that you send us copies of all the responses received to the Call for Evidence, listed in Annex C of the Government’s Reply.”
6. On 5 July 2021, DEFRA responded. It provided some information within the scope of the request but refused to provide the remainder. It relied upon Regulation 12(5)(e) and Regulation 12(5)(f) in order to do so.
7. The complainant requested an internal review on 11 July 2021. DEFRA completed its internal review on 8 November 2021. It disclosed the majority of the withheld information but continued to withhold five submissions.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 17 September 2021 to complain about the way his request for information had been handled. At that point, DEFRA had yet to complete its internal review.
9. Following the outcome of the internal review, the complainant contacted the Commissioner again on 25 November 2021 to say that he still wished to receive the five remaining submissions.
10. The Commissioner commenced his investigation on 7 June 2022 with a letter to DEFRA, asking for it to justify its use of the exceptions and provide copies of any remaining withheld information. At DEFRA’s request, the deadline for responding was extended twice. However, when DEFRA had still failed to provide a substantive response by 15 August 2022, the Commissioner issued an Information Notice, compelling DEFRA to respond.
11. DEFRA responded to the Commissioner on 13 September 2022. It now disclosed four of the five remaining consultation submissions to the complainant, but still wished to withhold the fifth.

12. The Commissioner considers that the scope of his investigation is to determine whether DEFRA is entitled to rely on either Regulation 12(5)(e) or Regulation 12(5)(f) of the EIR.

## **Reasons for decision**

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### **Is the requested information environmental?**

13. Regulation 2(1) of the EIR defines environmental information as being information 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)...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 it is information relating to plastics and, specifically, how to reduce plastic waste, the Commissioner believes that the requested information is information on a measure, affecting factors (eg. substances, waste), which in turn affect the elements of the environment (eg. soil, water).

For procedural reasons, he has therefore assessed this case under the EIR.

**Regulation 12(5)(e) – Confidentiality of commercial or industrial information**

15. Regulation 12(5)(e) states that:

“a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.”

16. The Commissioner’s published guidance<sup>1</sup> on this exception explains that, in order for this exception to be applicable, there are a number of conditions that must be met. These are:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

17. The EIR do not provide a precise definition of what constitutes commercial or industrial information. The Commissioner’s guidance on this exception states that “industrial” information will relate to the processing of raw materials or the process for manufacture – as opposed to their sale.

18. The guidance goes on to state that the essence of commerce is trade and therefore commercial information will need to relate to some sort of purchase of goods or services. The guidance also notes that:

“Not all financial information is necessarily commercial information. In particular, information about your revenue or resources is not

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<sup>1</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/commercial-or-industrial-information-regulation-12-5-e>

generally commercial information, unless the particular income stream comes from a charge for goods or services.”

19. In his investigation letter, the Commissioner asked DEFRA to explain why it considered the information in question to be either commercial or industrial in nature. DEFRA responded to say that:

“The information is about the development, production and sustainability of bio-based and biodegradable plastic products. In a highly competitive industry, any indications of a company’s strategic approach to furthering its business through research and development have the potential to be valuable to competitors. This will be the case whether those competitors embrace similar technology and can exploit that information or use a contrasting technology and are fighting for valuable market share in one way or another.”

20. Having considered the withheld information, the Commissioner considers that some of it could reasonably be said to be industrial in nature – in that it relates to the manufacturing process or research into manufacturing processes. However, this information only comprises a very small part of the submission.
21. In broad terms, the withheld information provides an overview of the available evidence on the biodegradability of different types of plastics. The submission also makes some suggestions as to how government policy in this area might be improved.
22. However there is very little within the withheld information that relates to products, processes or research carried out by the particular company that provided the submission. The number of times the phrase “our understanding is” recurs within the document indicates that the company is, for the most part, referring to products, processes or research originating elsewhere.
23. The EIR ultimately derive from the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The implementation guide to the Aarhus Convention (as well as numerous decisions of the senior courts since) have stressed the need for the EIR exceptions to be interpreted restrictively, so as to give effect to the aim of the Convention (and by implication, the EIR): to increase access to environmental information.
24. Information about the broad regulatory landscape around plastic manufacture and design, or observations as to how that landscape might be changed, would not fit within a restrictive interpretation of this particular exception. Nor would the sort of broad observations about products or processes available on the market, that the Commissioner

has seen within the withheld information, but which are likely to be familiar to anyone with knowledge of this particular industry. Any observations about customer behaviour within the withheld information relate to customers in general (and appear to be based on published research) not to the specific customer base of the company which provided the submission.

25. Therefore, apart from a few limited sections (which, in broad terms, deal with specific products, processes or research generated or planned by the company), the Commissioner does not consider that the withheld information is commercial or industrial in nature. It therefore follows that the exception cannot be engaged in respect of this information.
26. For the small quantity of information that is industrial in nature, the Commissioner accepts that this information is subject to the common law duty of confidence.
27. DEFRA explained that consultees were informed, during the consultation, that their responses would not be disclosed. It also noted that the company in question had stated several times that it considered the information in question to have been provided in confidence.
28. The Commissioner is satisfied that the nature of such consultations means that manufacturers often cannot provide informed responses without referring to specific products, processes or research that they carry out or produce. They provide this information voluntarily to DEFRA so that its civil servants (who may not be experts in the field) can understand what the specific impact of existing or future policy may be, but they would be unlikely to provide this sort of material if they considered that commercially or industrially sensitive material would end up in the hands of their competitors or the wider world. There is therefore an expectation that such information will be dealt with in confidence.
29. The Commissioner also considers that this confidentiality protects a legitimate economic interest. The companies that contribute are entitled to make a profit. However, they are likely to be prevented from doing so if commercially or industrially sensitive material that they hold is made available to competitors. Having access to such material could enable competitors to "steal" the company's technology or deduce its corporate strategy in order to disadvantage it in a competitive marketplace.
30. As the Commissioner's guidance states, once it is established that the first three parts of the test for Regulation 12(5)(e) are met, it is inevitable that the fourth will also be met. The Commissioner considers that to be the case here.

31. Therefore, for the small amount of information that is industrial in nature, Regulation 12(5)(e) is engaged.
32. In *Office of Communications v Information Commissioner* [2010] UKSC 3, the Supreme Court (having consulted the Court of Justice of the European Union) held that, when two or more exceptions from disclosure are applied, a public authority can aggregate the public interest arguments both in favour of and against disclosure. The Commissioner will next consider whether Regulation 12(5)(f) applies so that, if both exceptions apply to the same information, the public interest can be aggregated.

**Regulation 12(5)(f) – detriment to the confider**

33. Regulation 12(5)(f) of the EIR states that:

“a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(f) the interests of the person who provided the information where that person—

- (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
- (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure”

34. The Aarhus Convention implementation guide suggests that the purpose of the exception provided at Regulation 12(5)(f) is to protect and encourage the voluntary flow of information to public authorities from third parties.
35. There are many situations where public authorities rely on the voluntary provision of environmental information in order to perform their functions. However, the Commissioner’s guidance on this exception states that the starting point must always be the effect on the party that originally provided the information.
36. As with all the Regulation 12(5) exceptions, the Commissioner considers that, in order to demonstrate that disclosure “would adversely affect” a confider’s interests, a public authority must demonstrate that the adverse effect is more likely than not to occur.



37. In its submission to the Commissioner, DEFRA explained that the company that had provided this particular submission, like all the parties that had contributed to the consultation, had done so voluntarily. There was no legal compulsion on any party to contribute, if they did not wish to do so.
38. DEFRA also reiterated its previous arguments about the assurances of confidentiality given to consultees.
39. Finally DEFRA noted that the company in question had objected, on several occasions, to its submission being disclosed. DEFRA was therefore satisfied that the provider of the information had not consented to its disclosure.
40. In explaining why it considered disclosure would have an adverse effect on the provider of the information, DEFRA referred back to the arguments that it had put forward in respect of Regulation 12(5)(e) about protecting the company's economic interests. It also noted that:

"Disclosing information from [the company] to a competitor would place [it] at a disadvantage, as equivalent information from competitors would not be shared with [the company]."

"[The company] considers that the request is likely to be part of a concerted campaign by its competitors (or those acting for them) via lobbying organisations acting on their behalf, [names redacted], with the aim of attacking [the company]'s scientific credibility. According to [the company], the object of such lobbying is to try to ensure that if governments (in other countries as well as the United Kingdom) implement bans on plastic products with exceptions for biodegradable plastic products, their competitors' products are included in the scope of such exceptions and [the company]'s products are excluded."

### **The Commissioner's view**

41. In the Commissioner's view, the majority of the withheld information is not covered by Regulation 12(5)(f), for much the same reason it is not covered by Regulation 12(5)(e) – namely that it does not provide sufficient detail about the company's current or intended activities for it to be of use to competitors.
42. As the Commissioner has already noted above, the withheld information discusses matters at a relatively high level of generality. It is difficult to see how a company could be adversely affected by revealing that it had highlighted published research to a government department.
43. Even if it could be argued that the submission as a whole represents the company's "corporate opinion" on the future of plastics, the



Commissioner is still not persuaded that disclosing that opinion is more likely than not to be harmful to the company.

44. As DEFRA has already pointed out, the future of plastics is already an issue that is highly contested – with the potential for companies to lobby for regulations designed to be more sympathetic to their own products and less sympathetic to those of their competitors. Given how general the information is, the Commissioner considers it unlikely that the majority of its contents would come as a surprise to the company's competitors – who will be familiar with the main themes, challenges and arguments within the industry.
45. The Commissioner would also point out that all the other consultation submissions have been disclosed under EIR and are therefore now considered to be in the public domain. There is nothing to stop the company in question from making a similar request to find out what its competitors have said. The Commissioner does not consider that disclosure of the majority of the submission would represent any competitive disadvantage to the company.
46. The Commissioner has already identified a small amount of information within the submission that appears to be industrial in nature. For broadly the same reasons as in relation to Regulation 12(5)(e), he considers that disclosure of this particular information would adversely affect the provider of the information – therefore Regulation 12(5)(f) also applies to this information.
47. However, for the remaining information, the Commissioner is not satisfied that DEFRA has demonstrated that disclosure would have an adverse effect – therefore no exception applies.

### **Public interest test**

48. The Commissioner has identified a small quantity of information that is covered by both Regulation 12(5)(e) and Regulation 12(5)(f). As he has noted, the EIR allow the public interest test to be aggregated.
49. In this case, the public interest in disclosure is the same, regardless of the exception applied, namely that consultation processes should be transparent.
50. Consultation processes allow public authorities to test ideas, to evaluate the effectiveness of existing policies and to gauge the likely effect of future policies. However, they are also an opportunities for parties to lobby in support of their own interests.
51. There is nothing intrinsically wrong with lobbying. Indeed, it can lead to better-informed policy-making. However, when any individual or

organisation attempts to influence the future direction of a particular public authority, there is a pressing need for transparency so that the public can see who is trying to influence policy and why. This acts as a deterrent for anyone wishing exercise, or to accept, undue influence.

52. The Commissioner wishes to stress that there is nothing within the withheld information that suggests any undue influence was exercised or accepted – but the opportunity would arise if such consultations were carried out in complete secrecy.
53. However, in the circumstances of this case, the Commissioner is satisfied that the public interest in transparency is met by the disclosure of the submissions that DEFRA has already placed in the public domain – as well as the information the Commissioner is ordering to be disclosed. The information to which the exceptions apply would add very little to public understanding of the consultation process.
54. The Commissioner is also required to consider the aggregated public interest in maintaining both exceptions. There is a strong public interest in protecting information which has a commercial or industrial sensitivity as disclosure will damage the ability of the subject of that information to compete on a level playing field with its competitors. There is also a likelihood that similar organisations will not entrust DEFRA with their commercially or industrially sensitive information in the future – and that in turn could lead to poorer policy-making, which is not in the public interest.
55. More broadly (and particularly relevant to Regulation 12(5)(f)), public authorities rely on a supply of environmental information being provided to them on voluntary basis. This helps to inform the formulation, development and implementation of policy. If individuals and organisations do not trust DEFRA with sensitive information, they will be less candid with DEFRA and DEFRA will therefore find it more difficult to perform its statutory functions – this would not be in the public interest.
56. In the circumstances of this case, the Commissioner is satisfied that the aggregated public interest in maintain both exceptions easily outweighs the public interest in disclosure.

## Right of appeal

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57. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

58. 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.
59. 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 .....**

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