

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

**Date:** 12 October 2017

**Public Authority:** Department for Environment Food and Rural Affairs (Defra)

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

**Decision (including any steps ordered)**

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1. The complainant has requested any reports produced by Defra on the Smarter Environmental Legislation review which began in 2014.
2. The Commissioner's decision is that Defra should have considered the request under the EIR not the FOIA. She has decided that the information held by Defra has not been appropriately withheld in reliance of section 35(1)(a). She also finds Defra in breach of regulation 11(4) in providing an internal review outside the time specified.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the "Smarter Environmental Legislation. Final report 2015"
4. 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**

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5. On 8 July 2016 the complainant wrote to Defra and requested information in the following terms:

"Any internal or external reports produced by Defra in relation to the Smarter Environmental Legislation review which began in 2014, and an update on progress for this review."

6. Defra responded on 5 September 2016 with a refusal notice in reliance of the FOIA section 35(1)(a).
7. The complainant requested an internal review on the same day. Following the intervention of the Commissioner Defra provided an internal review after seven months, on 10 April 2017, which upheld its initial response. In the internal review Defra stated that the requested information is not environmental information as defined by regulation 2(1) of the EIR and it would therefore consider the request under the FOIA legislation.

### **Scope of the case**

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8. The complainant initially contacted the Commissioner on 5 December 2016 to complain about the delays she had encountered in receiving an initial response and the continuing delay following her request for internal review. The Commissioner reminded Defra of her guidance in respect of the provision of internal reviews and the unacceptable delay experienced by the complainant despite her frequent emails chasing the review.
9. Following the internal review the complainant remained dissatisfied by Defra's response and therefore the Commissioner began her substantive investigation on 27 April 2017. Defra suggested to the Commissioner that the report comprising the withheld information was intended for future publication at some point. Defra explained:

"The information requested serves as an evidence base for a number of different pieces of legislative work that Ministers are currently considering – for example the forthcoming Environment Green Paper. Ministers have not as yet agreed on a date for the release of the Green Paper – and we do not want to release the information ahead of the publication of the Green Paper as it might cause confusion amongst stakeholders or raise expectations as to what the Green Paper will contain."
10. The Commissioner considers the scope of her investigation is to determine the appropriate access to information legislation to be applied to the request and Defra's application of FOIA section 35(1)(a) to withhold the requested information.

## Reasons for decision

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### Environmental information

11. The Smarter Environmental Legislation Review (SELR), to which this FOI request relates, was concluded in summer 2015. The SELR stemmed from Defra's Smarter Environmental Regulation Review which sought ways of achieving environmental outcomes more effectively and efficiently. The SELR considered the scope to reform environmental legislation. Following her examination of the withheld information the Commissioner asked Defra to consider whether the request should have been considered under the EIR. Defra responded advising that it considered that the information is not environmental information as defined in regulation 2(1) of the EIR because it constitutes details about any internal or external reports produced by Defra in response to the Smarter Environmental Legislation Review .

12. Regulation 2(1) of EIR states:

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other 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);

(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);”

13. The Commissioner has inspected the information and has formed a different view to Defra. The Commissioner considers that the review document “Smarter Environmental Legislation - Scoping a new environmental legislative framework. Final report June 2015” (‘SELR report’) clearly relates to the reform of environmental legislation. As such the Commissioner considers that the information falls within the scope of regulations 2(1)(c) & (d) of the EIR.
14. Defra’s submission to the Commissioner relies on section 35(1)(a) FOIA which states:

“Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to the formulation of government policy.”
15. The Commissioner’s guidance explains that with regard to the section 35 exemption the most relevant EIR exceptions are likely to be regulation 12(4)(d) (material in the course of completion, unfinished documents and incomplete data) and regulation 12(4)(e) (internal communications).
16. In seeking to rely on section 35 Defra explained to the Commissioner that the withheld information will inform the ongoing development of the 25 year plan for the environment. Defra’s opinion is that the SELR report is a report which will inform environmental policy but it is not environmental policy in itself, the request should be considered in accordance with the FOIA rather than the EIR. The 25 year plan resulted from a Government commitment to the Natural Capital Committee’s third State of Natural Capital report to publish a 25 year plan for a healthy natural environment. Defra added:

“...we do not want to pre-empt what will be said in any plan by releasing data that was part of the formulation and development of policy and may form the basis of government policy when a new government is formed”
17. Defra provided its submission in June 2017 and included statements regarding the uncertainty surrounding the implementation of the SELR, for example:

“if the incoming Government wishes to proceed with this policy.”
18. Defra explained that:

"The SELR contains suggestions and proposals by stakeholders for changes in environmental legislation, which together with other evidence, has informed development to date of the 25 year plan framework. The SELR will continue to inform its development and that of the final plan itself, if the new government wishes to proceed with it."

19. Defra also advised the Commissioner that no decision has been taken whether to incorporate any of the suggestions and proposals from the SELR report into 25 year plan framework. Defra understands that stakeholders are anxious for the 25 year plan to be published. Notwithstanding this Defra considers that disclosure of the SELR would hinder the policy development of the framework and would "unnecessarily confuse the policy landscape."
20. Defra is concerned that work would be diverted from the framework development to respond to unjustified stakeholder concerns about material that may never have been under consideration. It is further concerned that the information may give a "false impression that certain legislative changes might be under active consideration." Defra considers that this could negatively affect future stakeholder engagement and prejudice their responses to any forthcoming consultation on the 25 year plan.
21. Defra provided the Commissioner with its public interest considerations and explained that it is mindful of promoting transparency and particularly in respect of the:  
  
"specific public interest in transparency when it comes to environmental policy. There is a public interest in scrutinising departmental spend on external research, evidence gathering and stakeholder engagement, as well as on departmental decision making based on such evidence."
22. In persisting with its reliance on section 35(1)(a) FOIA consideration Defra explained that the likelihood of prejudice is "high" and the severity "moderate". It went on to explain that due to the EU exit any information on environmental legislation released into the public domain "will be closely scrutinised by a wide range of stakeholders" who could be equipped to put pressure on government to implement SELR proposals or alternatively cause alarm amongst other stakeholders that proposals in the review are being actively considered.
23. Defra went on to explain that it considers there to be a strong public interest in withholding the requested information to allow a safe space for officials and ministers to discuss policy options with an expectation that these deliberations would not be made public. Defra considers that future communications, such as those contained in the information, could be hampered as a result of disclosure in this case which could

undermine ministerial unity and effectiveness and result in less robust, well-considered or effective policies and decisions in the future.

24. Defra considers that disclosure of the information would hinder rather than assist public understanding of current environmental policy in the absence of published policy proposals.
25. Defra maintains that the balance of the public interest is best served by withholding information that is: "not an accurate reflection of current policy consideration, but may nevertheless be perceived as such."
26. The Commissioner's view, as set out above in paragraph 15, is that the request for information should have been considered under the EIR. The most relevant exception, but not identical to FOIA section 35, is at regulation 12(4)(d). To be clear, Defra has not applied this exception. In June 2017, following a telephone conversation, Defra advised the Commissioner that it would comment further on this application but as at the date of this decision notice, has failed to do so. Having reviewed the withheld information and in consideration of the submission provided by Defra in respect of FOIA section 35(1)(a), the Commissioner has considered the application of regulation 12(4)(d) notwithstanding Defra's position.
27. Regulation 12(4)(d) states that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
28. The exception sets out three distinct categories and the information must fall within one of these for the exception to be engaged. The first category is that the information relates to material which is in the course of completion. The 'material' in question may be a final policy document that is to be produced later. Therefore although the requested information may be contained in a document which is itself complete, if that document is intended to inform a policy process that is still ongoing, the information may attract the exception.
29. In this case, the Commissioner notes the emphasis placed by Defra on the withheld SELR informing the '25 year plan' which is still under development.
30. The complainant explained to the Commissioner that the environmental legislation framework review had taken place two years prior to her request, with the final SELR report dated June 2015. She argued that this is a significant period of time to develop a policy response.

31. In its initial response to the complainant, Defra argued that disclosure of the report would be likely to cause speculation and misinformation about Defra's policy intentions. The complainant explained her view that since there has been a significant passage of time with no policy response resulting, if Defra has no intention of following through the findings or recommendations of the report:

"... then so be it, but merely reporting on what its own research has found would not in and of itself result in either of these [speculation and misinformation]."

32. In her reading of the withheld information the Commissioner considers that the report is unlikely to be misleading. She does not agree with Defra's comments that false impressions could be created by disclosure of the report nor does she consider that stakeholders would be deterred from involvement in any future consultations. Nevertheless she accepts that the withheld information comprises material in the course of completion and as such would engage the exception at regulation 12(4)(d).

### **The public interest**

33. The Commissioner is cognisant of the 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, the Commissioner notes the importance of environmental legislation and the withheld information may assist in informing public debate on this particular topic.
34. In balancing the public interest in any case the Commissioner must determine 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 exception. If the public interest in the maintenance of the exception does not outweigh the public interest in disclosure, the information in question must be disclosed.
35. 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 policy position may be determined. If disclosing incomplete material would support this then it increases the weight of the argument for disclosure. In this case, from Defra's submissions to the Commissioner, she cannot determine whether the SELR report will be used to inform future policy or not. Defra appears to make conflicting points and it is far from clear whether the report will be utilised. The political circumstances at the time of the report were significantly

different to those at the time of the request. Notwithstanding this, the report was commissioned and created. At the time of the request this 'Final Report' was over a year old and currently is over two years old.

36. The Commissioner acknowledges that, if the effort involved in correcting a misleading impression (for example, in answering a large volume of queries from stakeholders or the public) would be so great that it would actually hinder the public authority from completing the work of which the 'unfinished' information is a part, this may be a public interest argument for maintaining the exception. In this case she considers it to be unlikely that such queries received by Defra would be the cause of further delaying any action resulting from the proposals contained there.
38. The Commissioner gives limited weight to the argument that the information at issue could be deemed 'misinformation'. Readers would be aware of the date of the report and the changed (and changing) political circumstances currently prevailing. In any event she considers that it would not require a disproportionate effort for DEFRA to correct any misleading or inaccurate impression that may arise from disclosure. Defra could include a statement with the disclosure explaining the context of the report if it considers its concerns warrant this.
39. In this case, the Commissioner considers that there is a strong public interest in understanding the detail of the research that has been carried out, even if this research is subsequently not implemented. She accepts that there may be little public interest in the disclosure of discontinued research in some circumstances. However, she notes that there is considerable public interest in understanding the government's policies on the environment and associated legislation, Defra has taken a significant period of time considering the report and has still to make a decision on whether the report will or will not be discarded. Consequently the Commissioner has determined there to be a strong public interest in disclosure.
40. For the reasons stated above and taking into account the timing of the request, the nature of the information and the EIR's emphasis on disclosure, the Commissioner has found that the public interest weighs in favour of the release of the withheld information.

### **Regulation 11 – Internal review**

41. Regulation 11(1) provides that an applicant may make representations to a public authority, if he or she considers that the authority has failed to comply with the requirements of the EIR in relation to the request.
42. Regulation 11(3) requires that the public authority consider the complainant's representations, along with any supporting evidence



provided by the complainant, and to decide whether it has complied with the requirements of the EIR. Finally, regulation 11(4) requires that the authority notify the applicant of its decision in relation to the applicant's representations no later than 40 working days after receipt of those representations.

43. In this case Defra provided its internal review after 167 working days and only after the intervention of the Commissioner. Defra has therefore breached regulation 11(4).

## Right of appeal

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44. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

45. 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.
46. 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  
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