

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

**Decision notice**

**Date:** 1 February 2019

**Public Authority:** Department for Transport  
**Address:** Great Minster House  
33 Horseferry Road  
London  
SW1P 4DR

**Decision (including any steps ordered)**

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1. The complainant, on behalf of Greenpeace's 'Unearthed' journalism project, has requested from the Department for Transport (DfT) information about any ministerial meetings with the Society of Motor Manufacturers and/or Volkswagen. DfT released some information (with personal data withheld) and advised that it did not hold any formal minutes of meetings held. DfT confirmed that it is withholding some information under regulation 12(4)(e) of the EIR as it considers that this information can be categorised as internal communications. It considers the public interest favours maintaining this exception.
2. The Commissioner's decision is as follows:
  - DfT has correctly applied regulation 12(4)(e) to information it is withholding under this exception, and the balance of the public interest favours maintaining the exception.
3. The Commissioner does not require DfT to take any remedial steps.

## Request and response

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4. On 17 January 2018 the complainant wrote to DfT and requested information in the following terms:

*"I am writing to request documents under the Environmental Information Regulations.*

*I would also like to see details of all ministerial meetings at the Department for Transport with the Society of Motor Manufacturers and Traders and/or Volkswagen between 15 August 2017 and the present day.*

*The details I would like to see are:*

- date and location*
- people in attendance*
- agendas*
- minutes*
- briefing notes*

*If my request is denied in whole or in part, I ask that you justify all deletions by reference to specific exemptions of the Act. I will also expect you to release all non-exempt material. I reserve the right to appeal your decision to withhold any information or to charge excessive fees."*

5. DfT responded on 14 February 2018. It released information on the date and location of meetings held at DfT with the Society of Motor Manufacturers and Traders and/or Volkswagen, with some personal data redacted. DfT advised that it did not hold any formal minutes of the meetings held. It confirmed that it was withholding some information related to the meetings in question (agendas, briefing notes, post-meeting communications) under regulation 12(4)(e) of the EIR as this comprises internal communications. DfT's position was that the public interest favoured maintaining the exception.
6. The complainant was not satisfied with DfT's reliance on regulation 12(4)(e) and DfT provided an internal review on 3 May 2018. It noted that *"consideration of the implications of the Volkswagen emissions investigation are ongoing and have not yet reached a conclusion"*. As such, DfT maintained its reliance on regulation 12(4)(e) to withhold

some of the information the complainant has requested, and its public interest position.

## Scope of the case

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7. The complainant contacted the Commissioner on 25 July 2018 to complain about the way her request for information had been handled.
8. The Commissioner's investigation has focussed on whether DfT can rely on regulation 12(4)(e) to withhold the disputed information, and the balance of the public interest.

## Reasons for decision

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### Background

9. DfT has provided the Commissioner with a background to the request. The US Environmental Protection Agency issued a Notice of Violation to Volkswagen in September 2015 for installing software designed to cheat emissions tests. Volkswagen subsequently admitted that 11 million Volkswagen, Audi, Skoda and SEAT vehicles worldwide were installed with the software, which allows the vehicles to recognise the legislative laboratory test cycle and adjust their emissions control system to meet the relevant Euro 5 limits. In the UK there are 1.2 million vehicles affected and recall action has resulted in 74% being modified to bring them into compliance.
10. To date, the German Government has issued administrative orders for failures to comply with corporate monitoring duties, and fined Volkswagen a total of €1.8 billion, including the €800m fine relating to Audi cars. The German authorities have advised that the imposition of the fine against Volkswagen does not impact on their continuing consideration of criminal action against a number of individuals involved in Volkswagen's wrongdoing.
11. DfT says that consideration of the implications of the Volkswagen emissions investigation are still ongoing and have not reached a conclusion. Given that the relevant engines were designed, developed and manufactured in Germany, it is for the German Government in the first place to take appropriate criminal action. Policy and legal experts at the Department are continuing to monitor this and consider how it impacts on the case for potential separate legal action in the UK.

12. With respect to the way Volkswagen has dealt with their customers, DfT says that it believes that Volkswagen's treatment of UK consumers has not been acceptable and that vehicle owners should be compensated for the inconvenience, uncertainty and worry caused by Volkswagen's actions as well as for any loss in the value of affected vehicles which may become apparent. Ministers also find it unacceptable that Volkswagen has avoided this issue for so long and has failed to engage adequately with its customers on this matter and respond to their valid concerns.
13. DfT has explained that the resulting investigation has created an enormous amount of work to deal with legitimate public concerns about the environmental performance of diesel vehicles. It has carried out a significant amount of testing on the emissions of vehicles to establish whether vehicles from a range of manufacturers, including Volkswagen were fitted with devices to cheat the regulatory emissions test.
14. DfT's Market Surveillance Unit has been established in the Driver and Vehicle Services Agency and undertakes an annual emissions testing programme of a range of road vehicles, including diesel cars. This includes laboratory testing and on-road measurement using portable emissions equipment to ensure that vehicles are compliant with relevant standards.

#### **Regulation 12(4)(e) – internal communications**

15. Regulation 12(4)(e) of the EIR says an authority may refuse to disclose information to the extent that the request involves disclosure of internal communications. This regulation is subject to the public interest test under regulation 12(1)(b).
16. As the Commissioner notes in her published guidance on the application of regulation 12(4)(e), the term '*internal communications*' is not defined in the EIR and is normally interpreted in a broad sense. She has considered the meaning of '*internal*' and '*communications*' separately.
17. With regard to the term '*internal*', the Commissioner notes in her guidance that "*...an 'internal' communication is a communication within one public authority*".
18. With regard to '*communications*', the guidance notes that "*the concept of a communication is broad and will encompass any information someone intends to communicate to others, or even places on file... It will therefore include not only letters, memos, and emails, but also notes of meetings or any other documents if these are circulated or filed so that they are available to others*".

19. DfT has provided the Commissioner with copies of the information it is withholding under regulation 12(4)(e). It comprises four documents: three briefing notes (documents 1, 2 and 3) and a 'lines to take' document (document 4). DfT has confirmed that all the material meets the Commissioner's definition of '*internal communications*' as each document remained internal to the Department.
20. In its response to the complainant DfT had indicated that it also holds 'post meeting communications'. The Commissioner queried this with DfT. Its policy team reviewed the original searches it had carried to identify information within the scope of the request and, as a result of this review, confirmed that DfT does not, in fact, hold any record of post meeting communications between DfT officials for any meetings covered by the complainant's request. DfT acknowledged that it had made an error in its original response, in that regard.
21. Having reviewed the information that DfT holds and is withholding the Commissioner is satisfied that it can be categorised as internal communications and that, as such, it engages the regulation 12(4)(e) exception. She has gone on to consider the public interest test; despite regulation 12(4)(e) being engaged, the information may still be disclosed if there is sufficient public interest in doing so.

### **Public interest test**

#### Public interest in disclosing the information

22. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure. DfT says it recognises that disclosure could enhance public understanding on the subjects raised by the complainant and facilitate the accountability and transparency of Government decisions.
23. In her complaint to the Commissioner the complainant has presented a series of arguments in favour of the information's disclosure. First, she says that the only evidence DfT provided in its correspondence with her concerned the ongoing Volkswagen emissions investigation, which DfT stated is ongoing and has not yet reached a conclusion. The complainant says it is not clear what deliberations this refers to. She says that although, in 2015, the Competition and Markets Authority (CMA) and Serious Fraud Office stated that Volkswagen could face an investigation, a cross-party report concluded in 2016 that: "*in practice little action has been taken*". Later that year the CMA announced it was dropping its investigation. The complainant argues that it has now been almost three years since the emissions scandal was exposed but there is no sign of any investigation materialising.

24. The complainant's next argument concerns the 'chilling effect'. She says that DfT has used regulation 12(4)(e) to argue that the information must not be disclosed in order to '*protect the internal deliberation and decision making processes*'. This implies to her that DfT is concerned about the idea that disclosing information could have a chilling effect on the making of public policy. The complainant argues that there is little evidence of this effect in practice. She says the most comprehensive study of the phenomenon to date: 'The Impact of the FOIA on Central Government in the UK (2010)' for University College London, concluded that: "*The interview evidence gathered in this study points to the conclusion that government decision making and effectiveness has not been significantly affected either positively or negatively...the adverse impact of FOI seems negligible to marginal*".
25. The complainant goes on to note that DfT argues that the public interest in withholding the information is so great as to override the usual presumption in favour of the public interest in disclosure. The complainant argues that, as illustrated above, DfT has provided very little evidence in defence of this. In her view the public interest in favour of disclosure is manifold. She argues that since the revelations of the emissions scandal in 2015, the Government has taken very little action to address the public's environmental and consumer concerns. While the US regulator has negotiated the biggest settlement in US history and the German government has issued a \$1billion fine, the complainant says that the UK government has taken no legal action and negotiated no compensation for consumers. The complainant says that Volkswagen has paid just £1.1m in the UK for the taxpayer costs of testing and that the EU is taking legal action against the UK Government for failing to act.
26. In the complainant's view this raises public interest questions about why the Government is failing to hold corporations to account, at a time when the scientific evidence about the impacts of air pollution clearly show that the UK is facing a public health crisis. The complainant says that report after report has detailed the long-term health effects of nitrogen dioxide pollution; from fatal asthma in children to increased risk of respiratory or cardiac conditions in the elderly and other vulnerable groups in society.
27. The complainant argues that the public policy reaction has been weak; the Government's plan to tackle the issue has been deemed so inadequate that it has been thrown out by the court three times. In addition plans to clamp down on polluting vehicles are either behind what the infrastructure is capable of achieving, behind other countries or have been shelved altogether. In the complainant's view the tax system continues to fail to adequately incentivise the take up of low emission vehicles. Given that the role of car companies in tackling this crisis is so

vital and, according to the complainant, the Government has clearly failed to hold them to account, the complainant argues that it is necessary to scrutinise the relationship between the Government and the car lobby to find out more details about how public policy decisions being made and whether the car lobby has undue influence over the Government. The complainant argues that the requested information would shed light on this relationship in a period when public policy has been widely criticised for being completely disproportionate to the seriousness of the issue. The information would also enable the public to better understand the mechanics of lobbying, by revealing the manifold ways it takes place, outside of the public eye.

28. Finally, in more recent correspondence to the Commissioner, the complainant has noted that DfT stated (at the time of the request) that consideration of the implications of the Volkswagen emissions investigation was ongoing and had not reached a conclusion. This suggests to her that the investigation itself is not ongoing and it is therefore not clear to her what specific policies would be affected if the information was to be released.

#### Public interest in maintaining the exception

29. In its submission DfT has told the Commissioner that discussion of the issues in question and development of policy are still ongoing and that the public interest therefore lies in favour of maintaining the exception.
30. DfT says that documents 1 and 2 concern vehicle taxation, the provision of charging facilities for electric vehicles and consideration with industry of the rate of take up of Ultra Low Emission Vehicles. DfT says it is continuing to develop policy on these issues. It considers that it is essential that discussion on these policy issues is carried out in a 'safe space' to ensure that free thinking and that an open exchange of views can take place.
31. Removing the safe space would, in DfT's view, have a significant detrimental effect on the Government's ability to negotiate future policy positions that optimise industry buy-in while maximising environmental objectives. DfT says that if the options and factors considered in arriving at the positions when developing policy are made public, there is a significant risk that officials may be influenced by public and industry reaction into altering their approach to future proposals, to the detriment of good policy making.
32. DfT says that documents 3 and 4 concern the public understanding of the emissions issue and the action the Government is taking. It argues that it is already taking significant steps to meet its obligation toward increasing the public's understanding of these matters. It says that

results of the 2017 emissions testing programme have already been published and those for the 2018 programme will be published in early 2019.

33. DfT says that ministers and officials regularly meet with vehicle manufacturers, including Volkswagen, and the relevant trade association to discuss the ongoing position on the emissions performance of vehicles. DfT argues that it is important that these meetings are held in a safe space where free thinking and exchange of views can take place, protecting the decision making process, where work is still being developed. Ministers and industry need to have confidence that the exchanges take place in a manner that does not restrict the views that are expressed.
34. Finally, DfT has argued that there is a very significant amount of public interest in seeing Volkswagen held to account for its actions. To this end, DfT says it is critical that the strategic positions the Government is taking on the issue, as outlined in the withheld information, is not made public and therefore available to Volkswagen, as to do so would diminish their effectiveness.

#### Balance of the public interest

35. The Commissioner's guidance on regulation 12(4)(e) advises that public interest arguments for maintaining the exception should always relate to the content and sensitivity of the particular information in question and the circumstances of the request.
36. As in the current case, arguments about protecting internal deliberation and decision making processes will often relate to preserving a 'safe space' to debate issues away from external scrutiny, and preventing a 'chilling effect' on free and frank views in future. The weight of these factors will vary from case to case, depending on the timing of the request and the content and context of the particular information in question.
37. It appears to the Commissioner that DfT's public interest arguments in support of maintaining the regulation 12(4)(e) exception are focussed on preserving a 'safe space', rather than on preventing a 'chilling effect' in the future.
38. She accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This may carry significant weight in some cases. The need for a safe space will be strongest when the issue is still live. Once a public authority has made a decision, a safe space for deliberation will



no longer be required and the argument will carry little weight. The timing of the request will therefore be an important factor.

39. The Commissioner has first considered the timing of the request. The withheld information is dated September 2017, October 2017 and December 2017 and is associated with meetings held in those months. The complainant submitted her request in January 2018. This was approximately three months to one month after the meetings in question; the meetings were still therefore either fairly, or very, recent.
40. The Commissioner has next considered the status of the issues being discussed. Documents 1 and 2 do not directly concern Volkswagen, as such. They are briefing notes for meetings in September and October 2017 to discuss matters associated with air quality, electric vehicles and Ultra Low Emission Vehicles. Their content is not especially sensitive but DfT has told the Commissioner that it is continuing to develop policies on these matters. The Commissioner has considered that further.
41. With regard to air quality, the Commissioner has noted that, with Defra, DfT published a '*UK plan for tackling roadside nitrogen dioxide concentrations*' document in 2017. That document advised that the Government was developing further measures to reduce nitrogen dioxide concentrations which would be set out in a '*Clean Growth Plan*', a '*pathway to zero transmission transport for all road vehicles*' strategy to be published in March 2018 and a wider '*Clean Air Strategy*' in 2018. The *Clean Air Strategy* was consulted on during the summer of 2018 and the Commissioner understands that it was published in January 2019. The above plans and strategies include measures associated with electric vehicles and Ultra low Emission Vehicles. As such, the Commissioner is satisfied that at the time of the request in January 2018, the matters under discussion in documents 1 and 2 were still live and no final policy decisions had been made.
42. Documents 3 and 4 are associated with a meeting in December 2017 that was directly concerned with Volkswagen and the emissions issue. As the complainant has noted, DfT has explained that at the time of the request it was still considering the implications of the Volkswagen emissions investigation and had not reached any conclusion. Its policy and legal experts were continuing to monitor the actions being taken by the German Government and to consider how these would impact on the case for potential separate legal action in the UK. The information contained in documents 3 and 4 has a degree of sensitivity which the Commissioner has taken into account. Her focus, however, is on whether the issue was still live at the time of the request. Even though particular investigations into Volkswagen may have concluded by January 2018 the Commissioner is satisfied that the Volkswagen

emissions issue was still live at the time of the request, in that DfT was still considering any related impacts there might be for the UK.

43. The Commissioner recognises the gravity of the Volkswagen emissions scandal and the serious health and environmental problems associated with vehicle emissions more generally. She notes that there will always be public interest in disclosure to promote public authorities' transparency and accountability. In the circumstances of the current case transparency in relation to the possible influence of lobbyists is also a factor in favour of disclosure. However, the complainant has not presented the Commissioner with any compelling evidence to suggest that the influence of lobbyists on DfT is a concern here and, as such, the Commissioner does not consider this factor to carry much weight.
44. Having considered all the circumstances, the Commissioner is satisfied that the public interest in maintaining the exception is greater on this occasion. The meetings the withheld information is associated with had been held not too long before the complainant submitted her request; the issues that are the information's focus were still live and the Commissioner agrees with DfT that the Department needed a 'safe space' in which to have free and frank discussions with third parties in order to formulate its related policies and positions. The Commissioner considers that the public interest in this case has been sufficiently met first, through DfT's testing programme on emissions from diesel cars which it established in 2016 as a result of the Volkswagen scandal, and which published its first results in 2017. The Commissioner considers the public interest has also been met through the plans and strategies referred to above.

## Right of appeal

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45. 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)

46. 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.
47. 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

**Pamela Clements**  
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