

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 May 2023

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

Address: Nobel House
17 Smith Square
London SW1P 3JR

Decision (including any steps ordered)

1. The applicant requested information about air quality targets. Defra directed the applicant to some relevant information that is already in the public domain. Defra advised that it did not hold some of the information and so regulation 12(4)(a) of the EIR was engaged in respect of that information. Defra subsequently identified one piece of relevant information that it did hold and which it disclosed.
2. Defra had also originally refused to disclose some information under regulation 12(4)(e), which concerns internal communications. However, due to the passage of time that information was subsequently published.
3. The Commissioner's decision is as follows:
 - Defra correctly applied regulation 12(4)(a) of the EIR to the parts of the request to which it had applied this exception because, on the balance of probabilities, it does not hold that information or any further relevant information.
 - Defra breached regulation 5(2) of the EIR in respect of some of the information it disclosed. This is because it did not make this information available within 20 working days of the request.
 - Defra failed to offer adequate advice and assistance and breached regulation 9(1) of the EIR.

4. It is not necessary for Defra to take any corrective steps.

Request and response

5. The applicant made the following information request to Defra on 11 July 2022:

"1. for each of calendar 2020 (actual) and calendar 2030 (estimated).
Note: I have chosen a round number for simplicity in requesting 2030.

2. for England as a whole and each of nine regions: North East; North West; Yorkshire and the Humber; East Midlands; West Midlands; East of England; London; South East and South West (i.e. as used in your modelling⁷);

3. each of the following: 3.1. average ambient PM2.5 concentrations (ug/m³) i.e. total including primary, secondary and non_anthropogenic i.e. across the whole region or England as a whole; 3.2. population-weighted PM2.5 concentrations (ug/m³) i.e total including primary, secondary and non-anthropogenic; and 3.3. qualitative commentary or a quantitative assessment of the impact on PM2.5 concentrations where limit values apply using the modelling referred to or indicated by Professor Lewis.

4. the impact of each of the following future emission scenarios by 2030:

4.1. the UK complying fully with the National Emissions Ceiling Directive 2018 for ammonia (NH₃) in 2030;

4.2. the UK reducing NH₃ emissions from all sources, including both agricultural and non_agricultural, by 50% as suggested in the scientific paper titled 'Abating ammonia is more cost effective than nitrogen oxides for mitigating PM2.5 air pollution' (by Mark A Sutton, Mike Holland and others, 5 November 2021). I appreciate that 4.2 may include 4.1;

4.3. the phasing out of all domestic wood burning in urban areas by 2030 <https://www.gov.uk/government/statistics/emissions-of-air-pollutants>

4.4. the phasing out of all other domestic solid fuel burning in urban areas by 2030;

4.5. the phasing out of all biomass including wood burning from industrial combustion by 2030;

- 4.6. other measures (excluding those above) required by UK legislation, regulation or guidance that would reduce PM2.5 emissions by 2030 (please identify each of these) e.g. vehicle emissions and non-road mobile machinery standards;
- 4.7. the possible impact of new powers requested by the Mayor of London and London Councils to control emissions from plant and equipment in areas of poor air quality e.g. boilers, combined heat and power plant, cooking appliances used in restaurants, solid fuel burning in fireplaces and stoves, non-road mobile machinery and static generators. Please note commercial cooking as identified in the London Atmospheric Emissions Inventory 20199;
- 4.8. the contribution from other UK sources of primary and secondary PM2.5 not included above (please identify each of these);
- 4.9. all EU 27 countries complying fully with their obligations under the National Emissions Ceilings Directive 2016 by 2030 (which would reduce secondary PM2.5 in the UK);
- 4.10. the EU27 implementing fully its zero pollution vision for 2050 and achieving a straight line reduction in air emissions between 2021 and 2050;
- 4.11. the UK matching the EU27's ambition level as described in 4.10; and
- 4.12. the UK being fully on-track in 2030 (in straight-line terms) to comply with the 5th and 6th carbon budgets set by the Climate Change Committee
5. any other essential information you can provide to help me understand what could be done to reduce emissions and concentrations of PM2.5 including in relation to implementing and improving the UNECE's Convention on Long-Range Transboundary Air Pollution."
6. Defra directed the applicant to some relevant information that was already published, providing links to that information. Defra advised that it did not hold other information that had been requested, namely the information requested in parts 4.1-4.12 and 3.3 about future emissions scenarios. It withheld information about modelling that had been undertaken under regulation 12(4)(e) of the EIR. Defra continued to rely on regulation 12(4)(a) and 12(4)(e) following its internal review.
7. On 27 February 2023, on behalf of the applicant, the complainant, a legal firm, submitted a complaint to the Commissioner about Defra's handling of the request.

8. As a result of this investigation Defra identified one piece of information to which it had originally applied regulation 12(4)(a). This is an Excel spreadsheet that breaks down population exposure to PM2.5 by region for different years. Defra disclosed this information to the applicant on 10 May 2023.

Reasons for decision

9. This reasoning is focussed on whether Defra is entitled to apply regulation 12(4)(a) of the EIR to some of the requested information, its compliance with regulation 5(2) and whether it complied with regulation 9.
10. Under 'Other Matters' the Commissioner will consider Defra's handling of two reports within scope of the request to which it originally applied regulation 12(4)(e) of the EIR.

Regulation 12(4)(a) – information not held

11. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that it does not hold the information when it receives the request.
12. In their complaint to the Commissioner, the complainant has said that information that is publicly available suggests that Defra has either failed to disclose information that it holds within the scope of the request, including baseline data for PM2.5 for 2030, or has failed to provide advice and assistance to enable the applicant to locate information that is already publicly available (and so had breached regulation 9(1) of the EIR, which concerns advice and assistance).
13. From Defra's subsequent correspondence with the applicant on 10 May 2023, it appears to the Commissioner (as a lay person) that the Excel spreadsheet that Defra disclosed that day should address that particular concern and fall within scope of part 3.3 of the request.
14. In its submission to the Commissioner, Defra confirmed that it determined that some of the requested engaged the exception in regulation 12(4)(a) of the EIR as the information is not held by Defra. This is the information originally requested in parts 4.1-4.12 and 3.3 of the request.
15. Defra said its officials do not print emails or keep paper files either now or at any time during the course of the work programme (ca 2020-2023). For this reason, it has not searched printed paper records. Defra also says that, "Officials searched but have not located any relevant written notes."

16. The searches of electronic records that officials within the immediate policy team carried out have included relevant folders in Defra's shared drive (SharePoint) where important documents are saved. They have also searched personal inboxes, sent items, and deleted folders (including archives), and have considered any emails received or sent over the duration of this work programme (ca 2020-2023). Most correspondence with external contractors and sub-contractors whose work was relevant to the request (eg ICL, UKCEH, EMRC, Wood PLC, Ricardo EE) will have gone to a specific policy official but may have been copied more widely to other team members. Emails sent to and from the relevant contractors were examined. These were ordered by those with attachments, and those attachments compared to files already saved on Defra's cloud-based storage system, SharePoint, to establish if it could identify any additional information in scope of this request.
17. Defra says that it also searched relevant folders within its SharePoint filing system including locations where analysis and reports are created and/or saved. Defra considered the contents of such files and compared them to the information already made available through the published reports. Defra expects officials within the immediate policy team to have received and filed, or created and saved, any information in scope of this request. It does not expect that others outside of the immediate team will have received and/or created information in scope of this request.
18. Policy officials searched for all emails to and from relevant contractors and sub-contractors. This identified hundreds of unrelated emails sent and received in the process of managing, planning, and delivering the contract and its work. Officials therefore conducted manual searches on relevant emails, email attachments and SharePoint folders and considered the content of any documents. This was conducted back to 2020 when the modelling included in the published reports was first being considered/developed. It was through this process that Defra identified the document which it has now disclosed.
19. Defra did not identify any other relevant information and confirmed its reliance on regulation 12(4)(a).
20. The Commissioner considers that the searches that Defra has undertaken for relevant information within scope of parts 4.1-4.12 and 3.3 of the request were appropriate and adequate. The searches retrieved one additional item of information that appears to fall within scope of part 3.3 and the Commissioner will accept that, on the balance of probabilities, Defra does not hold any further information within scope of those parts. Defra was therefore entitled to apply regulation 12(4)(a) to parts of the applicant's request.

21. Although regulation 12(4)(a) is a qualified exception (ie subject to the public interest test), the Commissioner's position is that it is not necessary to consider the public interest test as to do so would be illogical; the public interest cannot favour disclosing information which is not held.

Procedural matters

22. Under regulation 5(2) of the EIR a public authority must make requested information available as soon as possible and no later than 20 working days after the date of receipt of the request if it holds the information and it is not excepted from disclosure.
23. The complainant submitted their request on 11 July 2022 and Defra did not disclose all the relevant information it holds until 10 May 2023. Defra therefore breached regulation 5(2) in respect of that information.
24. Regulation 9(1) 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.
25. In their complaint, the complainant said that, "...Pursuant to this regulation, Defra should have provided our client with accurate information about where and when it could find information previously withheld. Because of the lack of advice and assistance, it is not clear whether Defra has now published all information previously withheld under regulation 12(4)(e)."
26. The Commissioner has noted that in its further response to the applicant on 10 May 2023, Defra advised that it had withdrawn its application of regulation 12(4)(e) as the information to which it had applied that exception had been published in the interim. Defra did not, however, provide both of the relevant links to that information (it appears to have provided one, but not the other) or indicate where the applicant could find the information.
27. The Commissioner considers that Defra could reasonably have done so; it provided him with both of the links. The Commissioner therefore finds that Defra did not comply with regulation 9(1) in that respect. This is a somewhat a moot point however, as it appears that the complainant had already located the published reports themselves.

Other matters

28. Under regulation 12(4)(e) of the EIR information is excepted from disclosure if it comprises internal communications. Defra advised the complainant in its fresh response of 10 May 2023 that, due to the passage of time, the information to which it had originally applied regulation 12(4)(e) – two reports - had now been published. However, from their complaint to the Commissioner it is apparent that the complainant was already aware that this information had been published on 9 February 2023. But they disputed that the reports could be categorised as 'internal communications' and considered that Defra should have disclosed them at the time of the request.
29. As has been discussed above, the Commissioner has found that Defra breached regulation 5(2) in respect of information it disclosed outside the 20-working day deadline.
30. The complainant put forward arguments as to why they considered that the two reports that Defra originally withheld could not be categorised as 'internal communications'. There is a chance that Defra may have a reasonable argument around the embedding of researchers within its team. However, those arguments would be best explored in a case where it will actually make a difference to the outcome. In this case, whether the Commissioner found that Defra was or was not entitled to withhold the reports originally, the complainant now has access to the two reports and the Commissioner has found a regulation 5(2) breach, which would remain regardless of the 12(4)(e) finding.
31. On the basis of the available evidence, the Commissioner considers it unlikely that the exception was engaged. It is disappointing that Defra did not take the opportunity to explain its relationship with Imperial College properly, but the Commissioner would prefer to withhold a formal determination on the matter until such times as it would make a difference as to whether information should or should not be disclosed.

Right of appeal

32. 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

33. 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.
34. 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

Cressida Woodall
Senior Case Officer`
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF