

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

Decision notice

Date: 9 October 2012

Public Authority: Department of Energy and Climate Control
Address: 3 Whitehall Place
London
SW1A 2AW

Decision (including any steps ordered)

1. The complainant has requested correspondence regarding advice provided to Ministers in relation to the Feed-In Tariff ("FIT") subsidy for solar generation. The Department of Energy and Climate Control ("DECC") identified information within the scope of the request but withheld it on the basis of regulation 12(4)(e).
2. The Commissioner's decision is that DECC has correctly applied the internal communications exception and the public interest favours withholding the information.

Request and response

3. On 2 February 2012, the complainant wrote to DECC and requested information in the following terms:
"Please could you provide me with all the exchanges of correspondence or e-mails that you hold that either stem from or relate to any advice that was given to ministers in relation to the decision to axe the Feed-In-Tariff subsidy for solar generation before the end of the consultation period."
4. On 23 February 2012 DECC responded and firstly clarified it considered the information to be environmental information and therefore subject to the EIR. It also explained that it considered some information within the scope of the request to be already in the public domain and directed

the complainant to the Phase I consultation on FIT's for solar installations and its associated documents¹.

5. DECC explained that emails and other correspondence to Ministers that it considered within the scope of the request were exempt from disclosure on the basis of regulation 12(4)(e) – that the information constituted internal communications. DECC stated it had considered the public interest and concluded it favoured withholding the information.
6. The complainant requested an internal review on 20 March 2012 specifically. In this request the complainant raised concerns about DECC's balancing of the public interest arguments and added that although the formulation of government policy should be protected, in this case the need for transparency on decisions about green solutions outweighed the public interest in withholding the information.
7. DECC conducted an internal review and provided the complainant with the outcome on 4 April 2012. DECC upheld its original decision to withhold all of the information on the basis of regulation 12(4)(e).

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant raised concerns that DECC had not correctly balanced the public interest arguments and that the withheld information should be disclosed.
9. During the course of the Commissioner's investigation, DECC also sought to rely on regulation 12(4)(d) to 2 annexes to a submission, regulation 12(5)(b) for one annex and regulation 13(1) for some personal information.
10. The Commissioner considers the scope of his investigation to be to determine whether DECC correctly applied the above exceptions and the associated public interest tests to withhold this information.

Background

11. The FIT scheme was introduced on 1 April 2010 under powers in the Energy Act 2008. FIT's work alongside the Renewables Obligation (the primary mechanism to support development of large-scale renewable

¹ www.decc.gov.uk/en/content/cms/consultations/fits_comp_rev1/fits_comp_rev1.aspx

electricity generation) and the Renewable Heat Incentive which supports generation of heat from renewable sources at all scales.

Reasons for decision

12. Before considering the application of the internal communications exception the Commissioner has determined what information the exception has been applied to. DECC has identified the following information within the scope of the request:
 - a) Submission to Ministers of 16 September 2011
 - b) Submission to Ministers of 5 October 2011
13. As well as the submissions, DECC also considered the annexes that were attached to the submissions and provided to Ministers to inform their decisions also fell within the scope of the request. These annexes contained statistics, costs, benefits and risk analysis, legal advice on FIT's, a draft letter to the Cabinet Committee and a project plan.

Regulation 12(4)(e) – prejudice to internal communications

14. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
15. The Commissioner considers that communications within one public authority will constitute internal communications for the purpose of this exception. All central government departments (including executive agencies) are deemed to be one public authority. However, communications between a public authority and a third party will not constitute internal communications except in very limited circumstances. The definition of a communication is broad and will encompass any information intended to be communicated to others or to be placed on file where it may be consulted by others.
16. Based on the above, the Commissioner has considered whether the documents identified by DECC would constitute an internal communication.
17. The Commissioner has viewed the submissions and notes that they were sent by the FIT team at DECC to the Secretary of State and Ministers on the subject of the review of FIT's. The documents sent with the submissions (referred to as annexes) provided further information to assist Ministers in making a decision on the proposed approach. The

Commissioner's guidance on internal communications² states that a communication can include letters, emails, memos and notes of meetings intended to be communicated to others.

18. Based on the broad description of what constitutes a "communication" the Commissioner accepts that this information would be a communication as it consists of emails sent to Ministers with the specific intention of obtaining their views and a decision. They were therefore written with the intention to be communicated to others. The Commissioner has next considered whether the information can be deemed to be an internal communication.

The emails in this case were sent only between DECC and its Ministers and as such the Commissioner is satisfied it is an internal communication and regulation 12(4)(e) is engaged.

19. As the Commissioner has found the exception to be engaged in relation to the documents identified as being within the scope of the exception he has next gone on to consider the public interest test.

Public interest arguments in favour of disclosure

20. DECC has stated that it recognises there is a general public interest in the disclosure of information in order to increase transparency and Government accountability. DECC also recognises the public interest in being able to assess the quality of information and advice which is used in policy formulation.
21. The complainant argues that whilst it is accepted that the principle of 'safe space thinking' in relation to policy formulation has some validity in relation to this exception and in relation to the specific information in this case, due to the subject matter there is a stronger public interest in information about the decisions for proceeding with green solutions to be disclosed.

Public interest arguments in favour of maintaining the exemption

22. The main arguments put forward by DECC in support of maintaining the exception relate to the information contributing to the formulation and development of government policy. DECC argues that the development of policy on FIT's was still under consideration.
23. DECC considers that disclosure of information at a stage of policy development where decisions are yet to be made would increase

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http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_internal_communications.ashx

speculation and have a detrimental impact on the Government's ability to discuss policy options relating to this subject in the future.

24. DECC also states that there is a clear public interest in preserving a safe space to formulate policy, debate 'live' issues and reach decisions without being hindered by external comment. The withheld information constitutes submissions sent to Ministers (and the Secretary of State in one case) to ask for decisions on the future of FIT policy. The submissions were intended only for internal deliberation purposes.
25. DECC has explained that at the time of the request the proposal for FIT's that was in the 31 October 2011 consultation was the subject of ongoing judicial review proceedings which were concluded on 23 March 2012 (after the complainant's request). DECC therefore argues that the policy remained subject to further consideration as the Government had postponed its decision on whether to implement the proposal until after the final conclusion of those proceedings.

Balance of the public interest arguments

26. The Commissioner recognises there is a public interest in transparency, openness and accountability in relation to decisions made by government to instigate change. In this case he considers the public interest is strong due to the potential impact of any decisions about green solutions.
27. The Commissioner notes that the submissions were intended to provide Ministers with the necessary information to make informed recommendations on the way forward in the review of FITs and were reflective of the situation at the time the Ministers decision was required. The release of this information would be of some public interest as it demonstrates the evidence base used to determine how the review of FITs would be conducted.
28. The Commissioner also considers there is a public interest in the public being informed on this issue to enable them to engage in debate and discussion. The argument that legislative changes can best be made by informed contributions from interested parties based on the full knowledge of the evidence base behind policies and consultations is a valid argument which the Commissioner recognises and gives weight to.
29. However, at the time of the request the Commissioner accepts that the formulation of new policy in this area was ongoing. The Commissioner is aware that the FIT's review was separated into three phases with the phase 1 review launching in October 2011. At the time of the request the phase 1 review was still underway and was then proceeded by a phase 2A and 2B review which have now completed. Following this

DECC published a phase 2B response document and consultation with the intention that the decisions made in light of the consultation will be implemented in changes to the FITS Order and the Electricity Licensees Standard Conditions documents to be laid before Parliament in October 2012.

30. The Commissioner therefore accepts that the government policy on FIT's was still being developed at the time of the request and is still being finalised at the time of this decision. Therefore, arguments in favour of withholding the requested information have not diminished over time.
31. The Commissioner acknowledges the 'safe space' argument and recognises that part of the reason for needing a safe space is to allow free and frank discussion; the need for a safe space exists regardless of any impact on the candour of debate. The Commissioner has therefore gone on to consider the safe space arguments relevant to this request.
32. The Information Tribunal in the *DfES*³ case found that ministers and officials were entitled to time and space to agree policies by exploring safe and radical options without the threat of media involvement or external scrutiny. Therefore, the need for a safe space to debate and reach decisions without external comment is a valid argument.
33. The Commissioner recognises the public interest in preserving a safe space in which proposals can be put forward and discussed to allow the development of new legislation or policies leading to new or amended legislation. He considers that to release internal submissions used to inform the direction of the FIT's review may erode the 'safe space'. The Commissioner considers there is a public interest in maintaining a safe space to allow Ministers to provide clear views and to guide policy development and that full and frank views and evidence need to be provided in that safe space to allow this to take place.
34. The Commissioner has carefully balanced the arguments for maintaining the exception against the arguments in favour of disclosure. He considers that there is a strong public interest in assisting the public in understanding decisions made by DECC in this area and enhancing public debate on this issue. However, he also recognises there is a public interest in maintaining a safe space for proposals to be developed and discussed.
35. The Commissioner considers the policy in relation to FIT's was still ongoing at the time of the request and the content of the submissions, including draft Cabinet Committee letters and legal advice, is such that if it were to be disclosed it could have a detrimental impact on DECC and

³ Information Tribunal reference EA/2006/0006

its ability to provide full and frank records of discussions and relevant information to Ministers for their consideration when making decision on the future of government policy.

36. The Commissioner has therefore decided that the public interest in maintaining the exception outweighs the public interest in disclosure. Accordingly DECC has correctly applied the exception to withhold the information. The Commissioner has therefore not gone on to consider the application of the other exceptions in this case.

Right of appeal

37. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

38. 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.
39. 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
Group Manager, Complaints Resolution

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