

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 February 2017

Public Authority: Department for Environment Food and Rural Affairs

Address: Area 4C, Nobel House,
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant requested the two spreadsheets comprising the Streamlined Pollution Climate Mapping (PCM) model from the Department for Environment Food and Rural Affairs.
2. The Department for Environment Food and Rural Affairs withheld the requested information in its entirety under Regulations 12(5)(c) and 12(5)(e) of the EIR.
3. The Commissioner's decision is that the Department for Environment Food and Rural Affairs has not correctly applied Regulations 12(5)(c) and 12(5)(e) of the EIR. The Commissioner also finds that the Department for Environment Food and Rural Affairs has breached Regulation 11(4) of the EIR by failing to respond to the complainant's representations for a review within 40 working days.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under Regulation 12(5)(c) and 12(5)(e).
5. 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

6. On 5 January 2016 the complainant wrote to Department for Environment Food and Rural Affairs (Defra) and requested information in the following terms:

'Please can you provide me with the two spreadsheets which comprise the Streamlined PCM model, as detailed in paragraph 76 of the DEFRA report:

Improving air quality in the UK

*Tackling nitrogen dioxide in our towns and cities Technical Report
December 2015*

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492901/aq-plan-2015-technical-report.pdf

With thanks for your attention.'

7. Defra responded on 2 February 2016. It stated that it was withholding the requested information in its entirety under Regulations 12(5)(c) and 12(5)(e) of the EIR.
8. On 24 March 2016 the complainant requested an internal review
9. In the absence of a substantive response to his request for an internal review the complainant contacted the Commissioner on 6 July 2016.

Scope of the case

10. The complainant contacted the Commissioner initially on 6 July to complain that Defra had not issued a substantive response to his internal review request and subsequently on 19 August 2016 to complain that the response eventually received was not satisfactory.
11. The scope of the Commissioner's investigation is to assess whether Defra has successfully applied one or both of the EIR exceptions under Regulations 12(5)(c) and 12(5)(e) to the requested information namely the two Excel spreadsheets with formulas comprising the Streamlined PCM model.

Chronology

12. The Commissioner contacted Defra on 16 August 2016 and pointed out that the complainant was still waiting for a substantive response to his internal review request dated 24 March 2016. Accordingly, she requested Defra to issue a response to the complainant as soon as possible and in any event within seven days.

13. On 19 August 2016 Defra issued an internal review response to the complainant and sent a copy to the complainant.
14. On 19 August 2016 the complainant contacted the Commissioner to say he was dissatisfied with Defra's response.
15. On 6 September 2016 the Commissioner contacted Defra to request a copy of the withheld information together with the following;
 - a) Links to information already in the public domain which Defra believed would largely satisfy the public interest in relation to being able to scrutinise the evidence underpinning the UK National Air Quality Plan¹ to improve air quality.
 - b) Any evidence from the third party contractor² employed to build the PCM model regarding the likelihood of any prejudice to their commercial interests as a result of disclosure.
 - c) A copy of Defra's standards terms and conditions regarding its ownership of the relevant intellectual property rights to the Streamlined PCM model.
 - d) Any further arguments Defra wanted to raise in support of the EIR exceptions it had cited, namely Regulations 12(5)(c) and 12(5)(e).
 - e) An explanation as to why it took Defra from 24 March to 19 August 2016 to complete its internal review.
16. Defra responded to the Commissioner on 4 October 2016 with a link to a zipped file containing the withheld information which it said was extremely large together with a further link to a technical report³ prepared for it by Ricardo Energy & Environment which it said described

¹ <https://www.gov.uk/government/collections/air-quality-plan-for-nitrogen-dioxide-no2-in-uk-2015>

² Ricardo Energy & Environment

³ [https://uk-air.defra.gov.uk/assets/documents/reports/cat09/1511260938_AQ0959_Streamlined_PCM_Technical_Report_\(Nov_2015\).pdf](https://uk-air.defra.gov.uk/assets/documents/reports/cat09/1511260938_AQ0959_Streamlined_PCM_Technical_Report_(Nov_2015).pdf)

the technical background of the Streamlined PCM. Defra also provided a copy of its contract with Ricardo Energy and Environment covering its ownership of the intellectual property rights of the Streamlined PCM. Finally, Defra said it did not wish to add any further arguments to those already made in its initial and internal review responses in support of its application of Regulations 12(5)(c) and 12(5)(e) of the EIR. In respect of the delay in carrying out the internal review, Defra accepted that it had breached Regulation 11 of the EIR and explained that this was due to organisational changes, difficulty in identifying the correct contract for the Streamlined PCM and considering the very complicated and sensitive issue of intellectual property rights.

17. The Commissioner replied to Defra on 6 October 2016 and said she was unable to access the zipped file containing the Streamlined PCM from the link provided. She therefore invited Defra to send it again in a different electronic format.
18. Defra responded on 14 October 2016 suggesting a number of options for re-sending the withheld information including the possibility of putting it onto a memory stick.
19. The Commissioner responded to a subsequent communication from Defra on 3 November 2016 agreeing to its suggestion to send the withheld information on a memory stick.
20. As Defra failed to provide the Commissioner with the withheld information by 16 November 2016, she issued an Information Notice requiring them to do so within 30 days.
21. On 1 December 2016 Defra delivered a memory stick to the Commissioner's office containing the withheld information.
22. On 21 December 2016 the Commissioner contacted Defra to obtain confirmation that it had interpreted the complainant's request as the dynamic software behind the spreadsheets comprising the Streamlined PCM model rather than the spreadsheets in a static state.
23. Defra responded on 3 January 2017 confirming that it had interpreted the complainant's request as the actual Excel spreadsheets comprising the Streamlined PCM model complete with formulas.
24. On 3 January 2017 the complainant confirmed that Defra had correctly interpreted his information request.

Background

25. The Streamlined PCM was built by Ricardo Energy & Environment for Defra and is run and maintained at Defra's request. Its purpose is to assess the effectiveness of emission abatement measures to inform policy making and to ensure the efficient allocation of efforts and resources to those that exhibit the highest mitigation potential at the lowest possible cost, in order to improve air quality and human health.⁴

Reasons for decision

Legislative regime

26. Defra has dealt with the request under the EIR and applied the exceptions under Regulations 12(5)(c) and 12(5)(e) to withhold the requested information.
27. The Commissioner has seen the requested information, namely, the Streamlined PCM model which comprises of two Excel spreadsheets. One called the 'Emissions Calculation Spreadsheet' which allows for the estimation of Nitrogen Oxide emissions under different scenarios. The other called the 'Concentration Calculation Spreadsheet' which estimates the Nitrogen Dioxide concentration from the emission values estimated with the Emissions Calculation Spreadsheet.
28. The Commissioner is satisfied that this information is 'environmental' under the EIR in that it is information on 'factors' such as 'emissions' and 'discharges' into the environment, 'affecting or likely to affect the elements of the environment', namely air and atmosphere under Regulation 2(1)(b). The Commissioner is also satisfied that the information is environmental in that it constitutes 'measures' under Regulation 2(1)(c) 'affecting or likely to affect the elements and factors referred to in Regulations 2(1)(a) and 2(1)(b) as well as measures or activities to protect those elements'.

Exceptions under the EIR

29. Defra has withheld the requested information in its entirety under Regulations 12(5)(c) and 12(5)(e) of the EIR. The Commissioner will now consider these exceptions in turn starting with Regulation 12(5)(e)

⁴ [https://uk-air.defra.gov.uk/assets/documents/reports/cat09/1511260938_AQ0959_Streamlined_PCM_Technical_Report_\(Nov_2015\).pdf](https://uk-air.defra.gov.uk/assets/documents/reports/cat09/1511260938_AQ0959_Streamlined_PCM_Technical_Report_(Nov_2015).pdf)

Regulation 12(1) and 12(2)

30. Regulation 12(1) states that 'subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –
- (a) an exception to disclosure applies under paragraphs (4) or (5); and
 - (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information'.
31. Regulation 12(2) states that 'a public authority shall apply a presumption in favour of disclosure'.

Regulation 12(5)(e)

32. Regulation 12(5)(e) states that 'for the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
- (a) The confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest'.
33. Defra has argued that the requested information is commercial and disclosure would not only result in harm to the legitimate interests of its contractor, Ricardo Energy and Environment but also to Defra's effectiveness. This would be because current and future contractors would be reluctant to provide it with such services if commercial harm resulted from its disclosure of this and other sensitive information.
34. The complainant has argued that Defra cannot rely on Regulation 12(5)(e) by virtue of Regulation 12(9) because the environmental information relates to information on emissions.
35. Defra has argued that the Regulation 12(9) does not apply as the information does not relate to 'actual emissions'. Instead it has argued that the requested information is on the 'software' and not the 'emissions themselves'.

Regulation 12(9)

36. Regulation 12(9) states that 'to the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs 12(5)(d) to (g)'.

37. In order to consider whether Regulation 12(5)(e) of the EIR is applicable to the requested information the Commissioner will initially consider whether the information to be disclosed 'relates to information on emissions'.
38. The Commissioner has referred to her guidance about 'Information on emissions (regulation 12(9))⁵ and adopts the approach taken by the Information Tribunal that the word 'emissions' should be given its plain and natural meaning. As a result the definition of what constitutes an emission for the purposes of the EIR is broad. This interpretation is consistent with the European Directive 2003/4/EC⁶ and Aarhus Convention purpose of achieving greater awareness of environmental matters and more effective participation by the public in environmental decision making.
39. The first reference to 'emissions' in the EIR may be found in the definition of environmental information found in Regulation 2(1). In particular Regulation 2(1)(b) states that environmental information includes information on '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)'. Elements of the environment in Regulation 2(1)(a) include air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity'.
40. Neither the EIR nor the European Directive 2003/4/EC, from which they were implemented, provide a definition of the term 'emissions'. However, the Commissioner accepts the view expressed by the Information Tribunal in the case of *Ofcom v Information Commissioner and T-Mobile (EA/2006/0078)*⁷ that, the word emissions 'should be given its plain and natural meaning'.
41. The Commissioner has taken into account the definitions of the words "emit" and "emissions" in the Shorter Oxford English Dictionary and applied them to mean that emissions will generally be:
- the by-product of an activity or process;

⁵ <https://ico.org.uk/media/1616/information-on-emissions-eir-guidance.pdf>

⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>

⁷ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i104/Ofcom.pdf>

- which is added (or potentially added) to and affecting the elements of the environment;
 - over which any control is relinquished
42. In this case the withheld information relates to nitrogen oxide emitted into, and concentrations of nitrogen dioxide in, the air and atmosphere by road vehicles. The Commissioner takes the view that nitrogen oxide is a by-product of combustion in vehicle engines which is added to and affects the elements of the environment, namely air and atmosphere and over which any control is relinquished.
43. Regulation 2(1)(b) of the EIR refers to “any information **on** ...emissions” and Regulation 12(9) applied to information falling within this definition. In other words, where it details the level of existing or potential emissions or for example where it records that testing has revealed that no emissions have occurred. “Information on emissions” will also cover assumptions and formulas used to calculate the emissions in question. This interpretation is supported by Regulation 5(5) which requires public authorities to refer applicants who receive information falling within Regulation 2(1)(b) to the place where further details about measurement procedures, methods of analysis or sampling can be found or to a standardised procedure used if they request it.
44. For the reasons stated above the Commissioner has concluded that the two Excel spreadsheets that make up the Streamlined PCM model constitute information on emissions under Regulation 2(1)(b) affecting or likely to affect the elements of the environment in Regulation 2(1)(a) namely, air and atmosphere.
45. Accordingly, by virtue of Regulation 12(9) of the EIR, the Commissioner finds that Defra cannot rely on the exception under Regulation 12(5)(e).
46. The Commissioner will now go on to consider the other exception cited by Defra, namely, Regulation 12(5)(c) – intellectual property rights, which is not affected by Regulation 12(9).

Regulation 12(5)(c)

47. Regulation 12(5)(c) states that ‘for the purposes of paragraph 12(1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
- (c) intellectual property rights;’
48. Regulation 12(5)(c) is a qualified exemption and is therefore subject to the public interest test under Regulation 12(1)(b).

49. The scope of intellectual property (IP) rights is wide and such rights arise when owners are granted exclusive rights to certain intangible assets. Although there are many forms of IP rights, the main ones relevant to information requests are copyright, database rights and copyright in databases.
50. For a public authority to establish that Regulation 12(5)(c) is engaged it must demonstrate the following;
- The material is protected by IP rights;
 - The IP rights holder would suffer harm. It is not sufficient to merely show that IP rights have been infringed;
 - The identified harm is a consequence of the infringement or loss of control over the use of the information; and
 - The potential harm or loss could not be prevented by enforcing the IP rights.
51. When considering the public interest in favour of disclosure, a public authority should consider all benefits, even those which could only be realised by infringing the IP right.
52. The Commissioner will now consider whether Defra has successfully engaged Regulation 12(5)(c).

Is the material is protected by IP rights?

53. Defra has argued that it owns all the IP rights to the Streamlined PCM model by virtue of the standard terms and conditions in its agreement with its 'contractor', Ricardo Energy & Environment. The two Excel spreadsheets that make up the Streamlined PCM model are akin to databases.
54. Defra has provided the Commissioner with a copy of its standard terms and conditions and specifically drawn her attention to the section headed 'Intellectual Property Rights' part of which states that;

'The Contractor' (Ricardo Energy & Environment) 'hereby assigns to the Authority' (Defra), 'with full title guarantee, all intellectual Property Rights which may subsist in the IP Materials prepared in accordance with clause E8.1(b) and (c). This assignment shall take effect on the date of the contract as a present assignment of future rights that will take effect immediately on the coming into existence of the Intellectual Property Rights produced by the Contractor.'

Clauses E8.1(b) and (c) states; 'All Intellectual Property Rights in any guidance, specifications, instructions, toolkits, plans, data,

drawings, databases, patents, patterns, models, designs or other materials which is:

- (b) Prepared by or for the Contractor on behalf of the Authority for use, or intended use, in relation to the performance by the Contractor of its obligations under the Contract or
- (c) The result of any work done by the Contractor, the staff or any Sub-Contractor in relation to the provision of the Services (together with (a) and (b) above, the "IP Materials").'

55. Defra has also provided the Commissioner with an email it has received from Ricardo Energy & Environment in which the latter states it understands and fully accepts that Defra owns all the intellectual property rights to the Streamlined PCM model.
56. Having seen a copy of the relevant terms and conditions of the contract and an email from Ricardo Energy & Environment, the Commissioner is satisfied that the requested information is protected by IP rights which are owned by Defra.

Would the IP rights holder suffer harm by disclosure?

57. There are two issues to be considered here. Firstly, a technical infringement of IP rights is not sufficient to engage the 'would adversely affect' test in the exception. There must be some real loss suffered by the owner of the IP right, such as monetary loss. This was established by the Information Tribunal and subsequently endorsed by the Court of Appeal in the cases of Ofcom v Information Commissioner & T-Mobile (UK) Limited EA/2006 and Ofcom v Information Commissioner 2009 EWCA Civ 90⁸. The Information Tribunal in this case stated;

"...we believe that, interpreting the exception restrictively requires us to conclude that it was intended that the exception would only apply if the infringement was more than just a technical infringement, (which in other circumstances might have led to a court awarding nominal damages, or even exercising its discretion to refuse to grant the injunction that would normally follow a finding of infringement). It must be one that would result in some degree of loss or harm to the right holder".

⁸ <https://www.supremecourt.uk/cases/docs/uksc-2009-0168-judgment.pdf>

58. Secondly, the harm in question has to be suffered by the holder of the IP right because the right holder can no longer rely on his IP rights to control the use of the information.
59. In this case Defra has argued that there is a potential commercial market for Streamlined PCM model and disclosure would make it difficult, if not impossible for it to trace the source of any future IP rights infringement and take action to enforce its IP rights.
60. Defra has not been specific as to what harm it would suffer if the requested information was disclosed apart from prejudice to its ability to trace the source of any IP infringements and then take enforcement action. Although it has referred to the Streamlined PCM model as having a potential commercial market it has not elaborated on this or provided any evidence to support its view.
61. The Commissioner is not persuaded by Defra's arguments that disclosure of the Streamlined PCM model would result in it suffering some real loss, such as monetary loss.

Is the identified harm a consequence of the infringement or loss of control over the use of the information?

62. Ownership of IP rights give the right holder, in this case Defra, control over how and by whom the information is used. It therefore follows that harm must result from the right holder losing that control.
63. As Defra has not provided detailed arguments as to the loss it would suffer, it is difficult for the Commissioner to form a view as to whether this would be due to any infringement or loss of control over the Streamlined PCM model.

Could the potential harm or loss be prevented by enforcing the IP rights?

64. Disclosure of the requested information under the EIR would not extinguish any IP rights Defra may hold in the material. Accordingly, if Defra became aware of any further uses of the information that infringed its rights, it could still take action to prevent harm arising from that infringement. The Commissioner will therefore take into account Defra's ability to enforce its IP rights when considering whether the alleged harm would actually arise.
65. In this case Defra has argued that disclosure of the Streamlined PCM model would make it very difficult, if not impossible for it to identify the source of any IP infringement and take enforcement action due to the potential swift transmission of the information. However, Defra has not provided any detailed evidence or arguments as to the commercial value of the information, the ease with which it could be used by another

individual or organisation or the potential market for it. As the Streamlined PCM model is in the form of two Excel spreadsheets the Commissioner accepts that it has the potential to be transmitted swiftly and easily by electronic means.

Conclusion

66. For the Commissioner to be satisfied that Defra has successfully engaged Regulation 12(5)(c) of the EIR she has to be satisfied that disclosure would adversely affect its identified IP rights. In practice this means that a person or organisation would want to exploit the requested information (in other words that there is a potential market for it), could do so successfully and such infringements would go undetected or could not be protected.
67. The Commissioner is satisfied that Defra owns the IP rights in the Streamlined PCM model as a result of its contract with Ricardo Energy & Environment. However, she is not persuaded by the arguments advanced so far by Defra that it would suffer some real loss by disclosure or that there is a potential commercial market for the information that individuals or organisations would want to exploit. However, the Commissioner does accept that due to the fact that the Streamlined PCM model is in the form of two Excel spreadsheets it has the potential to be transmitted swiftly and easily by electronic means.
68. In conclusion the Commissioner is not satisfied that Defra has engaged Regulation 12(5)(c) of the EIR. She has not therefore gone on to consider the public interest test.

Regulation 11 of the EIR

69. Regulations 11(1) and 11(2) of the EIR state that an applicant may make representations to a public authority (no later than 40 working days after receipt of its response to a request) if it appears that it has failed to comply with the Regulations.
70. Regulation 11(4) states that a public authority should respond to an applicant's representations as soon as possible and no later than 40 working days after receipt.
71. In this case the complainant made representations to Defra on 24 March 2016 but did not receive a substantive response until 19 August 2016 which was in excess of 40 working days. As a result the Commissioner finds that Defra breached Regulation 11(4) of the EIR.

Right of appeal

72. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

73. 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.
74. 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

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF