

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

**Decision notice**

**Date:** 6 April 2023

**Public Authority:** Department for Environment Food & Rural Affairs

**Address:** Noble House  
Area 1E  
17 Smith Square  
London  
SW1P 3JR

**Decision (including any steps ordered)**

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1. The complainant requested information held by the Department for Environment Food & Rural Affairs ("DEFRA") related to a report reviewing the impact of domestic combustion from wood burning stoves. DEFRA eventually disclosed the information, but the complainant believes more is held.
2. The Commissioner's decision is that, on the balance of probabilities, DEFRA has disclosed all of the relevant information it holds within the scope of the request and therefore, regulation 12(4)(a) of the EIR is engaged. The Commissioner also finds that DEFRA has breached Regulations 5(2) and 14(2) of the EIR.
3. The Commissioner does not require further steps

**Request and response**

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4. On 11 August 2021, the complainant wrote to DEFRA and requested information in the following terms:

"Assuming DEFRA is indeed aware of this report ("A review of the impact of domestic combustion on UK air quality" published by Hetas), please confirm what information DEFRA holds relating to it e.g. internal emails about the provenance of the report or commenting on it, correspondence about the report or its conclusions with anyone outside DEFRA, briefing notes about it for Ministers etc. Please consider this to be a Freedom of Information/EIR request."

5. DEFRA responded on 1 October 2021. It stated that:

"We enclose a copy of the information you requested as follows:

- Annex C: An e-mail between the Stove Industry Alliance and DEFRA

combustion on UK air quality"

- Annex E: A summary of "A review of the Impact of Domestic Combustion on Air Quality"

- Annex F: The report "A review of the Impact of Domestic Combustion on Air Quality"

We have decided that some of the information we hold should be withheld under regulation 12(4)(e)"

6. DEFRA provided an internal review on 14 January 2022 and maintained its original position.

7. After the Commissioner opened his investigation, DEFRA further reviewed its position and on 17 November 2022 released additional information (Annexes A to C) to the complaint comprising:

- an internal email of three lines;
- a letter from the Stove Industry Alliance ("SIA"); and
- the Report.

8. A further exchange of correspondence failed to resolve matters.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 7 April 2022 to complain about the way their request for information had been handled. The complainant disputes DEFRA's statement that it does not hold further recorded information.

10. DEFRA initially relied on Regulation 12(4)(e) (Internal communications) to withhold information, however it subsequently disclosed this information during the course of the investigation.
11. The Commissioner considers the scope of his decision to be to decide whether on the balance of probabilities, DEFRA holds additional information which falls within the scope of the request and to consider the time which it took DEFRA disclose the information to the complainant.

## **Reasons for decision**

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### **Is the requested information environmental?**

12. Regulation 2(1) of the EIR defines environmental information as being information 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)...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); and
  - (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. As the requested information relates to a review of the impacts of domestic combustion of wood burning stoves on UK air quality, the Commissioner believes that the requested information is likely to be information on the state of the elements of the environment (and "factors" affecting those elements) as set out at regulation 2(1) and therefore DEFRA was correct to deal with this request under the EIR.

### **Regulation 12(4)(a) – Information not held**

14. This reasoning covers whether, on the balance of probabilities, DEFRA holds the remaining information the complainant has requested.
15. Like FOIA, the EIR concern solely information held in recorded form; the EIR do not oblige a public authority to give explanations or opinions, or to answer general questions.
16. 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 that information when an applicant's request is received.
17. When seeking an internal review, the complainant told DEFRA that they believed it held more information within the scope of the request, including, for example, notes of internal and external meetings, briefings, memoranda, emails and notes of phone conversations in the aftermath of the Report sent to DEFRA. They pointed to evidence, in the information already provided, that would indicate that would indicate the existence of further information, such as:

an internal DEFRA email of 1 October 2019 asks the recipient to "give us your comments";

emails between HETAS and DEFRA of 26 and 30 September 2019 discuss meetings to talk about the report;

an email from SIA to DEFRA of 30 October 2019 refers to a meeting to discuss the report; and

an internal email of 4 October 2019 refers to the report attempting to highlight uncertainties and the need for the recipients to see it. This email was sent to seven DEFRA officials and copied to an eighth.

18. Following a further review and wider search of information held, DEFRA wrote to the complainant on 23 December 2022. It provided further information relating to a meeting stating that it

"We can confirm that, following a further search, officials have not found any record of a written response to the request for comments in the internal DEFRA email of 1 October 2019.

You note that emails between Hetas and DEFRA of 26 and 30 September 2019 refer to a meeting to discuss the report. Officials have identified an email indicating that Hetas and DEFRA were due to meet on 6 November 2019, and that the Hetas "scientific study" was listed as one of a number of items to be discussed on the agenda for that meeting.

Officials have been unable to locate additional records, such as minutes or notes, of this discussion. The official responsible for managing DEFRA's contract with Hetas during 2019 (the Clean Air Act contract) left DEFRA almost 18 months ago and we are unable to access their account to establish if they had any further notes of this meeting.

You also point out that the email from SIA to DEFRA of 30 October 2019 offers a meeting to discuss the report.

Officials have found no records that this meeting was accepted or took place."

19. DEFRA confirmed that it had carried out searches of its records in order to locate any relevant information which it holds falling within the scope of the request for information.
20. DEFRA stated that they do not print or retain general business correspondence / information in written notes or paper files. All such information is held electronically on the computer systems and in accordance with its formal records management policy. Recorded information of this sort is stored for seven years from the date it was last modified and then deleted thereafter.
21. Searches of the electronic records on SharePoint and Outlook were made of key officials and those officers outside of the team who would have had an interest in the HETAS report using key words "Hetas", "SIA", the full title of the report in question, "scientific study", "domestic combustion", "FYI:Letter to Air Quality Expert Group from SIA", and "BSRIA". Where DEFRA has located relevant information, it has disclosed this to the complainant.
22. DEFRA also confirmed that they are are unable to access the accounts of officials who were on the team who have since left the Department. Any data stored for these individuals would have been wiped from personal laptops and accounts as they left DEFRA. However, there is an expectation that any other relevant and important documents would have been saved to SharePoint.
23. Having considered all the circumstances, the Commissioner is satisfied that DEFRA has made reasonable searches of its records and that on a

balance of probabilities, DEFRA does not hold any further information within the scope of the request and that regulation 12(4)(a) is therefore engaged.

### **Public interest test**

24. Technically, regulation 12(4)(a) is subject to the public interest test. However, in the Commissioner's opinion it is not necessary to consider the public interest test here as to do so would be illogical; the public interest cannot favour disclosing information that is not held.

### **Procedural matters**

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#### **Regulation 5(2)**

25. Regulation 5(2) of the EIR states that information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.
26. The complainant request was received by DEFRA on 11 August 2021. DEFRA had not disclosed all the information it held until 23 December 2022 and therefore breached Regulation 5(2) of the EIR.

#### **Regulation 14(2)**

27. Regulation 14 of the EIR states that states that a refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.
28. DEFRA did not issue its refusal notice until 1 October 2021 and has therefore breached Regulation 14(2) of the EIR.

### **Other matters**

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29. DEFRA has been unable to locate further recorded information for a potential meeting in early November 2019 as referred to in the emails disclosed to the complainant despite extensive searches.
30. In their complaint to the commissioner the complainant raised concerns that DEFRA had failed to take "take reasonable steps to organize the information relevant to its functions" with a view to dissemination to the public (regulation 4(1)(b)) and had demonstrated a failure to comply with the ICO's records management code of practice (paras.29, paras 34-36 and 37- 38), with particular regard to ensuring appropriate policies were in place for the storage and retrieval of documents from

the personal drives of staff who were leaving the government department.

31. The evidence the Commissioner has seen does not support a conclusion that DEFRA has failed to retain information that it ought to have retained. There is no requirement on DEFRA to retain each and every piece of information that comes into its possession and the Code of Practice recognises that deletion of information which is no longer required is an essential part of records management.<sup>1</sup> Even if DEFRA were able to restore access to the emails of its previous employees, there is no guarantee that relevant information would be found and the additional cost and time involved might well have imposed a manifestly unreasonable burden upon DEFRA.
32. In respect of Regulation 4(1), the key word is "reasonable". It is unlikely to be reasonable to expect a public authority to retain every piece of information that it creates or acquires simply in case someone might ask for it at a future date. Public authorities cannot be expected to anticipate every possible request that they might receive and it is therefore unreasonable to expect them to continually restructure their records to enable them to respond to hypothetical requests that may or may not be made.
33. The Commissioner would also note that Regulation 4(3) of the EIR makes clear that public authorities are not required to make available or proactively disseminate information that is exempt under any part of Regulation 12.

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1624142/section-46-code-of-practice-records-management-foia-and-eir.pdf>

## Right of appeal

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

35. 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.
36. 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 .....**

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**