

Department of Energy & Climate Change
3 Whitehall Place,
London SW1A 2AW
T: +44 (0)300 060 4000
E: foi@decc.gsi.gov.uk
www.decc.gov.uk

Our ref: **12/1659**

21 December 2012

Dear

RE: Freedom of Information Request

Thank you for your FOI request of 26 November 2012, in which you asked for the following:

"...please could you release all the communications (letters, emails etc) related to:

- 1) Ed Davey (or via his secretary) asking the Prime Minister to remove responsibility for green energy from energy minister John Hayes*
- 2) The legal advice given to Davey, which "confirmed that Hayes's presence increased the danger of the department's decisions on renewable energy being exposed to judicial review"*
- 3) The Treasury sanctioning Davey to "give advice to the National Grid on the need to prioritise renewable energy"*
- 4) Any other exchange of letters, emails etc - since Hayes's appointment as energy minister - between Davey, Hayes, The Treasury and/or Downing St related to "green energy" (to include wind power)."*

Question 1: In regards to your first question we can confirm that the Department does hold information in the scope of your request. However, this information is being withheld under section 35(1)(a &b) of the FOI Act. Under Section 35 information can be considered exempt information if it relates to the formulation and development of Government policy, and ministerial communications. Section 35 is a qualified exemption and therefore subject to the public interest test.

Section 35(5) defines the extent of ministerial communications as communications between Ministers of the Crown, [or between Northern Ireland Ministers, or between Assembly Secretaries.] However, according to the ICO

Awareness guide 24: *“communications between civil servants on behalf of their Minister are also likely to be included”*.

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/formulationofgovernmentpolicy.pdf

We accept the public interest arguments in favour of disclosure as greater transparency makes government more accountable and increases trust between government and the public. There is a great deal of public interest in energy issues and in information relating to the formulation and development of the renewable energy policy.

However in this particular case, the public interest in withholding the information outweighs the public interest in releasing it. We believe it is in the public interest that communications between civil servants on behalf of ministers, which are not already in the public domain, are withheld to ensure that the private thinking space needed to ensure sound policy discussion is maintained, and to maintain the convention of collective responsibility that is fundamental to the continued effectiveness of Cabinet government.

In the Scotland Office case EA/2007/0070, the Information Tribunal considered the convention in relation to s35(1)(b) and concluded that *“We accept that where collective responsibility of Ministers is engaged, there will nearly always be a public interest in maintaining the exemption.”* The Tribunal also commented that *“as with formulation of government policy under section 35(1)(a), timing is likely to be of paramount importance. Where the Ministerial communication is in relation to an issue that was “live” when the request was made, the public interest in preserving a “safe space” for Ministers to have a full and open debate, and the public interest in the Government being able to come together successfully to determine what may, in reality, have been a contentious policy issue, may weigh the balance in favour of maintaining the exemption.”*

The renewable energy deployment policy is a ‘live’ policy in its formulation stages and the release of the specific details of communications between the Secretary of State Ed Davey and the Prime Minister at this time, would not be in the public interest. There is a strong public interest in protecting a “safe space” for Ministers to have a full and candid debate on the renewable energy strategy – where they can consider the pros and cons without the risk of premature disclosure which might close off better options. . If ministers thought that their views would be revealed publicly, the nature of their policy discussions on energy would be very different. It might deter ministers stating controversial or radical opinions in relation to any given policy or idea. This would have a detrimental effect on the quality of the decisions made at the highest level, undermining good government.

There is also a strong public interest in the Government being able to come together successfully to determine the way forward for the renewable energy strategy and present a united policy front to the public and the energy sector,

once the internal debates have been concluded and the Ministers have accepted collective responsibility for their decisions. The full disclosure of interdepartmental consideration and communications between ministers at this time may undermine the promotion of the renewable energy deployment strategy in the future.

Question 2: Concerning part 2 of your request, this information is exempt under section 42(1) of the FOI Act 2000 as it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings, and is therefore deemed confidential.

Section 42 is a qualified exemption and therefore subject to the public interest test. There is a general public interest in the disclosure of information; greater transparency makes the government more accountable to the electorate; increases trust and also enables the public contribution to policy making to become more effective.

However, it is in the public interest that the decisions taken by government, including in particular decisions as to the conduct of litigation, are taken in a fully informed legal context. Government departments therefore need high-quality, comprehensive legal advice for the effective conduct of their business. That advice needs to be given in context, and with a full appreciation of the relevant facts.

The legal adviser needs to be able to present the full picture to his or her departmental clients, which includes arguments in support of his or her final conclusions with relevant counterarguments. It is in the nature of legal advice that it often sets out the possible arguments both for and against a particular view, weighing up their relative merits. This means that legal advice obtained by a government department will often set out the perceived weaknesses of the department's position. Without such comprehensive advice the quality of the government's decision-making would be much reduced since it would not be fully informed and this would be contrary to the public interest.

Disclosure of legal advice has a significant potential to prejudice the government's ability to defend its legal interests, by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour. This scenario is not in the public interest, as it may result in poorer decision-making because the decisions themselves may not be taken on a fully informed basis. There is also a risk that if legal advice were liable to be disclosed clients and lawyers might avoid making a permanent record of the advice that is sought or given or make only a partial record. This too would be contrary to the public interest.

In all the circumstances, we have concluded that the public interest in maintaining the exemptions outweighs the public interest in disclosing the information.

Question 3 & 4: With regards to parts 3 and 4 of your request, to the extent that the information requested is environmental information, it is exempt under regulation 12(4)(e) of the Environmental Information Regulations 2004. This information is withheld as it is regarded as internal communications. We recognise the general public interest in the disclosure of information and in particular in the discussions that take place between the Department's Ministers on policy issues. There is a public interest in favour of disclosure so that the public can understand the interaction between ministers, the disclosure of this information would bring greater transparency to the decision-making process and would help public understanding about the government policy on green energy including wind power

However, the public interest in the disclosure of the information we hold must be balanced with the need to ensure that Ministers can exchange information in a manner which allows for the free and frank exchange of views and opinions. We also consider that releasing Ministerial communications would have a detrimental effect on collective responsibility. If Ministers felt inhibited from corresponding with one another because of the risk of subsequent disclosure, the quality of debate behind collective decision-making would be diminished. This would have a detrimental effect on both the process of collective government and the quality of the decisions made at the highest level, undermining good government. Collective responsibility is a central tenet of the UK constitution. Protecting collective responsibility is in the public interest as it allows for the maintenance of space to formulate, develop and refine policy, properly considering all the options.

To the extent that the information requested is not environmental parts 3 and 4 of your request have also been considered under the Freedom of Information Act 2000. The information held relates to the formulation or development of government policy and ministerial communications, and is therefore exempt from disclosure under section 35(1)(a)&(b) of the FOIA.

Regarding 35(1)(a), there is a public interest in favour of disclosure so that the public can understand the work of the Department and this would provide greater transparency about the Government's policy position. However, we consider that in this case this transparency also poses a risk to the protection of the decision-making process which needs to be based on a full assessment and discussion of options. There is a public interest in ensuring that Ministers feel able to discuss policy issues with officials and with their counterparts within the department, and having as candid a discussion as possible on future options, exploring all plausible scenarios and setting the scene in as full a way as possible. We judge that disclosing the information we hold that describes the formulation and development of government policy, which is not in the public domain, would inhibit the frankness of future discussions and hence inhibit policy formulation and development which would not be in the public interest.

As regards, section 35(1)(b), we recognise the general public interest in the disclosure of information and in particular in the discussions that take place

between the department's Ministers on policy issues. There is a public interest in favour of disclosure so that the public can understand the interaction between ministers, the disclosure of this information would bring greater transparency to the decision-making process and would help public understanding about the government policy on wind power

However, the public interest in the disclosure of the information we hold must be balanced with the need to ensure that Ministers can exchange information in a manner which allows for the free and frank exchange of views and opinions. We also consider that releasing Ministerial communications would have a detrimental effect on collective responsibility. If Ministers felt inhibited from corresponding with one another because of the risk of subsequent disclosure, the quality of debate behind collective decision-making would be diminished. This would have a detrimental effect on both the process of collective government and the quality of the decisions made at the highest level, undermining good government. Collective responsibility is a central tenet of the UK constitution. Protecting collective responsibility is in the public interest as it allows for the maintenance of space to formulate, develop and refine policy, properly considering all the options.

In our view, taking account of these factors, the balance of public interest lies in withholding this information.

Appeals procedure

If you are dissatisfied with the handling of your request, you have the right to ask for an internal review. Internal review requests should be submitted within two months of the date of receipt of the response to your original letter and should be addressed to: **Information Rights Unit** (foi@decc.gov.uk)

Please remember to quote the reference number above in any future communications.

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF

Yours sincerely,