



Department
of Energy &
Climate Change

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Our ref: **FOI 12/1686**

26th March 2013

Dear

RE: Freedom of Information Request

Following our correspondence of the 2nd and 23rd January 2013, please find below the comprehensive response to your freedom of information request:

"Following the report in the Financial Times today ("PM rejects climate expert for top job") about how the prime minister has blocked the appointment of David Kennedy as DECC's new permanent secretary, despite the recommendation of Sir Bob Kerslake et al that Kennedy was the best candidate for the role, please could you send me all communications (emails, letters, minutes etc) related to this matter?

This includes any communications exchanged (internally and externally) by or between DECC, Downing Street, the Cabinet Office, the Committee on Climate Change and Sir Bob Kerslake's office."

We are writing to advise you that, following a comprehensive search of our paper and electronic records, we can confirm that the Department does hold information within the scope of your request.

The attached internal communication to DECC staff regarding the Permanent Secretary recruitment process is not covered by any exemption and is therefore released.

However, the remainder of the information is exempt under the following sections of the Freedom of Information Act 2000:

35(1)(b) – ministerial communications,
35(1)(d) – the operation of any Ministerial private office,
36 (2) – prejudice to the conduct of public affairs, specifically subsection 36 (2)(b),

40 – personal data,
41 – information provided in confidence and
43(2) – commercial interests,

and is therefore being withheld, following consideration of the public interest test, where applicable.

Sections 35(1)(b) – ministerial communications

Some of the information you requested is being withheld as it falls under the exemption in Section 35(1)(b) of the FOIA, which exempts information if it relates to ministerial communications. In applying this exemption we have had to balance the public interest in withholding the information against the public interest in disclosure. The factors we considered in deciding where the public interest lay are considered below.

We recognise that there is a general public interest in favour of disclosing such information. In particular, we recognise that greater transparency makes Government more open and accountable. However, any public interest in the disclosure of such information must be balanced with the need to ensure that Ministers can exchange information in a manner which allows for the frank exchange of views and opinions.

In this case, we take the view that the overriding public interest is in the non-disclosure of this information. If Ministers feel inhibited from corresponding with one another on these matters, because of the risk of subsequent disclosure, the candid nature of discussions in relation to appointments will be diminished. This would have a detrimental effect on both the process of government and the quality of the decisions made at the highest level, undermining good government.

Having considered the public interest the Department's decision is to withhold the information.

35(1)(d) – the operation of any Ministerial private office

Some information you requested is being withheld as it is exempt under section 35(1)(d) of the FOIA. This exemption applies to information which relates to the operation of a ministerial private office. In applying this exemption we have had to balance the public interest in withholding the information against the public interest in disclosing the information. The factors we considered in deciding where the public interest lay are considered below.

We recognise that there is a general public interest in disclosure of such information and that greater transparency makes government more accountable to the electorate. In this case we recognised the public interest in ensuring that private offices operate efficiently, that private offices are used appropriately and in ensuring that ministers are provided with the policy and administrative support in order for them to do their jobs effectively.

However, we take the view that the over-riding public interest is in the non-disclosure of some of this information. In reaching this decision we took into account the fact that the private office is an important aspect of the space around ministers which needs to be protected so that good decision making is not threatened. Ministers expect to receive advice from their private office about a range of matters that other officials are not able to give. They need to be able to discuss practical and personal arrangements confidentially in order to conduct business effectively.

Section 36(2) – effective conduct of public affairs

Some of the information you requested is being withheld, and to the extent that section 35 does not apply, it is exempt under section 36(2) of the FOIA. Section 36(2) provides an exemption for information where, in the reasonable opinion of a Minister, disclosure would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation, or would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. This exemption is subject to the public interest test.

Some of the arguments that it would be in the public interest to disclose this information include:

- a) there is general public interest in the working nature of relationships between ministers and those that work with them and between different arms of government;
- b) greater transparency makes government more accountable to the electorate and increases trust;
- c) the public interest in being able to assess the quality of advice being given to ministers and subsequent decision making;
- d) the public interest in being able to understand the rationale for decisions and to assess the strength of arguments for and against a decision.

However, it is also necessary to consider any specific arguments, for example as to public confidence in the appropriateness and robustness of processes used to appoint senior public servants.

Similarly there are generic arguments that it would be in the public interest to withhold documents of this type, including:

- a) a, the need for deliberations of these kinds to be candid and take place in a safe space;
- b) b. the need to protect the successful candidate from any aspersions being cast on the process used to appoint them and all the candidates from any conclusions which may be drawn as to the panel's views on them;
- c) c. arguments akin to those in favour of maintaining cabinet collective responsibility which would support maintenance of collective responsibility for the decision as to who to appoint and how it was reached once it is made.

On balance we have concluded that the public interest is to withhold this information.

Section 40 – personal data

Some of the information you requested is being withheld as it is exempt under section 40 of the FOIA. Section 40(2) provides an absolute exemption (i.e. the public interest does not apply) for information about identifiable individuals where this would breach the Data Protection Act. In order to comply with the Data Protection Act, a disclosure of personal data under the Freedom of Information Act must be fair and lawful (the first Data Protection Principle), meet one of the conditions in Schedule 2 of the Data Protection Act and, in particular, take into account the reasonable expectations of the individuals identified. The factors the Department considered in deciding whether it would be fair and lawful to disclose information in this category included:

- The general public interest in the disclosure of information as greater transparency makes Government more accountable,
- The possible consequences of disclosure on the individuals identified,
- The reasonable expectation of those individuals,
- The nature of the information itself and whether the individuals have consented to disclosure or not, and
- The circumstances in which the information was obtained.

Taking these factors into consideration, the Department has decided not to release the names and personal contact details of junior officials, and the names and personal contact details of some others involved in the recruitment process. It has also withheld information about the candidates. Our view is that the release of this information would not be fair and none of the conditions of Schedule 2 are met.

Section 41 – information provided in confidence

Some of the information withheld under section 40 could alternatively be treated as covered by section 41 FOIA. Section 41 provides an exemption if release would be an actionable breach of confidence, and the public interest test applies to this exemption. The relevant information in this case was provided by or in relation to candidates in a selection process for a senior public sector post and as such was provided in confidence and would fulfil the requirement. In reaching our decision we have balanced the public interest in maintaining the confidentiality of the candidates against the public interest in ascertaining whether selection processes for senior public sector posts are robust. We concluded that the public interest in the disclosure of this confidential information, was outweighed by a significant public interest in maintaining the confidentiality of candidates. Failure to do so would be likely to prejudice the effectiveness of future selection exercises and subject candidates to unwarranted intrusion.

Section 43(2) – commercial interests

A small amount of the information you requested is being withheld as it is exempt under section 43(2) of the FOIA. This provides that information may be exempt, again subject to the public interest test, because its release would be likely to prejudice the commercial interests of any person, including the public authority holding it.

We took into account the public interest in transparency in relation to the commercial arrangements of the Government, which promotes the achievement of good value for money and appropriate use of Government funds. However, there are public interest considerations in favour of withholding the information in order to ensure that the commercial interests of external businesses are not damaged or undermined by the disclosure of information which is not common knowledge and which could adversely impact on their ability to operate and compete in the market. We therefore consider the balance of the public interest to lie in withholding some of the information we hold in this case.

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