

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

**Decision notice**

**Date:** 23 February 2015

**Public Authority:** The Cabinet Office  
**Address:** 70 Whitehall  
London  
SW1A 2AS

**Decision (including any steps ordered)**

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1. The complainant has requested information about COBR(A) meetings held in relation to flooding on the Somerset Levels in early 2014. The Cabinet Office refused to provide this information citing section 35 as its basis for doing so. It upheld this position at internal review.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 35(1)(a) and (b) in relation to the non-environmental information within the scope of the request. It is also entitled to rely on regulation 12(4)(e) of the EIR as a basis for withholding the environmental information within the scope of the request.
3. No steps are required.

**Request and response**

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4. On 4 February 2014, the complainant made the following request for information under the FOIA to the Department for Environment, Food and Rural Affairs ("DEFRA") for information of the following description:

"Under the Freedom of Information Act I would like access to the following:

I understand there have been more than 15 "Cobra" meetings to discuss the flooding situation in Somerset. I would like access to the minutes of all of these meetings. Please either send them as text or PDFs.

Alternatively, paper copies would be acceptable. Please also include the dates all of these meetings were held, those in attendance, and any invite emails that were sent pertaining to the Cobra meetings – or discussing whether a Cobra meeting should be held regarding the flooding situation in Somerset. I look forward to receiving my reply within 20 working days.”

5. DEFRA passed this to the Cabinet Office who responded on 10 March 2014.
6. The Cabinet Office refused to provide the requested information and cited the following exemptions as its basis for doing so:
  - section 35(1)(a) – formulation and development of government policy; and
  - section 35(1)(b) – ministerial communications.
7. It provided links to the government’s UK Resilience website which contains more detail about the government’s emergency response and recovery programme.<sup>1 2</sup>
8. The complainant requested an internal review on 10 March 2014. The Cabinet Office sent him the outcome of its internal review on 28 April 2014. It upheld its original position.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 28 April 2014 to complain about the way his request for information had been handled. The Commissioner wrote to the Cabinet Office on 25 June 2014 asking for its substantive arguments and for access to the withheld information.
10. He asked for the Cabinet Office’s response by 22 July 2014. When this did not arrive, he asked the Cabinet Office to respond by 19 August 2014 and indicated that he would serve an Information Notice under

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<sup>1</sup> <http://www.gov.uk/emergency-response-and-recovery>

<sup>2</sup> <https://www.gov.uk/government/publications/the-central-government-s-concept-of-operations>

section 51 of the FOIA if it did not provide a timely response. There were further discussions during which time the relative sensitivity of the information was considered. The Cabinet Office eventually provided its substantive response on 16 September 2014. It provided the Commissioner with access to the withheld information on 23 October 2014.

11. As part of its submissions, the Cabinet Office said that the Commissioner may consider that the withheld information comprises or includes environmental information which should be considered under the EIR. It asserted that it did not think the information was environmental information but, for completeness, it submitted arguments in support of reliance on the EIR exception 12(4)(e) – internal communications.
12. The Commissioner has therefore considered whether any of the withheld information is environmental information and, where he thinks that it is, whether the EIR exception at 12(4)(e) applies to it. Where he does not think some or all of the withheld information is environmental information, the Commissioner has considered whether it is exempt from disclosure under FOIA section 35(1)(a) and (b).

## **Reasons for decision**

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### **Is some or all of the information environmental information?**

13. The severe flooding of early 2014 had a significant impact on the environment of the Somerset Levels and the people who live and work there. Residents were forced to leave their homes and farmland was overwhelmed by floodwater to devastating effect. The flooding prompted considerable debate at the time about the best way to manage or even prevent flooding in the area. In particular, there were widespread claims that an earlier cessation of river dredging had exacerbated the effect of extreme weather. There was also considerable concern about the contamination of the water table (including the supply of drinking water) by sewage overflow as a result of the floods.
14. A timeline of events can be found on the BBC website.<sup>3</sup>
15. While it is obvious that the flooding had an impact on the environment, it does not automatically follow that any information which covers the

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<sup>3</sup> <http://www.bbc.co.uk/news/uk-england-somerset-26157538>

events (including the information requested here) is environmental information as defined in the EIR.

16. The relevant part of regulation 2(1) of the EIR states:

*'environmental information' has the same meaning as in Article 2(1) of the Directive<sup>4</sup>, namely any information in written, visual, aural, electronic or any other material form 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) and (b) 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);'*

17. The Commissioner's general approach will be to interpret 'any information... on...' (in regulation 2(1) of the EIR) fairly widely. The relevant Oxford English Dictionary definition of 'on' is 'In reference to, with respect to, as to, concerning, about'. The Commissioner's view, in line with the purpose expressed in the first recital of the Directive from

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<sup>4</sup> EU Directive 2003/4/CE from which the EIR derive

which the EIR are derived, is that any information 'on' will usually include information concerning, about or relating to the measure, activity, factor etc in question. In other words, information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.

18. The withheld information is, as described in the request, namely: "minutes of all of [COBR(A) meetings where flooding on the Somerset Levels is discussed] ...[including] the dates all of these meetings were held, those in attendance, and any invite emails that were sent pertaining to the Cobra meetings – or discussing whether a Cobra meeting should be held regarding the flooding situation in Somerset".
19. It includes emails exchanged between relevant individuals at particular government departments as described in the request and formal minutes of the meetings showing the date of the meetings, who attended and what was discussed. Information, for example, about who attended particular meetings and email exchanges regarding the practical arrangements for the meeting is not environmental information in this case.
20. The Commissioner is unable to set out more of the detail of the withheld information on the face of this notice without disclosing the information in question but he is satisfied that some of it is environmental. In reaching this view, he gives particular emphasis to EIR Regulation 2(1)(c) and (f). Further detail is set out in a Confidential Annex to this Notice, served on the Cabinet Office only.

### **Is the withheld information environmental? - Conclusion**

21. In the Commissioner's view, the majority of the withheld information is not environmental information. He will therefore focus first on whether the Cabinet Office is entitled under the FOIA to withhold this non-environmental information. He will deal later in the Notice with whether the Cabinet Office is entitled to withhold the environmental information under the EIR.

### **Section 35 – Formulation of government policy, etc.**

22. Under section 35(1) of the FOIA, information held by a government is exempt if it relates to-
  - (a) The formulation or development of government policy,
  - (b) Ministerial communications.

23. The Commissioner understands the term "COBRA", although often spelt different ways, refers to "Cabinet Office Briefing Room 'A'". The Commissioner does not know whether COBR(A) meetings are always located in this specific room but he accepts that the term "COBRA" or "COBR(A)" is universally accepted as a shorthand descriptor for cross-government meetings convened to address urgent matters which are having (or could potentially have) a severe impact on some or all of the nation (see Notes 1 and 2). In the interests of uniformity, the Commissioner will use the term "COBR(A)".
24. The Cabinet Office explained that "[COBR(A)] refers to an operational meeting of the National Security Committee (NSC) convened in order to co-ordinate, at a national level, the formulation of Government policy in response to serious emergencies, including widespread or significant flooding. [COBR(A)]policy considerations are, by the nature of the committee wide ranging and are based on an understanding of the particular situation, how the event is likely to develop and the actual and potential impacts arising."
25. The Commissioner thinks that the term 'relates to' as it is used in the section 35 exemption can safely be interpreted broadly. With the Cabinet Office's explanation in mind, and having viewed the withheld information, he is satisfied that it relates to the formulation and development of government policy and that section 35(1)(a) is, therefore, engaged.
26. As noted above, section 35(1)(b) states that information is exempt from disclosure if it is held by a government department and relates to Ministerial communications.
27. The Cabinet Office explained: "Section 35(5) of the Act states that ministerial communications include, in particular, 'proceedings of the Cabinet or of any committee of the Cabinet'. [Given] that [COBR(A)] is an operational sub-committee of the NSC [this] clearly satisfies this definition under section 35(5). Detailed information about the timing attendance, chairmanship and minutes are, therefore, related to ministerial meetings and engage the exemption."
28. As stated above, the Commissioner interprets the phrase 'relates to' broadly. In light of the Cabinet Office's explanation and having viewed the withheld information, the Commissioner is satisfied that the withheld information is a ministerial communication and that section 35(1)(b) is therefore also engaged.
29. Both section 35(1)(a) and section 35(1)(b) are subject to public interests test by virtue of section 2 of the FOIA. This means that the Cabinet Office can only rely on either of these exemptions as a basis for

withholding the exempt information if the public interest in doing so outweighs the public interest in disclosure.

### **Public interest arguments in favour of disclosure**

30. The Cabinet Office set out the following arguments in favour of disclosure:
  - there is a public interest in transparency with particular regard to the way the government handles national emergencies;
  - there is also a public interest in providing assurance that the government responds to national emergencies in a "timely, proportionate and evidence based manner";
  - disclosure would promote public awareness and understanding of the management of flood risk across the public and private sector which is in the public interest; and
  - the free exchange of views on this subject is of benefit to the environment and to the UK's preparedness in the event of any future flooding emergencies.
31. The complainant made the following points in favour of disclosure:
32. The complainant said that "there were 30 Cobra meetings to discuss the flooding situation from late January onwards. But the flooding situation began in Somerset before Christmas. Part of the reason for me asking for these documents is to determine why the government took so long to become involved in this situation and to offer help. There is a clear public interest in finding out why the government response was, seemingly, so slow."
33. "The prime minister also claimed at the time of the crisis that 'money was no object' in resolving the Somerset flooding crisis. As you will be aware, FOI authorities should favour disclosure when large sums of money are involved. It is clearly in the public interest to see how that money was spent. We do not know how the government formulated its spending plan over the crisis and we do not know if the money was spent wisely or effectively. Nor do we know how much was spent. We've found out some costs piecemeal but not a total from the government".
34. He also commented "They have continually attempted to fob me off with information already in the public domain and ministerial statements. This is not the point of what I am asking. I want to know the background to the month-long delay in the government taking action and how this was discussed by ministers. I think the public interest in this, and what appears to be panic spending later, is enormously



important. Many people were left either without homes, cut off in villages with no way in or out, and businesses have been ruined. How much did the government know? Why did they not react earlier? Were the councils to blame for not declaring emergencies earlier?"

### **Public interest arguments in favour of withholding the information**

35. The Cabinet Office explained that there was considerable overlap in its arguments in favour of maintaining the exemptions at section 35(1)(a) and section 35(1)(b). That said, it also made points specific to the application of each exemption.
36. Its arguments made in relation to section 35(1)(a) were as follows:
- Disclosure would have a chilling effect on the provision of advice in any future emergencies – it drew attention to the fact that COBR(A) was attended by representatives from a range of agencies and government departments relevant to the matter under discussion
  - This chilling effect would undermine the effectiveness of the government's response to any future emergencies.
  - It submitted additional arguments which made specific reference to the withheld information which the Commissioner has set out in the Confidential Annex to this Notice.
37. Its arguments made in relation to section 35(1)(b) were as follows:
- Disclosure would undermine the established principle of collective responsibility as set out in the Ministerial Code.<sup>5</sup>
  - It is particularly important, given the circumstances in which they are usually convened, that a safe space is preserved for ministerial discussion in COBR(A) meetings. Following any meetings Ministers can present a united front for defending and promoting agreed decisions which is strongly in the public interest.

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61402/ministerial-code-may-2010.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61402/ministerial-code-may-2010.pdf)

"The principle of collective responsibility, save where it is explicitly set aside, requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained." Paragraph 2.1



- Disclosure of attendees (“other than in a controlled manner in agreed circumstances”) would provide a counterproductive distraction whereby there would be unnecessary commentary as to who should attend and why. This remains a matter for ministers to organise at their discretion.
38. It also made the general point that, in this case, ministers had taken the decision to make a certain amount of information public about the COBR(A) meetings. This showed that weight had been given to the public interest in providing this information up to a point. The extent of this disclosure added weight to maintaining the exemption in relation to that which had been withheld.

### **The Commissioner’s position**

39. The complainant has submitted compelling arguments in favour of disclosure. The flooding on the Somerset Levels caused traumatic difficulties for residents and businesses alike. There are widespread concerns about an earlier decision to suspend dredging activities on the rivers that feed into the area. There are also widespread concerns about a perceived delay in providing an effective response. The complainant, a broadcast journalist whose work is focussed on the southwest region of England, has set out key questions: “How much did the government know? Why did they not react earlier? Were the councils to blame for not declaring emergencies earlier?”. There is, in the Commissioner’s view, a weighty public interest in understanding more about the specifics of the government’s response to the flooding. There is also a weighty public interest in tracking the government’s decision making chronologically as the disaster on the Somerset Levels unfolded. This would inform the ongoing debate about how the flooding crisis was handled. It would enhance the public’s understanding of how and when decisions were taken at the highest level.
40. However, the Commissioner thinks that there is a more compelling public interest in preserving the convention of collective responsibility as set out in the Ministerial Code.
41. He also thinks the Cabinet Office’s arguments about protecting a safe space for ministerial discussion carry significant weight here. This is particularly the case where the matter under discussion by ministers is being considered in the forum of COBR(A). For COBR(A) meetings to work effectively, the focus of work must be to respond to the emergency that has been deemed serious enough to warrant management at such a senior level. He agrees that disclosing minutes of such meetings that have been held so recently would create an unnecessary distraction for future meetings. Minutes would need to be drafted and agreed with a view to prompt publication. Inevitably, this would detract from the main

purpose of the minutes which is to record decision making as matters develop.

42. That said, the Commissioner does not think that these records can be withheld in perpetuity simply because they were created under the auspices of COBR(A). Given the catastrophic impact that the floods had on people, property and local businesses, he agrees that, with the passage of time, the public interest in protecting the safe space in which these particular discussions were held will weaken. By contrast, the public interest in knowing more about the government's decision making during the crisis is likely to remain very strong. The local community will continue to tackle the challenges of extreme weather on the Somerset Levels as they present themselves. Understanding more about how and why certain decisions were made is likely to be key. Disclosure would serve the public interest in increasing the public's understanding in this regard.

### **Section 35(1)(b) - Conclusion**

43. In light of the above, he has concluded that the public interest in maintaining section 35(1)(b) in relation to all the non-environmental information within the scope of the request outweighs the public interest in disclosure. He has reached this view by a narrow margin but has given particular weight to the fact that the information was created relatively recently before the request was made.

### **Section 35(1)(a) - Conclusion**

44. In considering section 35(1)(a), the Information Tribunal (in *The Department for Education and Skills vs The Information Commissioner and The Evening Standard* (EA/2006/0006))<sup>6</sup> 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. The Commissioner agrees that the safe space arguments set out above in relation to section 35(1)(b) are equally applicable in relation to section 35(1)(a) in this case.
45. The Commissioner also notes the points that the Cabinet Office made to him which make specific reference to the withheld information. These are set out in the Confidential Annex to this Notice. He agrees that these

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<sup>6</sup> <http://www.informationtribunal.gov.uk/DBFiles/Decision/i70/DFES.pdf>

points carry particular weight with reference to maintaining the exemption at section 35(1)(a).

46. The Commissioner has already concluded that the public interest in maintaining section 35(1)(b) outweighs the public interest the non-environmental information caught by the scope of this request. For completeness, he also agrees that the public interest in maintaining section 35(1)(a) applies to the same information.
47. As noted above, the Commissioner thinks that some of the withheld information is environmental information. By virtue of section 39(1), environmental information is exempt from disclosure under FOIA.<sup>7</sup> It falls to be considered under the EIR.
48. This notice will now address whether the Cabinet Office can rely on regulation 12(4)(e) as an exception to its duty to disclose the environmental information which falls within the scope of this request.

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

49. 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. It is subject to a balance of public interest test.
50. By virtue of regulation 12(8), communications between government departments will constitute internal communications for the purpose of the exception at regulation 12(4)(e).<sup>8</sup> 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.
51. As noted above and as explained in further detail in the Confidential Annex, only some of the withheld information is environmental information. The Commissioner is satisfied that, for example, emails exchanged about meeting arrangements are not environmental information. However, the information, where it is environmental

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<sup>7</sup> (1) Information is exempt information if the public authority holding it—  
(a) is obliged by environmental information regulations to make the information available to the public in accordance with the regulations, or  
(b) would be so obliged but for any exemption contained in the regulations.

<sup>8</sup> Regulation 12(8) states: "For the purposes of paragraph (4)(e), internal communications includes communications between government departments."

information, clearly constitutes an internal communication such that it falls within the definition at regulation 12(4)(e). It is a record of environmental information that is communicated between government departments as part of the COBR(A) meeting process that is described in the request.

52. In light of the above, the Commissioner has concluded that regulation 12(4)(e) is engaged in respect of environmental information contained in the withheld information. Regulation 12(4)(e) is subject to a balance of public interest test. It can only be relied upon as a basis for non-disclosure of requested environmental information if the public interest in maintaining the exception outweighs the public interest in disclosure.
53. As noted above, the Cabinet Office did not conclude that any of the withheld information was environmental. However, in its submissions to the Commissioner, it said that its public interest arguments in relation to FOIA section 35(1)(a) and (b) were also applicable where the Commissioner finds that the withheld information includes environmental information.

#### **Public interest in favour of maintaining the exception at 12(4)(e)**

54. The Cabinet Office said that its arguments as to the balance of public interest in relation to section 35(1)(a) and (b) read across to the application of section 12(4)(e).
55. For obvious reasons the complainant did not submit, nor did the Commissioner seek from him, arguments in favour of withholding the information.

#### **Public interest in favour of disclosure**

56. The Commissioner has considered the arguments made by both parties in relation to FOIA section 35. In addition, he has also considered the particular public interest in disclosing environmental information. Where the information relates to an environmental impact on human life, he notes that there is always a compelling public interest in disclosure.

#### **The Commissioner's position**

57. The Commissioner's view regarding the public interest in withholding recently created ministerial communications is set out above. This also applies to the environmental information that has been withheld in this case. He has taken into account the particular public interest in disclosure referred to in paragraph 56 above. He considers that the relative age of the information contributes greater weight to the argument in favour of maintaining the exception at regulation 12(4)(e).

**Regulation 12(4)(e) - Conclusion**

58. Having balanced the competing public interest factors in this case, the Commissioner has concluded that, in all the circumstances, the public interest in maintaining the exception outweighs that in disclosure of the withheld environmental information.

## Right of appeal

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59. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

60. 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.
61. 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 .....**

**Graham Smith**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**