

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

**Decision notice**

**Date:** 7 March 2017

**Public Authority:** Environment Agency  
**Address:** Ergon House  
Horseferry Road  
London  
SW1P 2AL

**Decision (including any steps ordered)**

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1. The complainant has requested correspondence relating to flood defences between the Environment Agency (EA) and other authorities from 1 January 2015 onwards. The EA refused to disclose the requested information citing regulations 12(4)(d) and 12(4)(e) of the EIR.
2. During the Commissioner's investigation some information was disclosed to the complainant. With regards to the remaining withheld information, the Commissioner is satisfied that regulation 12(4)(d) and 12(4)(e) of the EIR apply and that the public interest rests in maintaining these exceptions. She therefore does not require any further action to be taken.
3. The Commissioner has however recorded a breach of regulations 14(2) and 11 of the EIR in this case, as the EA failed to respond to the complainant's request within 20 working days and failed to respond to the complainant's request for an internal review within 40 working days.

## Request and response

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4. On 13 January 2016, the complainant wrote to the EA and requested information in the following terms:  
  
"1. Please provide copies of all correspondence relating to flood defences since 1 Jan 2015 between former Environment Agency chairman Sir Philip Dilley and:  
  
(a) Defra ministers  
  
(b) DCLG ministers  
  
(c) Scottish Environment Protection Agency Chief Executive Terry A'Hearn  
  
(d) Environment Agency Chief Executive Sir James Bevan  
  
2. Please provide copies of all correspondence relating to flood defences since 1 Jan 2015 between Environment Agency Chief Executive Sir James Bevan and:  
  
(a) Defra ministers  
  
(b) DCLG ministers  
  
(c) Scottish Environment Protection Agency Chief Executive Terry A'Hearn"
5. The EA responded on 2 June 2016 refusing to disclose a number of documents under regulations 12(4)(d) and 12(4)(e) of the EIR.
6. The complainant requested an internal review on 20 June 2016.
7. The EA carried out an internal review and notified the complainant of its findings on 12 September 2016. It upheld its application of regulations 12(4)(d) and 12(4)(e) of the EIR.

## Scope of the case

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8. The complainant contacted the Commissioner on 12 September 2016 to complain about the way his request for information had been handled. Specifically, the complainant disagreed with the application of regulation 12(4)(e) of the EIR to communications outside of the EA and believed these should be disclosed. Additionally, the complainant believed the

public interest test had not been considered fully and in his view the public interest rested in disclosure.

9. During the Commissioner's investigation the EA accepted that regulation 12(4)(e) of the EIR cannot apply to correspondence with DEFRA, as this correspondence does not constitute an internal communication. It therefore decided to disclose a letter from the Secretary of State to the then Chairman of the EA to the complainant.
10. The EA confirmed that it still wished to rely on regulation 12(4)(d) and 12(4)(e) of the EIR for all other remaining withheld information. It advised that there remained three categories of withheld information:
  - 1) Internal email chains regarding the preparations for the Environment, Food and Rural Affairs Committee (Efra). Withheld under regulations 12(4)(d) and 12(4)(e) of the EIR.
  - 2) Email chains advising DEFRA on the proposed contents of documents and press releases. Withheld under regulation 12(4)(d) of the EIR.
  - 3) An email chain from the then Chairman of the EA to the Chief Executive of the EA. Withheld under regulation 12(4)(e) of the EIR.

## Reasons for decision

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### Regulation 12(4)(e)

11. 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.
12. This exception is also subject to the public interest test. So, in addition to demonstrating that the withheld information constitutes internal communications, the EA needs to consider the arguments for and against disclosure and demonstrate that the public interest rests in maintaining this exception.
13. The EA explained that this request was made in the immediate aftermath of the major flooding events in late December 2015 and January 2016 in Cumbria, Lancashire and Yorkshire. The EA was still carrying out its emergency response to, and the recovery from, the severe damage caused by the flooding.
14. It stated that category one and three of the remaining withheld information outlined in paragraph 10 above comprises of emails that are wholly internal to the EA. They relate to the very recent flooding events

in Cumbria, Lancashire and Yorkshire and the EA's response to them. These communications were not circulated to any other external source or organisation.

15. The Commissioner has reviewed these emails and the various recipients and she is satisfied that they do constitute internal communications for the purpose of regulation 12(4)(e) of the EIR. The emails are wholly internal to the EA and were not circulated to or copied to any other external source or organisation.
16. The Commissioner notes that initially the EA applied this exception to communications with DEFRA and informed the complainant that it believed the EA and DEFRA were 'acting as one', as they both have responsibility for flood management in the immediacy of a flooding event and for future planning and remediation work. However, this approach was later altered. The EA accepted the Commissioner's view that such communications cannot be classed as 'internal' and it disclosed this information to the complainant.
17. As the Commissioner is satisfied that all emails within category one and three are internal communications for the purposes of regulation 12(4)(e) of the EIR, she has gone on to consider the public interest test.
18. The EA stated that it recognised the public interest factors in favour of disclosure. It stated that there is, understandably, significant public interest in flooding events, how they are managed and responded to and what procedures or plans are in place or being developed to plan for future flood management. The EA confirmed that it did receive a number of requests around the same time from the public and the media relating to these events. It accepts that disclosure of this information would assist the public in understanding more closely the decisions that have been taken, how effective these were and what can be done going forward to improve the response of public authorities responsible for the management of flooding.
19. However, it considers the public interest factors in favour of maintaining the exemption are stronger in this case. The EA stated that the request was made within weeks of the flooding events in Cumbria, Lancashire and Yorkshire and at a time when the EA was still dealing with the aftermath of such events. It confirmed that disclosure of the requested information at this time would have caused confusion, been a waste of public resources in responding to such confusion rather than dealing with the issues at hand and caused a significant amount of distraction and diversion away from the immediate aftermath, the clean-up and its overall response to the emergency.

20. At the time of the request the EA was working hard to deal with the flooding events. It was still processing, discussing and finalising various matters relating to these events and its response. It required the safe space away from public scrutiny at this time to carry out its responsibilities and functions. The issues were very much live and ongoing at the time of the request and safe space was required at this time to provide the best response possible.
21. The Commissioner agrees with the EA that, in this case, the public interest in disclosure is outweighed by the public interest in maintaining this exception due to the specific timing of this request. She considers there are strong public interest arguments on both sides but because the request was made in the immediate aftermath of the flooding events and the relevant authorities were still dealing with these emergencies, the public interest rests in favour of maintaining this exception.
22. The Commissioner recognises the significant public interest in flood management and the reaction of public authorities to flooding events in the UK. She is aware of the severe damage such events do cause to the environment and members of the public. There is significant public interest in gaining access to information which enables the public to understand more clearly how such events are managed, what the response will be and what is being done to prevent and manage such events more effectively in the future.
23. However, in this case, the request was made at a time when the EA was still responding to significant flooding events in Cumbria, Yorkshire and Lancashire. At the time of the request the EA was still in the process of discussing, debating and formulating its response to various matters relating to these events and required the free and private space to do that. The Commissioner accepts in this case that disclosure would have hindered this process and discouraged officers from exchanging their views freely and frankly with the speed and candour that was required. Disclosure at this time would have resulted in a number of enquiries from concerned members of the public and media. Such enquiries at this time would have been resulted in a significant diversion away from managing the flooding itself.

#### **Regulation 12(4)(d)**

24. Regulation 12(4)(d) of the EIR states that a public authority can refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or incomplete data.
25. Again, this exception is subject to the public interest test. So, in addition to demonstrating that the information withheld under this exception

relates to material in the course of completion or to unfinished documents, the EA must consider the public interest for and against disclosure and demonstrate in this case that the public interest rests in maintaining this exception.

26. This exception has been applied to categories one and two but as the Commissioner has already decided that category one is exempt from disclosure under regulation 12(4)(e) of the EIR, she will only consider category two of paragraph 10 above.
27. The EA explained that category two consists of a chain of emails advising DEFRA on the proposed contents of documents; a draft of an article in the Yorkshire Post, statements about funds for flood defence and flood resilience and terms of reference for the Cumbria Floods Partnership. The EA confirmed that at the time of the request all were still in the course of completion.
28. As the EA has confirmed to the Commissioner that the contents of these emails were still in draft form and therefore in the course of completion, waiting amendments, additions and the critique of staff at the time of the request, she is satisfied that regulation 12(4)(d) of the EIR applies.
29. The Commissioner will now go on to consider the public interest test.
30. Again the EA stated that it recognised the significant public interest in favour of disclosure in this case. It stated that the arguments it presented in support of the public interest test under regulation 12(4)(e) above apply equally here.
31. However, it is of the view that the public interest rests in maintaining this exception in this case. It again referred to the timing of the request and how this was made within weeks of significant flooding events in the UK and the need for safe space to discuss, debate and formulate its response to them and future policy relating to overall flood management.
32. It explained that the contents of these emails relate to high level discussions that were taking place internally and with DEFRA about the development of strategy in Cumbria and nationally, the formulation of the response to the media about flooding in Yorkshire during the emergency and the funding for future flood work. All of which were in draft form and subject to change.
33. If disclosure of this information had taken place at the time of the request it would have resulted in a significant diversion away from this essential work towards enquiries from the public and media.

34. The Commissioner understands the public interest arguments in favour of disclosure are strong in this case. However, due to the timing of the request and the very fact that the contents of the withheld information being considered here were incomplete, in draft form and subject to change, the Commissioner considers the public interest rests in favour of maintaining this exception.
35. The Commissioner considers the need for private thinking space at the time of the request was significant. There had been major flooding events in the UK at this time, the EA was in the process of dealing with them and debating and formulating its strategy. The Commissioner considers the EA required the safe space to address these issues quickly, candidly, openly and effectively as possible without the fear of public scrutiny and interference and this could not have been achieved, or at the very least it would have been hindered, if disclosure had taken place at the time of the request.

### **Procedural matters**

36. The EA failed to respond to the complainant's request within 20 working days of receipt. The Commissioner therefore finds the EA in breach of regulation 14(2) of the EIR.
37. The EA did not respond to the complainant's request for internal review within 40 working days. The Commissioner therefore finds the EA in breach of regulation 11 of the EIR.

## Right of appeal

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38. 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)

39. 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.
40. 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** .....

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**SK9 5AF**