

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

Date: 22 March 2021

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

Decision (including any steps ordered)

1. The complainant has requested particular information regarding climate change held by the National Resilience Capabilities Programme or the National Security Council: Ministerial Sub-Committee on Resilience. The Cabinet Office response to this was considerably delayed but, following service of a decision notice by the Commissioner, it refused to confirm or deny whether it held the requested information citing FOIA section 24(2) (national security) and its equivalent in EIR (regulation 12(5)(a)) as its basis for doing so. It upheld this at internal review.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on FOIA section 24(2) and EIR regulation 12(5)(a) as its basis for refusing to confirm or deny whether it holds the requested information.
3. No steps are required.

Request and response

4. On 3 June 2019 the complainant requested information of the following description:

"I am writing to request under the Environmental Information Regulations:

- 1) Has the National Resilience Capabilities Programme or the National Security Council: Ministerial Sub-Committee on Resilience developed contingency plans for a climate emergency of any kind? This may

include plans relating to extreme flooding or a wider climate disaster, for example rising temperatures causing instability or other threats to human life or society?

2) Has climate change been discussed at the National Security Council: Ministerial Sub-Committee on Resilience or any of its sub groups?

3) What records relating to climate change have been created by the National Security Council: Ministerial Sub-Committee on Resilience? Please include details of any memos, minutes or other relevant documents."

5. The complainant then explained why they thought the information described in the request would be caught by EIR and added:

I would like to refer you to EIR 2(1)(f) which states that environmental information is any material on "state of human health and safety" and "conditions of human life inasmuch as they are or may be affected by the state the elements of the environment".

I would argue that this encompasses the type of security material I am requesting, which are based on the government's assessments of the possible outcomes of climate change and are therefore clearly linked to "human health and safety" and the "conditions of human life".

Furthermore, any security issues or conflicts that arise as a result of climate change are also impacts on "human health and safety" and "conditions of human life" and as such fall within the scope of EIR.

6. The Commissioner would clarify at this point that the requests set out in paragraph 4 above are three individual information requests although they clearly link to each other.
7. On 5 November 2019 the Cabinet Office responded. There were considerable delays that were addressed in the Commissioner's decision notice FER0857782.¹
8. In its response, the Cabinet Office refused to confirm or deny that it held the requested information and cited the national security exemption in FOIA (section 24(2)) and its equivalent in EIR (regulation 12(6) by virtue of regulation 12(5)(a)) as its basis for doing so.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2615714/fer0857782.pdf>

9. The complainant requested an internal review on 6 January 2020. The Cabinet Office sent him the outcome of its internal review on 31 January 2020. It upheld its original position and explained that to maintain its "neither confirm nor deny" position ("NCND") it needed to cited both FOIA and EIR.

Scope of the case

10. The complainant contacted the Commissioner on 31 January 2020 to complain about the way his request for information had been handled.
11. The Commissioner has considered whether the Cabinet Office is entitled to refuse to confirm or deny whether it holds the requested information on the basis of both FOIA section 24(2) and EIR regulation 12(6) by virtue of regulation 12(5)(a). The information described in the requests could well include both environmental and non-environmental information and therefore, regardless of whether it is actually held or not, the Cabinet Office should consider the requests under both pieces of legislation.
12. For the avoidance of doubt, the Commissioner has not sought to establish whether the Cabinet Office does or does not hold any information described in the requests. That is not the question at issue here. The question at issue is whether the Cabinet Office is obliged to provide confirmation or denial that it holds the information described in the requests.

Reasons for decision

13. Section 24(2) provides an exemption from the duty to confirm or deny where this is required for the purpose of safeguarding national security.
14. FOIA does not define the term national security. However in *Norman Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045 4 April 2007) the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, concerning whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords' observations as follows:
 - 'national security' means the security of the United Kingdom and its people;
 - the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;
 - the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
 - action against a foreign state may be capable indirectly of affecting the security of the UK; and,
 - reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the UK's national security.
15. The approach that the Commissioner takes to the term 'required' as it is used in this exemption is that this means 'reasonably necessary'. In effect, this means that there has to be a risk of harm to national security for the exemption to be relied upon, but there is no need for a public authority to prove that there is a specific, direct or imminent threat.
16. Therefore, section 24(2) is engaged if the exemption from the duty to confirm or deny is reasonably necessary for the purpose of safeguarding national security. The Commissioner considers that section 24(2) should be interpreted so that it is only necessary for a public authority to show either a confirmation or a denial of whether requested information is held would be likely to harm national security.

Cabinet Office position

17. In its response to the Commissioner, the Cabinet Office explained that information created by the sub-committee referred to in the request deals with "high-level, very sensitive and important matters relating the country's security and resilience". Confirming or denying whether this

information was discussed would infer the perceived importance of this subject in the context of national security. It added that responding to request 3 would indicate how frequently the matter was discussed. It also explained that "risks are not discussed in isolation, and any discussion on climate change would consider the risks and capabilities associated with it (e.g. flooding, drought, unexpected high levels of death)."

18. It also stressed the importance of maintaining a space where committee members are able to discuss frankly matters pertaining to national security (including potential threats facing the UK). It described the committee as "the main forum for collective discussion on the UK's resilience and the government's contingency plans".

The Commissioner's conclusion – engaging the exemption

19. The work of the sub-committee referred to in the request is explained in further detail on the gov.uk webpages.² Assessment of resilience capability (which is the programme also referred to in the request) is overseen by the sub-committee. The Commissioner is satisfied that if the programme also referred to in the request had "developed contingency plans for a climate emergency of any kind", this information would be held by the sub-committee that oversees its work.
20. The Commissioner would observe that the one-off provision of confirmation or denial as to whether there were e.g., minutes, would not, as the Cabinet Office seems to suggest in its submissions, indicate the frequency or otherwise that this matter had been discussed in the sub-committee. It would, instead, simply indicate whether or not the information described in request 3 was held at all.
21. The Commissioner recognises that the routine confirmation or denial as to whether specific subjects were recorded as having been covered would, of itself, paint a picture of what subjects were considered at the meeting.
22. The Cabinet Office's arguments against the publication of minutes as described are not relevant here because the matter at issue is the

² <https://www.gov.uk/guidance/preparation-and-planning-for-emergencies-the-capabilities-programme>

obligation to provide confirmation or denial and not the obligation to disclose.

23. However, the Cabinet Office further explained that confirmation or denial would "provide information on the government's immediate priorities on resilience and contingency planning". Its focus in putting this argument related to concerns about the development (through regular confirmation and denial) of a list of what the UK did and did not prioritise when developing its national security strategy. While recognising the positives of transparency it stressed that disclosure may also be useful to what it referred to as "hostile actors" who would be able to "build a picture of potential weaknesses in the UK's national security strategy. This could put the general public at risk, and also hamper any government response to an emergency".
24. The Commissioner agrees that confirming or denial as to whether the information described in the request is held would reveal the extent to which this subject has been considered as a matter relevant to the work of the committee. She also agrees that avoiding doing so is required in order to safeguard national security because it avoids identifying what is and is not seen as a national security priority. Where it were to do so, she accepts that this would make it easier for "hostile actors" to identify strategic weaknesses. The Commissioner is therefore satisfied that the exemption is engaged.
25. Section 24(2) is a qualified exemption which means that a public authority can only rely on it if the public interest in doing so outweighs the public interest in disclosure.

Public interest test

26. The Cabinet Office recognised "a general public interest in openness in government because this increases public trust in and engagement with the government". It also acknowledged "the public interest in policies surrounding climate change and contingency plans to address this". While acknowledging that the public interest in providing confirmation or denial was "not insignificant", it argued that public interest in neither confirming nor denying whether this information was held was much stronger.
27. Citing the Commissioner's own guidance in support of its position, it³ said that there was an "obvious and weighty" public interest in

³ https://ico.org.uk/media/for-organisations/documents/1174/safeguarding_national_security_section_24_foi.pdf

maintaining national security. It reiterated the potential harms to national security that confirmation or denial would give rise to.

28. It recognised the potential for exceptional circumstances which would weigh the balance of public interest in favour of disclosure but did not consider that this argument applied here.
29. The complainant considers that the complainant has struck the wrong balance in this case. His arguments focus specifically on the EIR but include the assertion that the Cabinet Office "both understates the public interest reasons for disclosure and overstates the apparent threats to national security".

The Commissioner's decision – public interest test

30. The Commissioner recognises the strength of the complainant's argument. Climate change may result in extreme weather events which would have practical negative consequences for the country which may be short or long term. There is a strong public interest in knowing whether this has been considered as a matter of national security as well as, for example, an economic issue.
31. However, the Commissioner recognises that confirmation or denial would create a potential for bad actors to exploit knowledge of the UK's national security priorities. This is contrary to the public interest such that it outweighs the public interest in providing that confirmation or denial. The Commissioner notes that the Cabinet Office has not sought to elevate this to a de facto class based exemption in respect of this information. It has recognised that there may be circumstances when the balance of public interest would be weighted differently. She agrees with this analysis.
32. In light of the above, the Commissioner is satisfied that the Cabinet Office is entitled to rely on section 24(2) and is not obliged to provide confirmation or denial as to whether the requested information is held.

Environmental Information Regulations – regulation 12(6) by virtue of regulation 12(5)(a)

33. The EIR only applies to environmental information as defined - full details of which can be accessed at Note 5 below. The Commissioner is satisfied that the requested information (if held) could include environmental information. She agrees with the complainant's own analysis in paragraph 5 above as to why such information would be environmental information.
34. Under regulation 12(6) by virtue of regulation 12(5)(a), a public authority is not obliged to provide confirmation or denial where this

would adversely affect international relations; defence; national security; or public safety.⁴

35. The Cabinet Office's position is that by confirming or denying whether it holds such information, this would reveal whether or not the sub-Committee and the National Resilience Capabilities Programme which is overseen by the sub-Committee has discussed contingency plans for a climate emergency of any kind.
36. For reasons outlined above in respect of non-environmental information which it may or may not hold within the scope of the requests, the Commissioner is satisfied that the Cabinet Office could rely on regulation 12(6) by virtue of regulation 12(5)(a) in respect of any environmental information it may or may not hold in respect of the request, subject to consideration of the balance of public interest
37. On the question of the public interest, the Cabinet Office acknowledges the factors favouring confirmation or denial as set out above for any non-environmental information it might hold within the scope of the request. However, it also acknowledged a public interest in a sustainable environment and the need for public bodies to carry out good decision-making to uphold standards and ensure the best use of public and environmental resources.
38. However, reiterating the arguments it had made for any non-environmental information, it also added that given that there is an NCND provision in the EIR which can be applied in limited circumstances, it believed that such a possibility was recognised in the legislation and that this was such a circumstance.
39. The complainant argued that refusal to provide confirmation or denial and, subsequently, disclosure undermines "the Aarhus Convention [from which the EIR are derived], denying UK citizens the right to be informed about, and participate in, decision-making around climate change".

⁴ <https://www.legislation.gov.uk/ukxi/2004/3391/regulation/12>

40. The Commissioner recognises the public interest in ensuring proper consideration of the impact on the environment of any government decision. She also agrees that there is a strong public interest in transparency to ensure greater accountability on this point. However, in the circumstances of this case, she agrees with the Cabinet Office that the public interest in avoiding a negative impact on national security is greater in this case. She has therefore concluded that the Cabinet Office is entitled to rely on regulation 12(6) by virtue of regulation 12(5)(a) as its basis for refusing to provide confirmation or denial. In reaching this view, she recognises that the EIR include an explicit presumption in favour of disclosure (or in providing confirmation or denial, as is the case here).

Other matters

41. The Commissioner remains disappointed in the delays which resulted in the issuing of a decision notice to order the Cabinet Office to respond to the original request.

Right of appeal

42. 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 123 4504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

43. 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.
44. 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

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