

## Environmental Information Regulations 2004

### Decision Notice

**Date: 8 December 2009**

**Public Authority:** Cabinet Office  
**Address:** Admiralty Arch  
North Entrance  
The Mall, London  
SW1A 2WH

### Summary

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The complainant asked the Cabinet Office for information about the Government's 2005-2006 Energy Review, including the 'first cut of the review', any briefing received by the public authority before a conference of the Confederation of British Industry, and 'full details' of a meeting with the Energy Review Team. The Cabinet Office responded that some of the information was already in the public domain; the remainder was withheld under regulation 12(4)(e) of the Environmental Information Regulations (EIR) and/or section 35(1)(a) and (b) of the Freedom of Information Act 2000 ('the Act'). Some further information comprising names of those involved in the Review was released after the complainant made a renewed request some time later. The Commissioner decided that all of the withheld information was environmental information, and that some of it was not correctly withheld under regulation 12(4)(e) of the EIR. The Commissioner required the Cabinet Office to disclose the information which had been incorrectly withheld

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (FOIA). This Notice sets out his decision. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the 'Commissioner'). In effect, the enforcement provisions of Part 4 of the FOIA are imported into the EIR.

## The Request

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### *Initial request*

2. The complainant wrote to the Prime Minister on 18 May 2006 requesting the following information under the FOIA and the EIR:

*'1. A full copy of the "first cut of the review" as referred to in your speech to the CBI;*

*1. A full copy of any, or any other, briefing received by your office prior to the CBI conference in connection with progress on the Energy Review;*

*2. Full details of the meeting on 16 February with the Energy Review Team including, in particular:*

- a. The names and positions of those present at the meeting;*
- b. Whether there exists any agenda for, or record of, the meeting (whether formal minutes or otherwise);*
- c. A copy of any such agenda and record.'*

(The complainant subsequently clarified that the Energy Review Team meeting took place on 15 May rather than 16 February 2006.)

3. The Cabinet Office replied on 23 June 2006. It stated that some of the information, which it had collated and attached to the letter, was already in the public domain. It claimed that the remainder was being withheld as falling under regulation 12(4)(e) of the EIR and, to the extent that it was not environmental information, under section 35(1)(a) and (b) of the FOIA.
4. The complainant wrote back to the Cabinet Office on 5 July 2006. He raised a number of objections and requested an internal review of the decision.
5. The Cabinet Office replied on 21 August 2006. It provided details of where the publicly available information could be accessed, and maintained the original decision that the requested information was exempt by virtue of regulation 12(4)(e) and section 35.

### *'Renewed' request*

6. On 20 September 2007 the complainant made another request for the same information, stating that the balance of the public interest might have changed since the original request was refused.
7. The Cabinet Office replied with an undated letter. It informed the complainant that it had reconsidered the balance of the public interest when the Commissioner had contacted it on 18 September 2007 and had now decided that it would be appropriate to release the names of Ministers, Special Advisers and one of the Senior Civil Servants who had attended the Energy Review meeting on 15 May

2006, which it attached. It said that other individual civil servants' names had been redacted on the grounds that releasing them would be potentially detrimental to free and frank advice to Ministers. The name of the most senior civil servant had been released owing to his *'public association with the Review'*. It decided that, for the remainder of the information, the public interest favoured maintaining the exemption under section 35(1)(a) and (b) of FOIA and the exception under regulation 12(4)(e) of the EIR. It also expressed its view that a 'reasonable interval' had not elapsed since the complainant's previous request, as required by section 14(2) of FOIA: *'a reasonable interval cannot be said to have elapsed until after the regulatory processes for the consideration of the original request have come to an end'*. It notified the complainant of its internal review procedure and of his right to complain to the Commissioner.

8. The complainant requested an internal review on 22 October 2007, pointing out that section 14(2) of the FOIA did not apply to environmental information.
9. The Cabinet Office provided its decision, to uphold the refusal notice, on 17 December 2007. It stated that the Energy Review report was now available at: [www.berr.gov.uk](http://www.berr.gov.uk).

## The Investigation

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### Scope of the case

10. In the meantime, the complainant had contacted the Commissioner on 4 September 2006 to complain about the way his original request for information had been handled. He specifically asked the Commissioner to consider the points which he had made in his original internal review request, which were that:
  - a. the Cabinet Office had failed to deal with each element of the request separately;
  - b. it was not clear where the information which the Cabinet Office claimed was in the public domain could be accessed;
  - c. not all of the information fell within the category of internal communications so as to engage regulation 12(4)(e);
  - d. the documents which had been withheld should be 'identified' *'in such a manner that we can decide whether or not to appeal'* to the Commissioner;
  - e. the Cabinet Office had made no attempt to provide redacted documents;
  - f. no details of the meeting with the Energy Review team on 15 May 2005 had been provided (the complainant wanted an agenda and minutes);
  - g. details of senior officials should have been provided;

- h. the Cabinet Office's assessment of the public interest test had been defective.

He also complained (i) that the Cabinet Office had failed to confirm properly whether it held the requested information.

11. While the complainant's initial request was made on 18 May 2006, it subsequently 'renewed' the request on 20 September 2007. The Commissioner has taken the renewed request as providing the relevant date for considering the disclosure outcome and the public interest test, since he considers that in this case the balance of the public interest in disclosure is strongest at that later date. He has also made procedural comments on the 2006 request.

## Chronology

12. The Commissioner wrote to the complainant and the Cabinet Office on 18 September 2007. He asked the Cabinet Office to provide him with a copy of the withheld information.
13. The Cabinet Office replied on 19 October 2007. It indicated that, given its sensitivity, the Commissioner should view the information on site at the premises of the Cabinet Office.
14. The Commissioner wrote back to the Cabinet Office on 21 November 2007 requesting the withheld information again. He expressed his view that it was appropriate to view information on site only in exceptional circumstances, which did not exist in this case.
15. The Cabinet Office responded on 30 November 2007, again declining to send the information on the grounds that it included '*extremely sensitive*' information.
16. The Commissioner wrote again to the Cabinet Office on 5 December 2007, indicating that he would issue an Information Notice requiring production of the information if the Cabinet Office failed to provide it.
17. On 10 December 2007 the Cabinet Office sent part of the withheld information to the Commissioner.
18. The complainant informed the Commissioner on 20 December 2007 of his 'renewed' request.
19. The Commissioner issued an Information Notice on 8 January 2007 requiring the Cabinet Office to send him the remaining withheld information.
20. The Commissioner subsequently discussed with the Cabinet Office options for secure transit and perusal of the information on and off site.
21. On 17 April 2008 the complainant wrote to the Commissioner complaining about lack of progress in the case.

22. The Commissioner provided an update to the complainant on 18 April 2008.
23. He subsequently made arrangements with the Cabinet Office for the withheld information to be perused. A representative of the Commissioner attended the premises of the Cabinet Office on 4 June 2008 for this purpose.

## Analysis

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### Background

24. According to information on the website<sup>1</sup> of the Department for Business, Innovation & Skills, the Government announced a review in November 2005 of progress against the UK's medium and long-term energy policy goals in the 2003 Energy White Paper. The Energy Review team was led by the Minister for Energy. As part of the Energy Review, the Government launched an Energy Review consultation on 23 January 2006. The accompanying document, *'Our Energy Challenge: Securing clean, affordable energy for the long-term'*, sought views on the measures needed by 2020 and beyond, to meet the energy goals set out in the 2003 Energy White Paper. The consultation took place over three months, finishing on 14 April 2006. The Government's report on the Energy Review, *'The Energy Challenge'*, was released on 11 July 2006.
25. On 15 May 2006 the Prime Minister held a meeting with the government's Energy Review Team. The following day he delivered a speech to the Confederation of British Industry (CBI) at which he made statements which the complainant in this case considered signalled an intention to take decisions on nuclear policy which pre-empted the findings of the Energy Review consultation exercise. The complainant's request was for a copy of the 'first cut of the review' from the Energy Review Team, details of the meeting with the Energy Review Team, and any briefings received by the Prime Minister's office prior to the CBI conference.

### Findings of fact

26. In its refusal notice the Cabinet Office claimed that some of the requested information was being withheld by reference to regulation 12(4)(e) of the EIR or, to the extent that any of it was not environmental information, by reference to section 35(1)(a) and (b) of the FOIA. The Commissioner has considered to what extent the withheld information is environmental information.
27. Regulation 2(1) of the EIR defines 'environmental information' as having the same meaning as in Article 2(1) of Council Directive 2003/4/EC:

*'namely any information in written, visual, aural, electronic or any other material form on –*

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<sup>1</sup> [www.berr.gov.uk](http://www.berr.gov.uk)

*(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)'.*

28. The Commissioner has had sight of the requested information. It comprises communications between Ministers, internal briefings for the Prime Minister, suggested policy measures, minutes and administration documents, all related to the Energy Review. The Commissioner believes that this information variously falls within regulation 2(1)(b), (c), (e) and (f) of the EIR. However, since he is also satisfied that all of it falls within regulation 2(1)(c) he has restricted his analysis to that paragraph.

29. The Commissioner takes that view that, to be environmental information under regulation 2(1)(c), the requested information must, first, be 'on' a measure or an activity, and secondly, the measure or activity (not the information itself) must affect, or be likely to affect, the elements and factors in regulation 2(1)(a) and (b), or be designed to protect the elements in regulation 2(1)(a).

30. In this case, the Commissioner has concluded that, since the requested information related to past and future energy policy, it fell within the definition of 'policies, legislation, plans, programmes [etc]' referred to in regulation 2(1)(c). Accordingly, it did indeed constitute information on a relevant 'measure' for the purposes of regulation 2(1)(c). The Commissioner is also satisfied that the information also related to relevant 'activities' for the purposes of regulation 2(1)(c).



31. The EIR stipulates that information about the measure is not environmental information unless the measure is affecting (or likely to affect) or protecting the elements of the environment cited in regulation 2(1)(a). The Commissioner takes the view that there must be some evidence that the factor would have the supposed effect. In this case, the Commissioner is satisfied that the measures and activities which the withheld information bears on were indeed likely to affect the state of elements of the environment falling within regulation 2(1)(a), particularly by way of the impact of future energy policy on the generation of energy, CO<sub>2</sub> emissions and waste. Accordingly, all of the requested information constitutes environmental information within the meaning of the EIR. The Commissioner has not therefore had cause to consider the application of FOIA in this case.

### **Exception – regulation 12(4)(e)**

32. Regulation 12(4)(e) of the EIR states:

*'For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that -...*

*...(e) the request involves the disclosure of internal communications.'*

Regulation 12(8) states:

*'For the purposes of paragraph (4)(e), internal communications includes communications between government departments.'*

33. In this case, the information which the Cabinet Office withheld as being exempt under regulation 12(4)(e) comprised communications between Ministers, internal briefings for the Prime Minister, suggested policy measures, minutes and administration documents. The Commissioner takes the view that 'communications' is a broad category and will encompass any information intended to be communicated to others, or placed on file for others to consult. The effect of regulation 12(8) is to include communications between two separate government departments. The Commissioner is satisfied that all of the information withheld in this case fell within this definition and therefore engaged regulation 12(4)(e).

34. In his letter of 5 July 2006 the complainant disagreed with the proposition that communications between separate government departments falls within regulation 12(4)(e):

*'communications between government departments do not fall within the internal communication exception under Council Directive 2003/4/EC, and the Environmental Information Regulations 2004 incorrectly transpose the directive in this respect.'*

The Cabinet Office informed the Commissioner that it disagreed with the complainant's contention in this regard, since the issue was expressly determined by the Information Tribunal in the case *Friends of the Earth v Information*

*Commissioner and Export Credits Guarantee Department (EA/2006/0073)*. The Tribunal stated that it *'finds no inconsistency between the Directive and regulation 12(4)(e) read with regulation 12(8)...'*. In the circumstances, the Commissioner accepts that the withheld information in this case comprising communications between government departments does in fact engage the exception in regulation 12(4)(e).

### **Public interest test**

35. Since regulation 12(4)(e) is a class based exemption there is no need for a public authority to demonstrate that disclosure will cause any prejudice. However, it is a qualified exception and therefore subject to a public interest test, as set out in regulation 12(1)(b) of the EIR, which states that a public authority may refuse to disclose requested environmental information if:

*'in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information'*.

The main aim of the Regulations is to provide greater access to environmental information than has been possible previously and regulation 12(2) directs public authorities to apply a presumption in favour of disclosure. A similar instruction is to be found in Article 4(2) of the Directive, namely, *'the grounds for refusal...shall be interpreted in a restrictive way...'*

36. The initial request was made on 18 May 2006, but the complainant 'renewed' the request on 20 September 2007. The Commissioner has decided that the balance of the public interest was more favourable to disclosure at the time of the renewed request, and his analysis of the public interest is therefore directed at the situation at that time.
37. In its undated refusal notice in response to the complainant's renewed request, the Cabinet Office explained its assessment of the public interest test. It explained that it had now decided to release the names of Ministers and some officials attending the Energy Review meeting, but had redacted the names of all civil servants except the head of the Energy Review Team. In relation to the remaining information, it accepted that because of their impact on the lives of citizens there was a public interest in the deliberations of Ministers being transparent, and therefore more accountable; and that increased public knowledge could make the public contribution to the policy-making process more effective and broad-based.
38. On the other hand, it identified the factors in favour of maintaining the exception. First, it noted the public interest in Ministers and their advisers being able to debate issues relating to policy formulation freely and in confidence *'while reaching a decision'* – a full and frank exchange of views which might be inhibited by the possibility of disclosure, thereby compromising the formulation and development of government policy and the convention of Ministerial collective responsibility (the 'safe space' argument). Secondly, *'If Ministers and their advisers knew or thought that once a decision was reached, their communications in arriving at that point were to be disclosed, they might be less*



*candid in expressing their views at the time*', which would inhibit the full and frank exchange of views (the 'chilling effect' argument). Thirdly, it claimed that eroding the space within which policy is developed would undermine *'the convention of Ministerial collective responsibility for Government policy'*, which is fundamental to the continued effectiveness of government and therefore the public interest. It reiterated these arguments in its internal review letter 17 December 2007.

39. In response to the Cabinet Office's refusal notice issued in response to the original request, the complainant claimed that its public interest test was only 'general'. As an argument in favour of disclosure he pointed out that the Prime Minister's announcement that he had seen a 'first cut' of the review, suggesting that he had formed a clear view on nuclear power, had ignited a public debate on a matter of crucial importance, and that there was therefore a strong public interest in ensuring that this debate was fully informed. In his complaint to the Commissioner he claimed that the Cabinet Office had failed to give adequate weight to the factors favouring disclosure, in particular the importance of the issue; the context in which the information was referred to (a speech to the CBI); the fact that it was the Prime Minister making the statement; and the controversial nature of the statement. The complainant also denied that civil servants or Ministers would be less candid in expressing their views were their names to be disclosed.

40. The Commissioner takes the view that there is a strong inherent public interest in releasing environmental information. It has long been recognised that in order to protect the environment it is important for people to have access to environmental information, to be able to participate in environmental decision making and have access to justice. In the words of the current European Directive (2003/4/EC):

*'Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment'.*

41. The Commissioner considers that there is also a general public interest in understanding how government formulates policy and in ensuring a well-informed public debate on important issues. In particular, there is a strong public interest in disclosing information where to do so would help determine whether public authorities are acting appropriately. In this case, the Commissioner accepts the complainant's point that there are strong public interest factors in favour of disclosure because of the importance of the information to the public debate about the United Kingdom's long-term energy strategy and to the public's ability to contribute to the democratic process of policy formation.

42. The Commissioner also notes the importance of Energy Review to the UK strategy to reduce CO<sub>2</sub> emissions. The EIR clearly places a high level of importance on disclosure of information relating to emissions, as regulation 12(9) disallows the reliance on certain exemptions when the information relates to information on emissions into environment. There is therefore a particularly strong

public interest in disclosure of information relating to measures or activities that will have an affect on emissions.

43. On the other hand, the Commissioner recognises that there are a number of factors that may weigh in favour of maintaining the regulation 12(4)(e) exception.
44. One potential public interest factor, raised by the Cabinet Office, is that related to the 'safe space'. This was identified in the Information Tribunal case of *Scotland Office v the Information Commissioner* (EA/ 2007/0070) as '*the importance of preserving confidentiality of policy discussion in the interest of good government*'; in other words, the idea that the policy making process should be protected while it is ongoing in order to prevent it being hindered by lobbying and media involvement. However, in *DBERR v the Information Commissioner and Friends of the Earth* (EA/2007/0072) the Tribunal commented that:

*'This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public.'*

45. The 'safe space' argument is based on the premise that it is in the public interest for Ministers to be able to have a full and open debate away from external scrutiny to enable them to reach an agreed position. Once an issue has been determined and a collective position agreed then 'safe space' arguments will tend to fall away. In this case, the Government's report on the Energy Review was released on 11 July 2006. Therefore, while the strategic decisions had not been formally taken by the time that the complainant made the first request on 18 May 2006, it had been taken at the time of the renewed request on 20 September 2007 (when further information was released). The Commissioner is therefore satisfied that, by the time of the renewed request, the public interest in maintaining a 'safe space' had substantially diminished, and he therefore believes that this factor merits very little or no weight in the assessment of the public interest. The Cabinet Office have provided no convincing evidence or explanation as to how disclosure of the information related to the Energy Review would impact on safe space for other future energy related policy development.
46. Another possible public interest factor concerns the 'chilling effect' argument, that is, the possibility that disclosure of information will reduce the frankness and consequently the quality of debate and advice. In this case the chilling effect might inhibit further debate between Ministers on ongoing energy policy, as well as deterring the frankness and candour of other parties dealing with different policy debates in the future.
47. The Commissioner takes the view that 'chilling effect' arguments should be given appropriate weight in the public interest test, by reference to the requested information in question and circumstances of the case. In this regard he notes the Information Tribunal case of *DfES v the Commissioner and the Evening Standard* (EA/2006/0006) (paragraph 75, principle i), commended as a statement of principle by the High Court in the case of *Friends of the Earth v The Information Commissioner and Export Credits Guarantee Department* ([2008] EWHC 638 (Admin)):

*'There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case. It is no part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between.'*

48. However, the Commissioner also notes that the Information Tribunal has generally not given significant weight to 'chilling effect' arguments. For example, in the case of *Foreign and Commonwealth Office v The Information Commissioner* (EA/2007/0047) the Tribunal indicated that:

*'we adopt two points of general principle which were expressed in the decision in HM Treasury v the Information Commissioner EA/2007/0001. These were first, that it was the passing into the law of the FOIA that generated any chilling effect, no Civil Servant could thereafter expect that all information affecting government decision making would necessarily remain confidential.... Secondly, the Tribunal could place some reliance in the courage and independence of Civil Servants, especially senior ones, in continuing to give robust and independent advice even in the face of a risk of publicity.'*

49. Furthermore, the Commissioner considers that the timing of the request will be crucial. The Information Tribunal acknowledged this in the Environmental Information Regulations case of *Friends of the Earth v The information Commissioner and Export Credits Guarantee Department*, which related to government departmental comments concerning regulation 12(4)(e) as applied to a strategic oil project:

*'The Tribunal is simply not willing to accept .....that disclosure of the 2003 inter-departmental responses in March 2005 was likely to pose a threat to the candour of further deliberations'* (paragraph 74).

50. Similarly, as the impact of the particular 'chilling effect' gets progressively wider, the Commissioner considers that it will be more difficult for convincing arguments of this nature to be sustained. This is particularly the case for information where the process of policy formulation or development is complete but it is claimed that historic issues would affect the frankness and candour of contributions to future policy debate. In this case, the Commissioner has attributed little weight to the argument that disclosure of information in this case might inhibit Ministers in their debates about other policies in the future, because the Cabinet Office itself did not specify how disclosure here would have any particular impact on frankness in future debates, but instead relied on a generic argument that would appear to apply indiscriminately to all such debate..

51. The Commissioner also considers that in some cases disclosure may actually lead to better quality advice and improved decision making. This argument was put forward by counsel for the Commissioner in *The Secretary of State for Work and Pensions v The Information Commissioner* (EA/2006/0040), recorded in paragraph 90 of the decision:

*'He suggested that the new law would have concentrated the mind of civil servants in a beneficial way to ensure a more rigorous approach to any analysis or predictions...the safest thing for the prudent civil servant, faced with the prospect of disclosure, is to make sure that he/she does the best job and puts forward figures that can be defended, not just to the Home Office, but, if necessary, in the course of public debate...the prospect of public disclosure is actually capable of importing a greater degree of rigour into the process.'*

52. While the Tribunal did not indicate what weight it had given to this argument, its decision was that the information in question should be released. The Commissioner's view is that arguments about the prospect of disclosure leading to improved advice or debate should be considered in light of the nature of the information in question and the overall circumstances of the case. He considers that this factor operates in conjunction with the strong inherent public interest in releasing environmental information noted in paragraph 41 above.

53. Having considered the requested information in this case, the Commissioner accepts that for much of it the 'chilling effect' of disclosure is likely to have some, but not great, weight. Further analysis is provided below in relation to each specific class of information withheld by the Cabinet Office.

54. The Commissioner has also considered whether the withheld information is covered by collective Cabinet responsibility. The Commissioner accepts the importance of respecting this convention, which allows the Government to consider sensitive policy issues without inhibition; creates a confidential space for political differences of opinion between Ministers to be raised candidly; protects high level government decisions from becoming personalised; and reduces the risk that Ministers will be inhibited from expressing themselves frankly in the future. This serves the public interest by improving the quality of the final decision. There is also a public interest in the Government being able to present a united front, as this prevents valuable government time from being spent publicly debating and defending views that have only ever been individual views rather than Government positions, and in commenting on the meaning and implications of a divided Cabinet.

55. In considering the relevance of the convention, the Commissioner notes that, in the case *Scotland Office v the Information Commissioner* (EA/2007/0070), the Tribunal was clear that the convention did not elevate section 35(1)(b) (the element of section 35 relating to Ministerial communications) to the equivalent of an absolute exemption, since *'the convention of collective Cabinet responsibility is a public interest like any other, in the sense that the weight to be accorded to it must depend on the particular circumstances of the case'* (paragraph 86). However, it accepted the importance of the convention, in that *'detriment can*

*arise to the public interest from disclosure of information concerning the formulation of Government policy at cabinet level'* (paragraph 83); and that, *'where collective responsibility of Ministers is engaged, there will nearly always be a public interest in maintaining the exemption'*. This latter point was confirmed in a further case, *Scotland Office v The Information Commissioner* (EA/2007/0128):

*'We do see some force however in the argument advanced by the Scotland Office that the factors in favour of maintaining the exemption for some types of information in this category will, almost always, be strong and that "very cogent and compelling" reasons for disclosure would need to be advanced before the balance tips in favour of disclosure in those situations.'*

56. The Commissioner recognises that neither the FOIA nor the EIR allow for Ministerial communications to be withheld automatically as a class of information, but he does accept that collective cabinet responsibility may well be a significant factor in the public interest test, if a specific harm can be identified which would be caused by disclosure. In the *Scotland Office* case (EA/2007/0070) the Tribunal also provided a (non-exhaustive) list of relevant factors for consideration when assessing the impact of the convention in a particular case:

*'the context of the information, whether it deals with issues that are still "live", the extent of public interest and debate in those issues, the specific views of different Ministers it reveals, the extent to which the Ministers are identified, whether those Ministers are still in office or in politics, as well as the wider political context are all matters that are likely to have a bearing on the assessment of the public interest'*.

57. The Commissioner is satisfied that some of the withheld information falls within the convention of collective Cabinet responsibility, and he has therefore included this as a factor in weighing up the balance of the public interest test for those elements. In particular, for the information comprising Ministerial communications, he has concluded that the convention is a relatively significant factor in favour of maintaining the regulation 12(4)(e) exception.

58. The Commissioner has closely examined the information to which the Cabinet Office has applied the exception. In respect of some of the withheld information he considers that the public interest in maintaining the exception outweighs the public interest in disclosure; in relation to other elements he has concluded that it does not. He has identified those elements of the information which should be disclosed or withheld in an associated Schedule which has been provided to the Cabinet Office. The reasons for his decision in relation to the different categories of withheld information are summarised below.

#### *(1) Ministerial communications*

59. A number of the documents comprise correspondence between government Ministers (including the Prime Minister). As a preliminary point, the Commissioner notes that the Information Tribunal in the case of *DfES v the Commissioner and the Evening Standard* (EA/2006/0006) stated that *'No information within s35(1)*



*[the FOIA exemption which has some equivalence with regulation 12(4)(e)] is exempt from...disclosure simply on account of its status'. The fact that the information relates to the deliberations of very senior officials or government Ministers does not of itself dictate that the information is sensitive, and 'To treat such status as automatically conferring an exemption would be tantamount to inventing within s35(1) a class of absolutely exempt information'. Accordingly, the Commissioner takes the view that, when applying the public interest test, the contents of Ministerial communications are of crucial significance, since there must be some detriment to the public interest for the balance of the test to justify maintaining the exemption (or exception, for environmental information).*

60. In addition, the Commissioner has taken account of a further point made by the Tribunal in DfES appeal that it is not necessarily unfair to politicians to release information that allows their policy decisions to be challenged after the event. Furthermore, he does not consider that there is a determinative public interest argument for withholding information on the basis that it reveals Ministers might have had a difference of opinion. It is reasonable to assume that an informed public will realise that such differences are a normal part of the policy-making process and the impact must be weighed on a case by case basis. The Commissioner also takes the view that the possibility that disclosure might cause embarrassment to an individual Minister should carry no weight in assessing the public interest
61. In this case, the Commissioner has identified factors that favour disclosure. First, the Commissioner considers that disclosure of the Ministerial communications would promote accountability and transparency, by showing whether decisions had been made following robust debate and the exchange of a variety of views. The Commissioner considers that this is particularly significant in this case, since in February 2007 the High Court ruled (in a case brought by the organisation which is represented by the complainant) that the public consultation to which the government had committed itself (in an Energy White Paper in 2003) had been '*seriously flawed*' and '*manifestly inadequate and unfair*' because insufficient information had been made available by the Government for consultees to provide an '*intelligent response*'.
62. Secondly, knowledge of the debate within government would facilitate the public debate. This has a significant public interest weight, considering the importance of, and interest in, both energy and environmental policy. The complainant in this case is a major pressure group which could be expected to have a strong, practical interest in the rationale behind the government's energy policy decisions.
63. On the other hand, there are factors which favour maintaining the exemption. First, there is the 'chilling effect' of disclosure, which bears both on future debate between Ministers regarding ongoing energy policy, and might also inhibit the frankness and candour of other parties when dealing with different policy debates in the future. The comment by the High Court in the case of *Friends of the Earth v*



*The Information Commissioner and Export Credits Guarantee Department* ([2008] EWHC 638 (Admin)) is relevant to this point:

*'There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision...I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between.'*

At the time that the renewed request was made in this case, formulation of energy policy was ongoing, but strategic decisions relating to the Energy Review itself had already been taken. Disclosure of Ministerial communications, which might contain a record of disagreements between Ministers and/or their Departments, would be less likely to have a significant inhibitory effect on their willingness to communicate with candour about the Energy Review report, because the conclusions of that review had already been put into the public domain. The Commissioner has therefore accorded this factor a small weight in the balance of the public interest applying to the information comprised of Ministerial correspondence.

64. Secondly, there is the public interest in maintaining the convention of collective Cabinet responsibility. The Commissioner accepts that some of the Ministerial correspondence in this case addresses substantive policy issues or relates to the process of decision-making. He is mindful of the Tribunal's comments in the case *Scotland Office v the Information Commissioner* (EA/2007/0070), which accepted the importance of the convention on collective Cabinet responsibility, in that *'detriment can arise to the public interest from disclosure of information concerning the formulation of Government policy at cabinet level'* (paragraph 83); and that, *'where collective responsibility of Ministers is engaged, there will nearly always be a public interest in maintaining the exemption'*. This latter point was confirmed in a further case, *Scotland Office v The Information Commissioner* (EA/2007/0128):

*'We do see some force however in the argument advanced by the Scotland Office that the factors in favour of maintaining the exemption for some types of information in this category will, almost always, be strong and that "very cogent and compelling" reasons for disclosure would need to be advanced before the balance tips in favour of disclosure in those situations.'*

65. The Commissioner has considered the impact of the convention in light of the (non-exhaustive) list of relevant factors identified by the Tribunal in the *Scotland Office* case (EA/2007/0070). In this case, he has identified the following issues as being of particular relevance to the impact of the convention on the public interest in maintaining the exception:

- the context of the information – the fact that it reveals the decision making of members of the Cabinet itself;

- the specific views of different Ministers which the information reveals, the extent to which the Ministers are identified, and the fact that some of the Ministers involved (although not the Prime Minister) were still in office or politics at the time of the renewed request.

On the other hand, he notes issues which tend to reinforce the public interest in disclosure:

- the fact that issues about the outcome of the Energy Review were still 'live' at the time of the renewed request;
- the extent of the public interest and debate in the issues, and the wider political context at the time.

Having considered these issues, the Commissioner is satisfied that the convention of collective Cabinet responsibility (when engaged) carries a significant weight in favour of maintaining the exception.

66. The Commissioner has weighed up the factors in favour of disclosure of the Ministerial communications, in particular: the significant public interests in accountability and transparency (in the context of the High Court ruling in February 2007 that the public consultation had been '*seriously flawed*' and '*manifestly inadequate and unfair*' because insufficient information had been made available by the Government for consultees to provide an '*intelligent response*'), and that in facilitating the public debate. He has compared these with the factors in favour of maintaining the exception: the small weight provided by the 'chilling effect', and the significant weight afforded by the convention of collective Cabinet responsibility. Having weighed up these factors, the Commissioner has concluded that, while the public interest is fairly well-balanced, at the time of the renewed request the balance favoured maintaining the exception for the information comprising Ministerial correspondence. However, two items of correspondence relate to purely administrative matters. The Commissioner has concluded that the public interest factors both in favour and against disclosure are weaker in relation to this information, but that on balance those favouring disclosure are strongest. These two documents should therefore be disclosed.

67. The Commissioner notes that the complainant requested 'identification' of the documents which had been withheld by the Cabinet Office. The Cabinet Office's response at internal review was that there was no requirement under the FOIA or the EIR to state the type or quantity of documents held. In the Commissioner's view, effectively what the complainant was asking for was a schedule or list of the documents held by the public authority. Since requests are for 'recorded information' rather than for documents, the information from which the schedule would be derived already exists and the Cabinet Office cannot be said to be creating it. Production of the schedule or list might be a new task but it is not the creation of new information, merely a re-presentation of existing information. For this reason, the Commissioner takes the view that, for the purposes of the EIR, the requested schedule or list is in fact held by the Cabinet Office.

68. Since the Commissioner has decided that some of the Ministerial correspondence was not disclosable in its entirety, he has considered whether it would be appropriate for the Cabinet Office to provide a list of the withheld documents, or whether the list itself would constitute information which is exempt under the provisions of the FOIA and/or EIR. He has concluded that such a list would engage regulation 12(4)(e), but that the balance of the public interest lies in disclosure. His reason for that conclusion is that disclosure of a list of correspondence between Ministers and government Departments would not create any 'chilling effect', nor would it undermine the convention of collective Cabinet responsibility. On the other hand, the public interest in transparency and accountability, while not served to a significant degree by disclosure of such information, would be more than completely minimal.

### *(2) Internal briefings*

69. For that part of the withheld information which comprises background briefing material, 'technical' advice and options for discussion, the Commissioner considers that this is principally a 'technical' outline of the context and possibilities within which policy is to be decided, rather than a substantive debate over potential policy positions involving the exchange of views and advice. As such, the Commissioner does not consider that the factors favouring maintenance of the exemption, in particular the 'chilling effect' argument and the convention of collective Cabinet responsibility, are significant in relation to such information. Furthermore, he notes that some information of this nature has been disclosed into the public domain (as identified in the 'Background' section above). Although the documents that fall into this category are marked mostly marked 'Restricted' and, in one case, 'Confidential', the Commissioner takes the view that at the time of the renewed request the balance of the public interest favoured disclosure of most of this information. However, part of one briefing note does recapitulate political issues which do attract the chilling effect and convention factors which favour maintenance of the exemption. The Commissioner has decided that the balance of the public interest test favours maintenance of the exception in relation to this part of the information.

### *(3) Suggested policy measures*

70. The Commissioner accepts that some of the briefing material deals with the pros and cons of future options. The Commissioner considers that this is policy advice by officials, and that the 'chilling effect' identified by the Cabinet Office may provide some weight to maintaining the exception. However, for the reasons explored above, particularly in paragraphs 48 and 51, the Commissioner considers that officials can reasonably be assumed to be capable of resisting the pressures attendant upon public disclosure of their advice. He has not been presented with any specific arguments as to why disclosure of these particular options would be likely to have a chilling effect. He does not believe that the convention of collective Cabinet responsibility is threatened by disclosure of the policy options identified by officials. Therefore, comparing the relatively minor weight of the chilling effect in this case with the significant public interest in accountability and transparency of the decision making involved in energy policy,

the Commissioner has concluded that the balance of the public interest favours disclosure of the information composed of suggested policy measures.

*(4) Meeting agenda and minutes*

71. Part of the complaint which the complainant raised with the Commissioner was that the Cabinet Office had provided no response to his request for an agenda and minutes of the meeting of the Energy Review team on 15 May 2005. The original request had included an express request for this information. The Cabinet Office informed the complainant that no agenda was held, and that it was withholding any minutes or record of the meeting. Insofar as minutes or notes are held of the meeting on 15 May 2006 (or there are any other relevant minutes or notes), the Commissioner takes the view that the public interest in maintaining the exception is weak because the Energy Review had concluded and the substance of the decisions reached were in the public domain at the time of the renewed request, whereas the public interest in disclosure remained relatively significant at that time. The Commissioner believes that there would have to be some specific reason to justify withholding any notes and minutes in these circumstances, and he does not believe the public authority has provided any such reason. This part of the information is therefore disclosable for similar reasons as the internal briefings and suggested policy measures (ie that any 'chilling effect' would be relatively insignificant and the convention of collective Cabinet responsibility would not be threatened by disclosure, contrasted with the relatively significant public interest in accountability and transparency of policy development in this significant area), except insofar as they contain a record of the sort of political debate between Ministers that is covered by the convention on collective Cabinet responsibility (and therefore invoke the public interest factors identified above for 'Ministerial communications').

*(5) Personal comments*

72. Some of the information comprises casual remarks by politicians about other politicians or their Departments – of this material; some is composed of manuscript notes appended to other documents. The Commissioner takes the general view that the possibility of embarrassment to individual Ministers should carry no weight in assessing the public interest. Further, he does not consider that there is a determinative public interest argument for withholding information on the basis that it reveals Ministers might have had a difference of opinion. It is reasonable to assume that an informed public will realise that such differences are a normal part of the policy-making process and the impact must be weighed on a case by case basis. (This is different, though related, to the 'chilling effect' argument, which focuses on the deterrent effect on engaging in and/or recording policy debate; and does not preclude a public interest in maintaining the convention of collective Cabinet responsibility). The Commissioner has concluded that disclosure of the casual remarks in question made by politicians about other politicians does not have a significant impact on the convention of collective Cabinet responsibility; nor is the 'chilling effect' relevant, since such comments do not serve to promote the public interest and could be deterred (through disclosure) without any negative impact on the public interest. Accordingly, this part of the information should be disclosed.

(6) Names of officials

73. The complainant requested details of the identities of civil servants involved in the Energy Review Team meeting on 15 May. The Cabinet Office originally declined to provide this information, but in its refusal notice following the renewed request it released the names of Ministers, Special Advisers, and the most senior civil servant, owing to his *'public association with the Review'*. However, it redacted the names of other civil servants who had attended the meeting. It explained this response to the complainant in its internal review letter dated 17 December 2007, claiming that:

*'publicising the identity of individual civil servants, particularly in the context of their working responsibility for individual policy briefs, could expose them unfairly to public scrutiny and could influence the advice they give, making them less able to offer full and frank expressions of opinion'*.

The explanation for withholding the names which the Cabinet Office gave in its refusal notice relating to the renewed request, and that which it provided to the Commissioner, took the form of a public interest test.

74. The Commissioner considers that names of those attending a meeting self-evidently constitute information that falls within the definition of 'personal data' as set out in section 1(1) of the Data Protection Act 1998. Therefore, instead of applying a public interest test under regulation 12(4)(e) to that part of the information comprising officials' names, it would have been more appropriate for the Cabinet Office to have considered whether this information was exempt by virtue of Regulation 12(3) of the EIR:

*'To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.'*

The Commissioner has therefore dealt with this part of the information as a data protection issue, and has not considered the Cabinet Office's application of regulation 12(4)(e).

75. Regulation 13(1) provides that personal data may not be disclosed where *'either the first or second condition below is satisfied'*; part of the first condition is where disclosure would contravene any of the data protection principles. The first data protection principle requires that the processing of personal data be fair and lawful, with further conditions to be met in addition. In this case, the Cabinet Office has explained to the Commissioner that it withheld the identities of those civil servants attending the meeting who were at Grade 5 or below,

*'in view of the particular sensitivity of the subject area and the harm that disclosing their names may therefore cause to future free and frank discussions on controversial policy areas and on the individuals' future careers'*.



76. The Commissioner does not consider that prejudice to policy discussions is relevant to the data protection issue, which is whether processing the personal data would be fair and lawful. He notes that, in the case of *'DfES v the Commissioner and the Evening Standard'* (EA/2006/0006), the Information Tribunal stated that there should be no blanket policy to withhold the names of officials, and that whether such information should be disclosed has to be decided on the particular facts: *'A blanket policy on refusing to disclose the names of civil servants wherever they appear in departmental records cannot be justified'* and *'There must, however be a specific reason for omitting the name of an official where the document is otherwise disclosable'*. The Commissioner accepts that there will often be circumstances in which the identities of even relatively junior officials might be fairly and lawfully disclosed, and he approaches this issue on a case-by-case basis.
77. In this case, he has concluded that it would be unfair to disclose the identities of those officials at Grade 5 or below. In coming to this conclusion, the Commissioner has had regard to his guidance on the issue, which can be found online<sup>2</sup>. This guidance suggests a number of issues that should be considered when assessing whether disclosure of information would be fair:
- the individual's reasonable expectations of what would happen to their personal data;
  - the seniority of the staff;
  - whether the individuals specifically refused to consent to the disclosure of their personal data;
  - whether disclosure would cause any unnecessary or unjustified distress and damage to the individuals;
  - the legitimate interests in the public knowing the requested information weighed against the effects of disclosure on the individuals.

In coming to this conclusion that the information should be withheld, the Commissioner has taken into account that the affected officials here had a relatively junior role in what was a very high-level meeting; that they could reasonably have expected that their identities would not be disclosed; that there is a perception that their future careers might be prejudiced (although the Commissioner does not attach much weight to that perception because he does not accept that it is objectively justified), with the possibility that that might cause some discomfort to those involved; and that there is no great 'legitimate interest' of the public in knowing the identity of these relatively junior officials in the context of more senior officials (with greater responsibility) being present at the meeting. The names of the junior civil servants therefore engage Regulation 13 and should not be disclosed.

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[http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/personal\\_data\\_flowchart\\_v1\\_with\\_preface001.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf)



*(7) Attachments*

78. There is an attachment to one of the letters between Ministers which comprises a lecture given to the Institution of Mechanical Engineers in February 2006 entitled *'The Severn Barrage: is the tide turning?'*. An internet search has revealed to the Commissioner that this lecture is available as an article<sup>3</sup> and that the information is therefore in the public domain.
79. There is also a draft of a public consultation document entitled ***Our Energy Future***, attached to a briefing note from an official to the Prime Minister.
80. Under the FOIA, information which is otherwise *'reasonably accessible to the applicant'* is exempt from disclosure. There is no equivalent exception in the EIR. Therefore, where a request is made for environmental information which is held by the public authority, the Commissioner's view is that the information has been made available to the applicant provided that it is publicly available and readily accessible, and the public authority has explained to the complainant specifically how the information has been made publicly available. In this case, however, while the information was readily accessible to the complainant the Cabinet Office failed to explain to the complainant either that it existed or where it could be accessed. Accordingly, the Commissioner takes the view that the Cabinet Office did not comply with its obligations under regulation 5(1), which provides that *'a public authority that holds environmental information shall make it available on request'*. The Cabinet Office also breached its obligations under regulation 5(2), which states that:

*'Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.'*

**Procedural Requirements**

81. The complainant raised a number of points in his 2006 internal review which he wished the Commissioner to consider. The Commissioner has focused on the renewed 2007 request in terms of the public interest test and the substantive outcomes and therefore points c, d, e, f, g and h and i have been addressed in the analysis in the 'Exception' section above. He has also considered some procedural aspects of the 2006 request below and also good practice issues under "Other matters".

*b. Access to information in the public domain*

82. The Cabinet Office informed the complainant in its internal review decision that the information had been attached to its letter of 23 June 2006. It also provided links to the relevant pages of the No 10 and Department of Trade and Industry websites where the most up-to-date information could be found (after receiving his renewed request, the Cabinet Office provided details of the website of the

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<sup>3</sup> *'The Severn Barrage: is the tide turning?'*, S Taylor and D Kerr, **Coastal Engineering Conference**, 2002, volume 2, pages 1983-1994, published by the ASCE American Society of Civil Engineers.

Department for Business, Enterprise & Regulatory Reform, which had superseded the Department of Trade and Industry). The Commissioner is satisfied that the Cabinet Office gave an adequate explanation to the applicant as to how it had made the information publicly available, in compliance with Regulation 5 of the EIR. He notes that it also provided the information itself.

### *Refusal notice*

83. The complainant's initial request was made on 18 May 2006 and the Cabinet Office provided a response on 23 June 2006. The Cabinet Office therefore took 25 working days to issue its refusal notice.

84. Regulation 14(1) of the EIR provides that:

*'If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.'*

Regulation 14(2) provides that:

*'The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.'*

85. The Commissioner has provided guidance on this issue in his *'Good Practice Guidance No 4'*. A response may take the form of the supply of the requested information, confirmation that the information is not held, a formal refusal or an indication that additional time is required to consider the public interest in relation to specific exemptions.

86. While the Commissioner recognises that the Cabinet Office dealt with the request in this case prior to the issuing of his *Good Practice Guidance No 4* in February 2007, he nevertheless notes that the Cabinet Office failed to comply with its duty to issue its refusal notice within the relevant statutory time limits. This constituted a breach of regulation 14(2) of the EIR.

87. The Commissioner notes that the response to the 2007 request appears to have been issued within the statutory time limit, although this is not possible to formally verify as the letter was undated.

### **The Decision**

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88. The Commissioner's decision is that the Cabinet Office did not deal with the request for information in accordance with the Act. In claiming that it was not required to produce a list of the withheld documents it breached regulation 5(1) of the EIR. Finally, in failing to disclose requested information which did not attract one of the exceptions under the EIR the Cabinet Office breached regulation 5(1), and also the time limit in regulation 5(2). For the 2006 request it breached regulation 14(2) of the EIR.

## Steps Required

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89. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- the Cabinet Office should disclose to the complainant that part of the withheld information identified in the Schedule which has been sent to it;
- disclose a schedule of the withheld documents to the complainant as requested at internal review.

90. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Other matters

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91. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

### *Failure to address elements separately*

92. In its internal review decision dated 21 August 2006 the Cabinet Office claimed that it had taken the view that the same considerations applied to all of the information at issue so that it was not necessary to deal with them separately. The Commissioner does not agree. As is evidenced by the analysis above of the regulation 12(4)(e) exception, he believes that the various categories of withheld information attract different public interest considerations. The Cabinet Office's failure to assess the categories in their particularity may therefore have contributed to a decision to incorrectly withhold information.

### *The 'renewed' request*

93. On 20 September 2007 the complainant made a renewed request for the same information covered by his original request, on the grounds that the balance of the public interest might have changed. The Cabinet Office's response was to indicate that it was not obliged to address the request, since section 14(2) of the FOIA provided that:

*'Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.'*

The Cabinet Office claimed that *'a reasonable interval cannot be said to have elapsed until after the regulatory processes for the consideration of the original request have come to an end'*. The Cabinet Office did nevertheless address the renewed request, but stated that it was doing so *'without prejudice'* to section 14(2).

94. The Commissioner disagrees with the Cabinet Office's view. First, since all of the information is environmental, the appropriate exception is to be found in the EIR – in regulation 12(4)(b) – which states that a public authority may refuse to disclose information to the extent that: *'the request for information is manifestly unreasonable...'*. There is therefore no equivalent in the EIR to the 'reasonable interval' specified in the FOIA.
95. Secondly, while the EIR does not define the term 'manifestly unreasonable', the Commissioner takes the view that 'manifestly' implies that the request must be obviously or clearly unreasonable. He does not believe that it was obviously unreasonable for the complainant in this case to have renewed his request 16 months after the original request and a year after he had first raised a complaint with the Commissioner. The Commissioner takes the view that the complainant had a legitimate reason for renewing the request, which was to ensure that if the balance of the public interest relating to the exemptions/ exceptions had changed since his original request that assessment would now be made from the more recent date. Although the Commissioner's view is that a public authority should keep the public interest test under consideration during the course of his investigation of a complaint – and provide the complainant with the information should the public interest in maintaining the exemption/ exception cease to outweigh the public interest in disclosure – he does not regard it as necessarily unreasonable for a complainant to press the public authority into an explicit consideration of the current balance of the public interest by way of a renewed request.
96. Thirdly, unlike the comparable provisions in FOIA, the 'manifestly unreasonable' provision of the EIR is itself subject to a public interest test, and may therefore only be applied if the public interest in maintaining a 'manifestly unreasonable' response outweighs the public interest in processing the request. The Commissioner considers it unlikely that the balance of the public interest would dictate that the renewed request was 'manifestly unreasonable'.
97. Fourthly, in its internal review decision in the renewed request the Cabinet Office informed the complainant that, since it was keeping the balance of the public interest under review, his renewed request would not *'lead to you receiving more information'*. In fact, when addressing a complaint the Commissioner will assess whether it was reasonable for the public authority to withhold information at the time of its refusal notice, rather than at a later time such as the date of the

complaint to the Commissioner or of the issue of his Decision Notice. Since the complainant in this case made the renewed request, the Commissioner has assessed whether it was reasonable for the Cabinet Office to have withheld the information in October 2007 rather than June 2006.

98. Finally, the Commissioner takes the view that it is unreasonable for the Cabinet Office to propose that a renewed request during *'regulatory processes for the consideration of the original request'* would inevitably be *'manifestly unreasonable'*.

## Right of Appeal

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99. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 8<sup>th</sup> day of December 2009**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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



## Legal Annex

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**Regulation 5(1)** provides that –

*'Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.'*

**Regulation 5(2)** provides that –

*'Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.'*

**Regulation 12(4)(e)** provides that –

*'For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that -...*

*(e) the request involves the disclosure of internal communications.'*

**Regulation 13(1)** provides that –

*'(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.'*

**Regulation 13(2)** provides that –

*'The first condition is -*

*(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene -*

*(i) any of the data protection principles; or*

*(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and*

*(b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998[7] (which relate to manual data held by public authorities) were disregarded.'*

**Regulation 13(3)** provides that –

*'The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of that Act and, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.'*

**Regulation 14(1)** provides that –

*'If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.'*

**Regulation 14(2)** provides that –

*'The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.'*