

Environmental Information Regulations 2004 (EIR)

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 October 2024

Public Authority: Cabinet Office

Address: 70 Whitehall

London

SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested, from the Cabinet Office, information about government buildings where RAAC (reinforced autoclaved aerated concrete) is present and RAAC surveys. Whilst the Cabinet Office confirmed to the complainant that RAAC surveys have been carried out in Cabinet Office buildings, it withheld information on the basis of regulations 12(4)(d) (material still in the course of completion, unfinished documents or incomplete data), 12(4)(e) (internal communications) and 12(5)(a) (international relations, defence, national security or public safety) of the EIR.
2. During the Commissioner's investigation, the Cabinet Office confirmed to the Commissioner that the information being withheld in respect of part 3 of the request wasn't actually held at the time the request was received, although it was held when the Cabinet Office responded to it.
3. The Commissioner's decision is that the Cabinet Office wasn't entitled to rely on regulations 12(4)(d) or 12(4)(e) to withhold the information requested in part 1 of the request. He also finds that, on the balance of

probabilities, at the time of the request the Cabinet Office didn't hold the information requested in part 3 of the request. Furthermore the Commissioner finds that the Cabinet Office breached regulations 11 and 14 as it failed to provide a substantive internal review response and didn't cite regulations 12(4)(a) and (e) at the time of its response.

4. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.
 - Disclose the percentage figure requested in part 1 of the request.
5. The Cabinet Office must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA, and may be dealt with as a contempt of court.

Request and response

6. On 3 January 2024, the complainant requested the below information from the Cabinet Office. The Commissioner has added numbers for ease of reference:
 1. "How many government buildings is the cabinet [sic] aware of has raac (%)?
 2. For Cabinet Office buildings has [sic] raac surveys been carried out?
 3. Provide a copy of the raac surveys?"
7. The Cabinet Office provided its substantive response on 28 February 2024. It refused to disclose information within scope of parts 1 and 3 of the request, on the basis of regulations 12(4)(d) and 12(5)(a) respectively. For part 2, it said RAAC surveys have been carried out.
8. The complainant requested an internal review on 28 February 2024, but the Commissioner's understanding is that the Cabinet Office hasn't provided any substantive internal review response to the complainant.

Scope of the case

9. The complainant contacted the Commissioner on 23 April 2024 to complain about the way their request for information had been handled.
10. They complained that the Cabinet Office didn't do an internal review.
11. They also disagreed with the Cabinet Office's reasons for withholding the requested information.
12. During the Commissioner's investigation, the Cabinet Office revised its position. It applied regulations 12(4)(d) and 12(4)(e) to part 1 of the request, and maintained its reliance on regulation 12(5)(a) for part 3.
13. The Cabinet Office also indicated its alternative reliance on several exemptions in FOIA, in respect of part 3 of the request, in the event that part 3 falls under FOIA.
14. Having examined the withheld information provided to him by the Cabinet Office, the Commissioner asked the Cabinet Office whether it held the RAAC surveys on 3 January 2024, when the complainant made their request.
15. The Cabinet Office confirmed that it didn't hold the surveys at the time of the request, although it held them when the Cabinet Office responded to the request.
16. The Commissioner therefore considers that the scope of this case is to decide whether the request falls under the EIR or FOIA; whether the Cabinet Office was entitled to withhold the information requested in part 1 of the request; whether it has handled part 3 of the request in accordance with the applicable access regime; and procedural matters.

Reasons for decision

Is the requested information environmental?

17. Regulation 2(1) of the EIR defines environmental information as being:
"... any information ... on—

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c) ...".
18. In this case the complainant requested information about the percentage of government buildings with RAAC, to the Cabinet Office's awareness, and a copy of RAAC surveys. The Commissioner has published several decision notices involving requests for similar information about RAAC, and he addressed them under the EIR. The

most recent, IC-285815-L7C0¹, explained that he considers this type of information falls under regulations 2(1)(c) and 2(1)(f) of the EIR.

19. Accordingly, the Commissioner has assessed this case under the EIR.

Regulation 12(4)(d)

20. Regulation 12(4)(d) provides that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.

21. The exception can therefore be split into three possible limbs.

22. The exception is subject to the public interest test. A public authority can only withhold the information if the public interest in maintaining the exception outweighs the public interest in disclosing the information.

23. Regulation 12(2) provides that a public authority must apply a presumption in favour of disclosure.

24. The Commissioner's website² provides detailed guidance on the exception, the three possible limbs and relevant considerations for each.

25. The Cabinet Office is applying this exception to the information requested in part 1 of the request – the percentage of government buildings with RAAC.

26. Based on the Cabinet Office's submissions, the Commissioner's understanding is that the Cabinet Office is relying on the 'incomplete data' limb.

27. The Commissioner first considered whether the exception is engaged.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4029863/ic-285815-l7c0.pdf>

² <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-124d-eir/>

28. The Cabinet Office has said that the information behind the requested percentage figure doesn't represent a complete picture, and hasn't been added to or kept up to date.
29. The Commissioner's guidance on the 'incomplete data' limb of regulation 12(4)(d) explains that this exception applies "where data is incomplete **because you are still collecting it**. The exception may also be engaged if the information relates to incomplete data" (emphasis added in bold). It also explains that data "is unlikely to be considered as incomplete if you are already relying on it in your decision-making processes"; and that public authorities need to consider "whether the data is an independent, complete, and separate piece of work in its own right".
30. The Cabinet Office's submissions indicate that it wasn't still collecting the data in question (see paragraph 28 above – it said the data hasn't been added to or kept up to date); and the Commissioner's understanding is that the Cabinet Office was relying on it, in its decision-making processes. Having seen the information behind the requested percentage figure, the Commissioner also makes the argument that the data is an independent, complete, and separate piece of work in its own right.
31. The Commissioner therefore finds that regulation 12(4)(d) isn't engaged, and he hasn't gone on to consider the public interest test.

Regulation 12(4)(e)

32. Regulation 12(4)(e) provides that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
33. The exception is subject to the public interest test. A public authority can only withhold the information if the public interest in maintaining the exception outweighs the public interest in disclosing the information.
34. Regulation 12(2) provides that a public authority must apply a presumption in favour of disclosure.

35. As the Commissioner's guidance on this exception³ explains, a wide range of internal documents will be caught by the exception.
36. The Cabinet Office is applying this exception to the information requested in part 1 of the request – the percentage of government buildings with RAAC.
37. Having seen the withheld information relating to part 1 of the request, and considered the Cabinet Office's submissions, the Commissioner is satisfied that the exception is engaged for that information. It comprises internal information not shared outside government.

Public interest test – complainant's position

38. The complainant argued only that there's a presumption in favour of disclosure under the EIR and said they don't agree with the Cabinet Office's reasons for refusing to disclose the withheld information.

Public interest test – Cabinet Office's position

39. The Cabinet Office acknowledged factors in favour of disclosure, including transparency, and understanding the scale and potential impact of the issue of RAAC in public buildings, and the potential risks to health and safety and the effective functioning of the public estate.
40. However, against disclosure, the Cabinet Office emphasised 'safe space' arguments.
41. It also noted that the issue of RAAC was a serious and ongoing issue at the time of the request.

Public interest test – Commissioner's position

42. The Commissioner has published two decision notices involving another government department's (the Department for Education's) reliance on

³ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-4-e-internal-communications/what-are-internal-communications/>

regulation 12(4)(e) of the EIR to withhold certain requested information about RAAC⁴.

43. As those decision notices explain, the requests in those cases were made whilst the issue of RAAC was live, and the government department emphasised the need for a safe space to consider, discuss and act upon the withheld information
44. In both cases, the Commissioner found that the public interest favoured withholding the information, emphasising the timing of the requests and that the issue of RAAC was live.
45. The request in the present case was made on 3 January 2024, and the Commissioner accepts that the issue of RAAC was still live at that time.
46. The Cabinet Office has focused safe space arguments, similar to those of the Department for Education in the two cases referenced above.
47. The Commissioner acknowledges some similarities between the circumstances of those two cases and the present case, including considerations like the timing of the request and the fact that RAAC was a live issue.
48. However, he also notes that some government departments have published information about buildings with RAAC, such as the Department for Education and the Department of Health and Social Care. This includes the number of education settings where RAAC was identified⁵ and the number of hospital sites confirmed to contain RAAC⁶.
49. That information was published from August and October 2023 respectively, according to the publication details available (ie whilst the issue of RAAC was still live).

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4029751/ic-279948-j9g4.pdf> and <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4029556/ic-272718-b6d6.pdf>

⁵ <https://www.gov.uk/government/publications/reinforced-autoclaved-aerated-concrete-raac-management-information>

⁶ <https://www.gov.uk/government/publications/reinforced-autoclaved-aerated-concrete-raac-in-hospitals-management-information>

50. Furthermore, the Commissioner has considered the sensitivity of the withheld information in this case (simply the percentage of government buildings with RAAC), and doesn't see it as being particularly sensitive.
51. On balance, and with regard to the presumption in favour of disclosure, the Commissioner finds that here, the public interest favours disclosure.

Part 3 of the request

52. Regulation 12(4)(a) states that a public authority may refuse to disclose information to the extent that "it does not hold that information when an applicant's request is received".
53. The Commissioner's guidance⁷ explains that when a public authority doesn't hold the information that has been requested **at the time it received the request**, the public authority needs to tell the requester.
54. In part 3 of the request, the complainant asked for the RAAC surveys.
55. The Cabinet Office sent the Commissioner a copy of the surveys in question. The Commissioner had asked to see the withheld information, to help him to reach a decision about regulation 12(5)(a) (the exception the Cabinet Office had cited for the surveys).
56. Noting that the surveys appeared to post-date the request, the Commissioner asked whether the Cabinet Office held them on 3 January 2024 (the date of the request).
57. After consulting the relevant team, the Cabinet Office confirmed to the Commissioner that whilst the surveys were held when the Cabinet Office responded to the request, they weren't held on the date that the Cabinet Office received the request.
58. The Commissioner isn't required to prove beyond doubt that a public authority does or doesn't hold information. When determining a complaint, he makes a decision based on the 'balance of probabilities'.

⁷ <https://ico.org.uk/for-organisations/eir-and-access-to-information/guide-to-the-environmental-information-regulations/refusing-a-request/#when-can-we-refuse-a-request-for-environmental-information-2>

59. The Commissioner sees no reason to doubt that the Cabinet Office didn't hold the surveys on 3 January 2024. He's satisfied that, on the balance of probabilities, it didn't hold them at that time, based on the information available and confirmation provided by the Cabinet Office.
60. Consequently regulation 12(4)(a) is engaged, and the Cabinet Office should've cited regulation 12(4)(a) in response to part 3 of the request.
61. Whilst all EIR exceptions are subject to a public interest test, the Commissioner sees no value in carrying out such a test where the public authority didn't hold the requested information.

Procedural matters

62. The Cabinet Office breached regulation 11 as it failed to provide a substantive internal review response, and breached regulation 14 as it didn't cite regulations 12(4)(a) and (e) at the time of its response.

Right of appeal

63. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

64. 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.
65. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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