

Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

Decision Notice

Date: 7 March 2011

Public Authority: Department for Communities and Local Government
Address: Eland House
Bressenden Place
London
SW1E 5DU

Summary

The complainant requested correspondence between HRH The Prince of Wales and Ministers at the public authority. The complainant also requested a list and schedule of the correspondence within the scope of his request. The public authority withheld the information on the basis of the exemptions at sections 37(1)(a) (communications with The Royal Household), 40(2) (personal data), and 41(1) (information provided in confidence). The Commissioner found that the withheld information was environmental and therefore caught by the Environmental Information Regulations 2004 (EIR) and the public authority subsequently relied on the regulations at 12(5)(d) (confidentiality of proceedings), 12(5)(f) (interests of a person who provided information), and regulation 13 (personal data).

The Commissioner found that part of the information was exempt on the basis of regulation 12(5)(f) and the remainder was also exempt on the basis of regulation 13.

The Commissioner's Role

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 (the "Act"). This Notice sets out his decision.
2. 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 Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

3. The complainant submitted a request to the Department for Communities and Local Government (DCLG) on 14 September 2009 which asked for all correspondence exchanged between The Prince of Wales and any Minister in the DCLG for the period 1 September 2006 and 1 September 2009. The complainant also requested that the DCLG provide him with a list and schedule of this correspondence. The full request is included in the annex attached to this notice.
4. The DCLG contacted the complainant on 9 October 2009 and confirmed it held information within the scope of the request. The DCLG however withheld the information on the basis of the exemption at section 37(1)(a) of the Act and explained that it needed an additional 20 working days to consider whether the public interest was in favour of or against disclosure.
5. The DCLG wrote back to the complainant on 9 November 2009. It confirmed that the balance of the public interest was in favour of maintaining the exemption at section 37(1)(a) and additionally relied on the exemptions at sections 40(2) and 41(1) to withhold the information within the scope of the request.
6. The complainant contacted the DCLG on 16 November 2009 and asked for an internal review of this decision to be undertaken.
7. On 26 January 2010 the DCLG informed the complainant of the outcome of the review; this upheld the application of the exemptions as set out in the refusal notice.

The Investigation

Scope of the case

8. The complainant contacted the Commissioner on 27 January 2010 in order to complain about the DCLG's decision to withhold the information he had requested. The complainant argued that it was incorrect for the DCLG to refuse to disclose any of the correspondence in such a blanket fashion. Rather the test should be whether the correspondence reveals The Prince of Wales exerting an undue

influence on an elected government and whether His Royal Highness had been involving himself in matters of party politics.

Chronology

9. The Commissioner contacted the DCLG on 6 March 2010 and asked to be provided with a copy of the information falling within the scope of the request.
10. The Commissioner contacted the DCLG again on 13 December 2010. He explained that as a consequence of considering a number of earlier complaints concerning very similar requests for The Prince of Wales' correspondence with government departments he was already in possession of very detailed submissions from a number of public authorities, including the DCLG, to support the application of exemptions and exceptions under the Act and the EIR respectively. These submissions were specifically in relation to the application of sections 37(1)(a), 40(2), 41(1), and regulations 12(5)(d), 12(5)(f), and 13(1). The Commissioner explained that he was happy to take these submissions fully into account when considering this complaint and therefore did not need the DCLG to provide him with submissions to support the application of these exemptions and exceptions. However, the Commissioner explained to the DCLG that it felt that these submissions were not equally applicable in this case, or if it felt that there were additional submissions beyond those previously provided to him which it felt were relevant to this case, he would welcome any further submissions that the DCLG might wish to make.
11. The DCLG contacted the Commissioner on 7 February 2011 and confirmed that it did not wish to provide any further submissions to support its reliance on the exemptions cited in its correspondence with the complainant. The DCLG also provided the Commissioner with copies of the information falling within the scope of the request.

Findings of fact

12. As noted in the preceding paragraphs the Commissioner has based his analysis of the exemptions in this particular case on the submissions he received from a number of public authorities, including the DCLG, when investigating a previous set of similar complaints. The decision notices on these earlier cases were issued between December 2009 and June 2010. However for consistency and ease of reference the remainder of this Notice suggests that information or a particular submission has been provided by the DCLG when it may have been the case that it was provided another public authority, most notably, the Cabinet Office.

13. At the time that this Notice is being issued the DCLG's position is that all of the correspondence falling within the scope of the requests is exempt from disclosure on the basis the exemptions contained at sections 37(1)(a), 40(2) and 41(1) of the Act.
14. The DCLG has also confirmed that although it believed that the withheld information did not constitute 'environmental information' if it was environmental information it would be exempt from disclosure under the EIR by virtue of regulations 12(5)(d), 12(5)(f) and 13(1).
15. The DCLG has also confirmed that it believed that a list and/or schedule of correspondence sent by The Prince of Wales would be exempt from disclosure on the basis of sections 37(1)(a), 40(2) and 41(1) of the Act and that a list and/or schedule of information sent to The Prince of Wales would be exempt on the basis of sections 37(1)(a) and 40(2) of the Act.

Analysis

Is any of the requested information 'environmental'?

16. Regulation 2(1) of the EIR defines 'environmental information' as any information in any material form on:
 - '(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the

environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)'

17. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor etc in question. In other words, information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.

18. The Commissioner also finds support for this approach in two decisions issued by the Information Tribunal. The first being *The Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth* (EA/2007/0072). In this case the Tribunal found:

'that the Decision Notice [in which the Commissioner has concluded that none of the requested information was environmental information] fails to recognise that information on 'energy policy' in respect of 'supply, demand and pricing' will often fall within the definition of 'environmental information' under Regulation 2(1) EIR. In relation to the Disputed Information we find that where there is information relating to energy policy then that information is covered by the definition of environmental information under EIR. Also we find that meetings held to consider 'climate change' are also covered by the definition.' (Tribunal at paragraph 27).

19. In reaching this conclusion the Tribunal placed weight on two arguments advanced by Friends of the Earth (FoE), the first being that information on energy policy, including the supply, demand and pricing issues, will often affect or be likely to affect the environment and the second that the term 'environmental information' should be interpreted broadly:

'23. Mr Michaels on behalf of FOE contends that policies (sub-para (c)) on 'energy supply, demand and pricing' often will (and are often expressly designed to) affect factors (sub-para (b)) such as energy, waste and emissions which themselves affect, or are likely to affect, elements of the environment (sub-para (a)) including, in particular and directly, the air and atmosphere and indirectly (in respect of climate change) the other elements.

24. He provides by way of simple and practical example, national policy on supply, demand and pricing of different energy sources (e.g., nuclear, renewable, coal, gas) has potentially major climate change implications and is at the heart of the debate on climate change. Similarly, national policy on land use planning or nuclear power has significant effect on the elements of the environment or on factors (e.g. radiation or waste) affecting those elements.

25. Mr Michaels further argues that the term 'environmental information' is required to be construed 'very broadly' so as to give effect to the purpose of the Directive. Recognition of the breadth of meaning to be applied has been recognised by the European Court of Justice, by the High Court and by this Tribunal in *Kirkaldie v Information Commissioner & Thanet District Council* EA/2006/001. The breadth is also recognised in the DEFRA guidance 'What is covered by the regulations'. It does not appear, Mr Michaels argues, that the Commissioner has adopted such an approach.'

20. Moreover in reaching this conclusion the Tribunal appeared to reject BERR's arguments that there must be a sufficiently close connection between the information and a probable impact on the environment before it can be said that the information is 'environmental information'.
21. The second Tribunal decision is *Ofcom v Information Commissioner and T-Mobile* (EA/2006/0078) which involved a request for the location, ownership and technical attributes of mobile phone cellular base stations. Ofcom had argued that the names of Mobile Network Operators were not environmental information as they did not constitute information 'about either the state of the elements of the environment....or the factors.....that may affect those elements.'
22. The Tribunal disagreed, stating at para 31 that:

'The name of a person or organisation responsible for an installation that emits electromagnetic waves falls comfortably within the meaning of the words "any information...on....radiation". In our view it would create unacceptable artificiality to interpret those words as referring to the nature and affect of radiation, but not to its producer. Such an interpretation would also be inconsistent with the purpose of the Directive, as expressed in the first recital, to achieve "... a greater awareness of environmental matters, a free exchange of views [and] more effective participation by the public in environmental decision making...". It is difficult to see how, in particular, the public might participate if information on those

creating emissions does not fall within the environmental information regime.'

23. The Commissioner has reviewed the withheld information and has concluded that all of the information falling within the scope of the requests constitutes environmental information because it falls within the definition in regulation 2(1) of the EIR. Therefore this information must be dealt with under the EIR rather than under the Act.
24. However, the Commissioner is not able to explain why he believes the withheld information to constitute environmental information in the body of this Notice without potentially revealing the content of this information. Therefore the Commissioner has included in the confidential annex, which will be provided to the DCLG but not the complainant, an explanation as to why he believes the withheld information to be environmental information as defined by the EIR.

Exceptions

The request for the correspondence

Regulation 12(5)(f) – interests of the person who provided the information

25. The DCLG has argued that if the Commissioner finds that any of the withheld information constitutes 'environmental' information as defined by the EIR, it would seek to rely on the exceptions contained at regulations 12(5)(d), 12(5)(f) and 13(1).
26. As the Commissioner has concluded that all of the information falling within the scope of this request is environmental information, he has considered the application of these exceptions, starting with 12(5)(f).
27. Regulation 12(5)(f) states:
 - 'a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
 - (f) the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure;'

28. The Commissioner is conscious that the threshold to engage an exception under regulation 12(5) of the EIR is a high one compared to the threshold needed to engage a prejudice based exemption under the Act:
- Under regulation 12(5) for information to be exempt it is not enough that disclosure of information will have an effect, that effect must be 'adverse'.
 - Refusal to disclose information is only permitted to the extent of that adverse effect – i.e. if an adverse effect would not result from disclosure of part of a particular document or piece of information, then that information should be disclosed.
 - It is necessary for the public authority to show that disclosure 'would' have an adverse effect, not that it may or simply could have an effect. With regard to the interpretation of the phrase 'would' the Commissioner has been influenced by the Tribunal's comments in the case *Hogan v Oxford City Council & Information Commissioner* (EA/2005/0026 & 0030) in which the Tribunal suggested that although it was not necessary for the public authority to prove that prejudice would occur beyond any doubt whatsoever, prejudice must be at least more probable than not.¹
29. Furthermore, the wording of the exception at regulation 12(5)(f) makes it clear that the information has to have been provided to the public authority by another person and the adverse effect has to be on that person who provided the information rather than the public authority that holds the information.
30. The Commissioner accepts that the correspondence in this case which the DCLG received from The Prince of Wales clearly constitutes information 'provided' to it by a third party and thus such information falls within the scope of the exception at regulation 12(5)(f).
31. With regard to the correspondence that the DCLG sent to The Prince of Wales the Commissioner has taken into account the arguments advanced by the DCLG in respect of section 41(1)(a) of the Act. This sub-section requires that for information to be exempt from disclosure on the basis of section 41 it must have been 'obtained from another person'. DCLG argued that this sub-section should be interpreted

¹ These guiding principles in relation the engagement of exceptions contained at regulation 12(5) were set out in Tribunal case *Archer v Information Commissioner & Salisbury District Council* (EA/2006/0037)

broadly to include information about a person, as well as information actually provided by a person.

32. In relation to this argument the Commissioner recognises that deciding whether information has been 'obtained from any other person' requires an assessment of the content of information, not simply of the mechanism by which it was imparted and recorded. However, the Commissioner does not agree with the DCLG's assertion that simply because information it holds is about an identifiable individual it constitutes information obtained from that person. Rather it will depend upon the content of the information which was communicated.
33. In the Commissioner's opinion there has to be a significant degree of similarity between the information which the DCLG has sent to The Prince of Wales and the information which The Prince of Wales originally provided to the DCLG for it to meet the requirements of section 41(1)(a). In the Commissioner's opinion it is not sufficient that the information is simply on the same topic; the correspondence being sent to The Prince of Wales has to reflect the actual views or opinions The Prince of Wales may have raised on a particular topic.
34. The Commissioner believes that a similar approach should be taken in respect of whether correspondence sent to The Prince of Wales can be said to be information originally 'provided' by The Prince of Wales.
35. Having looked at the content of the correspondence falling within the scope of this case that the DCLG sent to The Prince of Wales, the Commissioner accepts that part of it reflects the views of The Prince of Wales sufficiently closely that it falls within the scope of regulation 12(5)(f). However, he also finds that the remaining part of the information does not reflect the views of The Prince of Wales sufficiently closely to fulfil the requirement imposed by regulation 12(5)(f).
36. The Commissioner has outlined in the confidential annex the specific information (in relation to the above correspondence to The Prince of Wales) he considers to fall within the scope of regulation 12(5)(f). He has also included an explanation as to why he considers that the information meets the criteria above.
37. The Commissioner has therefore gone on to consider whether the correspondence from The Prince of Wales to the DCLG and the relevant part of the information from the DCLG to The Prince of Wales (which he has outlined in the confidential annex) was correctly withheld on the basis of regulation 12(5)(f).
38. Before considering the nature of the adverse effect, the Commissioner has considered whether the three limbs of 12(5)(f) are met. With

regard to the first limb, the Commissioner accepts that The Prince of Wales was not under any legal obligation to supply the information; although it is an established tradition, and one protected by the convention which is discussed below, that the Heir to the Throne will communicate with government Ministers, he is under no legally binding obligation to do so. The Commissioner believes that the second limb will be met where there is no specific statutory power to disclose the information in question. It is clear that there is no such power in this case and thus the second limb is met. Finally with regard to the third limb the Commissioner understands that The Prince of Wales has not consented to disclosure of the withheld information.

39. The Commissioner has summarised below the nature of the adverse effect which the DCLG has argued would occur if the withheld information was disclosed.
40. Firstly, if the information was disclosed this would adversely affect The Prince of Wales because it could appear to undermine his political neutrality. The DCLG argued that this potential harm to The Prince of Wales' political neutrality was directly linked to the constitutional convention that The Prince of Wales should be educated in, and about, the business of government in order to prepare him for the time when he will be the Sovereign, without that process putting at risk the political neutrality which is essential to the role and functions of the Sovereign. The DCLG argued that it is essential to the operation of the convention that The Prince of Wales should be able to express views to Ministers on important issues of government and moreover should receive their views in response. This also ensures that The Prince of Wales can carry out his role as Privy Councillor and Counsellor of State. As next in line to the throne he also has a statutory duty under the Regency Act 1937 to act for The Queen during her absence or incapacitation. The DCLG argued that the convention that The Prince of Wales will be informed about the business of government in order to prepare for his reign can only be maintained if both The Prince of Wales, and government Ministers who advise and inform him about the business of government, can be assured that their communications with each other remain confidential.
41. The DCLG explained that this convention is inextricably tied to the role of the Sovereign in the British constitution and the separate constitutional convention for the Sovereign to counsel, encourage and warn the government and thus to have opinions on government policy and to express those opinions to her Ministers. However, whatever personal opinions the Sovereign may hold she is bound to accept and act on the advice of her Ministers and is obliged to treat her communications with them as absolutely confidential. Such confidentiality is necessary in order to ensure that the Sovereign's

political neutrality is not compromised in case Her Majesty has to exercise her executive powers, e.g. initiating discussions with political parties in the scenario of a hung Parliament in order to ensure that a government can be formed. Consequently, The Prince of Wales must not be in a position where his position of political neutrality is compromised because it cannot be restored on accession to the throne. The DCLG argued that if correspondence between The Prince of Wales and government Ministers were routinely disclosed The Prince of Wales' political neutrality would be put at risk.

42. Secondly the DCLG argued that disclosure of the correspondence would have a chilling effect on the way in which The Prince of Wales corresponds with government Ministers, for example by The Prince of Wales no longer recording particular comments or the nature in which The Prince of Wales' views and opinions are recorded being less free and frank in nature. The DCLG argued that such a chilling effect would directly impinge upon the established convention that The Prince of Wales is able to correspond confidentially with government Ministers.
43. Thirdly, the DCLG explained that disclosure of the correspondence would impinge upon The Prince of Wales' privacy. In respect of the protection which should be afforded to The Prince of Wales' privacy in this case the DCLG noted the effect of Article 8 of the European Convention on Human Rights.
44. Article 8 provides that:
 - '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society for the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'
45. The DCLG highlighted the fact that the concept of 'private life' within Article 8(1) is a broad one, based upon the need to protect a person's autonomy and relationships with others from outside interference. The DCLG argued that the right is not confined to activities which are personal in the sense of being intimate or domestic but can be extended to business or professional activities. To support this broad interpretation the DCLG quoted the European Court of Human Rights case of *Niemietz v Germany* and also noted that this judgment

confirmed that Article 8(1) was intended to protect correspondence, (i.e. the type of information which is the focus of this case):

'[29]The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which an individual may choose to live his personal life as he chooses and to exclude entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.

There appears, furthermore, to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world...' ²

'[32] In this connection, it is sufficient to note that the provision does not use, as it does for the word "life", any adjective to qualify the word "correspondence". And, indeed, the Court has already held that, in the context of correspondence in the form of telephone calls, no such qualification is to be made...in a number of cases relating to correspondence with a lawyer...the Court did not even advert to the possibility that Article 8 might be inapplicable on the ground that the correspondence was of a professional nature'.

46. The Commissioner accepts that there is a causal link between disclosure of the correspondence in this case and the adverse effects described above.
47. Disclosure of information which reveals The Prince of Wales' views on particular issues of public policy could clearly have the potential to result in The Prince of Wales' political neutrality being compromised.
48. In relation to the DCLG argument that disclosure would have a chilling effect on the way in which The Prince of Wales communicates with government Ministers, the Commissioner believes that it is more difficult to make an assessment of such an argument given the unique nature of this relationship and thus the lack of any clear precedents.
49. However, the Commissioner is aware of the authorised biography of The Prince of Wales by Jonathan Dimbleby which was published in

² *Niemietz v Germany* (1993) 16 EHRR 97

1994.³ In his introduction to this publication, Dimbleby explains that The Prince of Wales provided him with access to His Royal Highness' archives at St James's Place and Windsor Castle. Dimbleby therefore had access to The Prince of Wales' journals, papers and correspondence with Whitehall. In relation to the inclusion of such information in his book Dimbleby explains that:

'I have been persuaded that the verbatim publication of the material might have a deleterious effect either on the conduct of British diplomacy or on the confidential nature of communications between the monarchy and Whitehall or Westminster; in these cases I have either withheld information or paraphrased the relevant documents or correspondence. However, when it was obvious that only the culture of secrecy which pervades Whitehall was under threat and not the conduct of good governance, I have not complied with requests to delete pertinent material'.

50. Therefore, it would clearly be incorrect to argue that details of the Prince of Wales' communications with government have never been placed in the public domain. To take but two examples from *The Prince of Wales: A Biography*, at page 582 Dimbleby quotes from a letter sent by His Royal Highness in 1985 to the then Prime Minister, Margaret Thatcher, in addition to quoting from a draft section of the letter which did not make the final version. And at page 809 Dimbleby notes that The Prince of Wales wrote to the then Secretary of State for Defence, Malcolm Rifkind, about the implications of cutting the Army's manpower and quotes from the this letter. Although the quote is not particularly lengthy it clearly shows The Prince of Wales' strong views on this issue. The Commissioner has not been provided with any evidence by the DCLG that the inclusion of details of The Prince of Wales' correspondence in this book has resulted in any sort of chilling effect.
51. However, the Commissioner accepts that a direct parallel cannot be drawn between the disclosure of the withheld information which is the focus of this case and the previous disclosures such as the Dimbleby biography. To some extent, as Dimbleby himself acknowledges, his book was 'self-censored': extracts have not been included that would undermine the confidential nature of communications with the monarchy. In contrast, disclosure of the withheld information in this case would be without the consent of The Prince of Wales and would result in complete copies, as opposed to extracts or paraphrased sections, of correspondence being revealed.

³ J Dimbleby, *The Prince of Wales: A Biography*, (Bath: Chivers Press, 1994)

52. Furthermore the Commissioner believes that an inherent part of the convention is the ability of both the Heir to the Throne and government Ministers to be free and frank when discussing matters of government business. This is to ensure that the Heir to the Throne is instructed in the business of government in the most effective and efficient way possible. In the Commissioner's opinion, disclosure of information falling within the scope of convention could lead The Prince of Wales to feel constrained or more reluctant to take part in the process of being educated about the business of government.
53. In reaching this conclusion the Commissioner wishes to clarify his position in relation to the scope of the constitutional convention provided to the Heir to the Throne. In the Commissioner's opinion given that the purpose of this convention is to allow the Heir to the Throne to be educated in the ways and workings of government, the only information which will attract the protective confidentiality of this convention is information which relates to The Prince of Wales being educated in the ways and workings of government. In the Commissioner's opinion this convention cannot be interpreted so widely as to encompass all of The Prince of Wales' communications with the government, for example it does not cover correspondence in which The Prince of Wales may be discussing his charitable work or indeed information of a particularly personal nature. (This is not to say of course that the withheld information in this case includes examples of either class of information.)
54. With regard to the relevance of the chilling effect arguments for correspondence which does not fall within the scope of the convention, the Commissioner does not believe that such arguments automatically attract weight in the way in which correspondence falling within the convention does. Rather, the assessment as to whether a chilling effect will occur will be based upon factors considered in other cases involving an assessment of the chilling effect, most notably the content of the information itself. This is because, in the Commissioner's opinion, in order for a chilling effect argument to be convincing the information which is disclosed has to be more than anodyne in nature otherwise disclosure of such information is unlikely to dissuade individuals from making frank and candid comments in the future. In the circumstances of this case the Commissioner accepts that the correspondence which is not covered by the convention is of a relatively frank and candid nature and thus some weight should be attributed to the argument that disclosure of this information would result in a chilling effect in the way in which The Prince of Wales drafts his correspondence.
55. Finally with regard the third effect, the Commissioner agrees with the DCLG that in respect of Article 8(1) the term 'private' should be interpreted broadly to ensure that a person's relationships with others

are free from interference. The Commissioner also accepts that matters of a business and professional nature are covered by the protection afforded by Article 8(1). Moreover, the Commissioner recognises the unique position which The Prince of Wales occupies. There is clearly significant overlap between The Prince of Wales' public role as Heir to the Throne and a senior member of the Royal Family and his private life. He only occupies such positions because of the family into which he was born. Therefore in the Commissioner's opinion The Prince of Wales' public and private lives can be said to be inextricably linked. Consequently the Commissioner accepts that disclosure of information in this case, even if it focuses on some aspects of The Prince of Wales' public role, could still be said to have an impact on his privacy and dignity.

56. In relation to the likelihood of such effects actually occurring, the Commissioner believes that the threshold of 'would adversely affect' is met. This is because there are number of ways in which the adverse effect could manifest itself: it could be to his privacy, dignity, political neutrality and/or the practical way in which he actually corresponds with government Ministers. Furthermore, it is clear that The Prince of Wales communicates with Ministers across government, rather than simply with one or two departments, so the frequency of the adverse effect occurring is likely to be increased.
57. The Commissioner believes that arguments concerning political neutrality are still relevant, and indeed attract similar weight, even when the information being withheld does not fall within the scope of the constitutional convention relating to the Heir to the Throne. In other words disclosure of correspondence not strictly on issues related to the business of government could still lead to The Prince of Wales being perceived as having particular political views or preferences and thus could undermine his political neutrality. Similarly the Commissioner accepts that a chilling effect on the nature of correspondence falling within the convention could occur even if the withheld information does not fall within the scope of the convention. That is to say, disclosure of information on topics not associated with the business of government would still be likely to affect future correspondence not simply on similar topics but also on topics falling within the scope of the convention.
58. The Commissioner therefore accepts that regulation 12(5)(f) is engaged. However all exceptions contained within the EIR are qualified and therefore the Commissioner must consider the public interest test set out at regulation 12(1)(b) which states that information will only be exempt from disclosure if the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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

Public interest test

Public interest arguments in favour of disclosing the information

59. There is a public interest in disclosure of information to ensure that the government is accountable for and transparent in its decision making processes.
60. Moreover, there is a specific public interest in disclosure of information that would increase the public's understanding of how the government interacts with the Royal Family and the Royal Household and, in particular in the circumstances of this case, the Heir to the Throne. This is because the Monarchy has a central role in the British constitution and the public is entitled to know how the various mechanisms of the constitution operate. This includes, in the Commissioner's opinion, how the Heir to the Throne is educated in the ways of government in preparation for his role as Sovereign.
61. Disclosure of the information may allow the public to understand the influence (if any) exerted by The Prince of Wales on matters of public policy. If the withheld information demonstrated that the DCLG or government in general had placed undue weight on the preferences of The Prince of Wales then it could add to the public interest in disclosing the information.
62. Conversely, if the withheld information actually revealed that The Prince of Wales did not have undue influence on the direction of public policy, then there would be a public interest in disclosing the information in order to reassure the public that no inappropriate weight had been placed on the views and preferences of The Heir to Throne. In essence disclosure could enhance public confidence in respect of how the government engages with The Prince of Wales.
63. These two arguments could be seen as particularly relevant in light of media stories which focus on The Prince of Wales' alleged inappropriate interference in matters of government and political lobbying.
64. Linked to this argument, is the fact that disclosure of the withheld information could further the public debate regarding the constitutional role of the Monarchy and particularly the Heir to the Throne. Similarly, disclosure of the business of government information could inform the broader debate surrounding constitutional reform.

Public interest arguments in favour of maintaining the exception

65. The public interest arguments in favour of maintaining the exception inevitably focus on the need to ensure that the adverse effects described above do not occur.
66. It is clearly in the public interest to preserve the political neutrality of the Royal Family as this essential to ensuring the stability of the constitutional monarchy.
67. It would not be in the public interest for The Prince of Wales to alter the way in which he corresponds with the government Ministers. Such a chilling effect would result in The Prince of Wales being less prepared for the business of government when he is Monarch and furthermore may undermine His Royal Highness' ability to carry out his role as a Privy Councillor, a Counsellor of State and any duties he may be called upon to undertake in line with the Regency Act 1937.
68. There is a clear public interest in protecting the privacy, and by implication, the dignity of the Royal Family so as to preserve their position and ability to fulfil their constitutional role as a unifying symbol for the nation.

Balance of public interest arguments

69. The Commissioner believes that significant weight should be attributed to the argument that disclosure would undermine The Prince of Wales' political neutrality. It is clearly in the public interest that The Prince of Wales, either as Heir to the Throne or when Monarch is not perceived to be politically biased in order to protect his position as Sovereign in a constitutional democracy. The Commissioner believes that arguments concerning political neutrality are still relevant, and indeed attract similar weight, even when the information being withheld does not fall within the scope of the constitutional convention relating to the Heir to the Throne.
70. Furthermore the Commissioner agrees that it is clearly in the public interest that the Heir to the Throne and government Ministers can be free and frank when discussing matters of government business. This is to ensure that the Heir to the Throne is instructed in the business of government in the most effective and efficient way possible. Again, as noted above the Commissioner accepts that the chilling effect arguments are still relevant even when the correspondence itself may not fall within his interpretation of the convention.
71. There is a clear public interest in protecting the dignity of the Royal Family so as to preserve their position and ability to fulfil their constitutional role as a unifying symbol for the nation. In addition,

disclosure of the withheld information would undermine The Prince of Wales' dignity by invasion of his privacy. The Commissioner accepts that these considerations add further weight to the public interest in maintaining the exception.

72. However, given the number of public interest arguments in favour of disclosure, a careful balance of all the relevant public interest factors is required. The arguments identified by the Commissioner touch directly on many, if not all, of the central public interest arguments underpinning the Act, namely ensuring that public authorities are accountable for and transparent in their actions furthering public debate and improving confidence in decisions taken by public authorities. Furthermore, the specific in relation to The Prince of Wales' relationship with government Ministers deserve to be given particular weight.
73. In reaching a conclusion about where the balance of the public interest lies the Commissioner has to focus on the specific content of the information. In this case, having considered the content, the Commissioner's view is that disclosure of the correspondence would not necessarily fulfil the public interest arguments identified in favour of disclosure. In contrast, as the Commissioner has explained above he considers that disclosure of this correspondence would result in the adverse effects identified by the DCLG, in respect of which there are weighty public interest arguments favouring avoidance. Therefore the Commissioner considers that in all the circumstances of this case the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 13(1)

74. As explained above the Commissioner has concluded that some of the information contained within the correspondence cannot be exempt on the basis of regulation 12(5)(f) because it was not provided to the DCLG by The Prince of Wales.
75. The Commissioner has therefore considered whether this information is exempt by virtue of regulation 13(1). This states that:
- '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.'
76. The elements of regulation 13 relevant to this request are as follows:
- '13(2) The first condition is –

- (a) in a case where the information falls within any 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'

77. Section 1(1) of the Data Protection Act 1998 (DPA) defines personal data as:

'data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'

78. DCLG has argued that the withheld information constitutes The Prince of Wales' personal data because:

- the views expressed in communications between the Prince of Wales and any Government minister are clearly data relating to the Prince of Wales;
- they contain the Prince of Wales' 'deeply held convictions on government business' and thus comprise opinions which 'relate to' him; and
- they contain a Minister's understanding of the Prince of Wales personal interests on a particular matter.

79. The Commissioner has reviewed the remaining withheld information and accepts that for these reasons it falls within the definition of personal data as defined by the DPA for the reasons set out above.

80. DCLG has also argued that disclosure of this information would breach the first data protection principle which states that:

1. Personal data must be processed fairly and lawfully; and
2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

81. DCLG has argued that disclosure would breach the first data protection principle for reasons which overlap with and buttress those for

upholding the exception at regulation 12(5)(f) following the application of the public interest. It stated that disclosure would be unfair because:

- The parties exchanged the correspondence with the clear expectation that the contents would not be disclosed;
- For information of a particularly personal nature, this would infringe The Prince of Wales' right to private life under Article 8 ECHR; and
- More widely, disclosure would harm The Prince of Wales' ability to carry out his public duties and would detract from The Prince of Wales' position of political neutrality.

82. In assessing whether disclosure of personal data would be unfair the Commissioner takes into account a range of factors including:

- The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and
 - even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 ECHR;
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - the particular circumstances of the case, e.g. established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.

83. Although it is publicly acknowledged that The Prince of Wales corresponds on occasion with the government. It is not generally known when, with whom or on what topics he corresponds. The specific information withheld in this case is not in the public domain.

With regard to the reasonable expectations of The Prince of Wales, both the operation of the constitutional convention relating to the education of the Heir to the Throne and, more generally, the way in which correspondence between the Royal Family and government has been historically handled give rise to the expectation that such information would not be disclosed. Given the respect and recognition that the Commissioner has accepted should be attributed to this constitutional convention, he believes that an expectation of confidentiality on the part of the Prince of Wales is objectively reasonable.

84. With regard to the consequences of disclosure, the Commissioner accepts that disclosure of the correspondence has the potential to harm The Prince of Wales. It could impact on The Prince of Wales's position of political neutrality and thus his ability to carry out his public duties both as Heir to the Throne and when he becomes Monarch. Furthermore, it could harm The Prince of Wales' privacy and dignity as protected by Article 8 ECHR.
85. Consequently, in light of the weight given to reasonable expectation and the likely personal impact on The Prince of Wales if the correspondence were disclosed, the Commissioner accepts that such a disclosure would be unfair and therefore the Commissioner is satisfied that DCLG can rely on regulation 13(1) to withhold the remaining environmental information. In consequence of this decision, the Commissioner has not gone on to consider regulation 12(5)(d).

The requests for the lists and schedules

86. In addition to asking for copies of correspondence exchanged between The Prince of Wales and Ministers at the DCLG, the complainant requested a list of this correspondence and a schedule of such correspondence. The complainant's request specified that the list should include the recipient of the correspondence, the sender of the correspondence and the date of the correspondence. The complainant's request also specified that the schedule should include a brief description of each relevant document, including the nature of the document, the date of the document and whether the document is being released or not.
87. The DCLG has argued that a list/schedule of documents which The Prince of Wales sent to the DCLG is exempt from disclosure on the basis of section 37(1)(a), 40(2) and 41(1) of the Act and that a list/schedule of documents which the DCLG sent to The Prince of Wales is exempt from disclosure on basis of sections 37(1)(a) and 40(2).

88. In relation to the application of section 37(1)(a), the DCLG explained that whilst it is publicly acknowledged that The Prince of Wales corresponds on occasion with government, it is not generally known when and with whom he corresponds. Disclosure of such information, i.e. by providing a list and/or schedule of the correspondence falling within the scope of this request, would not be in the public interest because disclosure of the details of when and with whom The Prince of Wales corresponds, even in the absence of disclosure of the subject matter of the correspondence, would lead to damaging speculation about the nature of that correspondence. Inferences would be drawn, whether warranted or not, from the knowledge that The Prince of Wales had written a certain number of times to a government department within a particular period, that he had written on particular topics or had expressed particular views. That in turn would inhibit The Prince of Wales and Ministers from exchanging views on governmental matters which would inhibit the convention that the Heir to the Throne should be instructed in business of government.
89. The DCLG argued that these public interest concerns should be given particular weight even without the need to demonstrate particular prejudice arising from these particular lists; section 37(1)(a) applied without proof of damage. To support this point the DCLG suggested that there was a strong parallel to be drawn between this case and *HM Treasury v Information Commissioner and Evan Owen [2009] EWHC 1811*. That case, like the present case, concerned a narrow and specific exemption. In that case, the exemption related to the advice of Law Officers under section 35(1)(c). The DCLG highlighted the fact that Blake J held that the general public interest considerations behind non-disclosure, which are reflected in section 35(1)(c), should be taken into account in the absence of proof of damage. This was why Parliament had enacted the specific exemption for Law Officers' advice under section 35(1)(c) without requiring proof of damage. The DCLG argued that the same considerations applied in the context of this case.
90. The Commissioner finds that the list/schedule of documents which The Prince of Wales sent to the DCLG and which the DCLG sent to The Prince of Wales is environmental information within the meaning of regulation 2(1) of the EIR. The reasons given in relation to the finding that the correspondence itself is caught by the EIR equally apply here. For the same reasons he found the exception at regulation 12(5)(f) applied to the correspondence from The Prince of Wales, he also finds that the list/schedule of documents from The Prince of Wales to the DCLG is exempt on the basis of regulation 12(5)(f) and he accepts that the balance of the public interest favours maintaining the exception. In relation to the list/schedule of documents which the DCLG sent to The Prince of Wales, for the same reasons he found the exception at regulation 13 applied to the correspondence from the DCLG, he also

finds that the list/schedule of documents from the DCLG to The Prince of Wales is exempt on the basis of regulation 13. In reaching this conclusion the Commissioner has placed particular weight on the fact that the request seeks details of correspondence between The Prince of Wales and Ministers themselves, rather than their respective offices or departments.

91. The Commissioner notes that the complainant seeks 'a brief description of each relevant document including the nature of the document', as part of his request for a schedule of documents. In this case, as the documents contain environmental information, the Commissioner considers that any description of the environmental information contained within the documents would in itself constitute environmental information. The Commissioner has determined that those parts of such a schedule would be exempt from disclosure either on the basis of regulation 12(5)(f) or regulation 13(1) for the reasons set out above.

The Decision

- 92 The Commissioner's decision is that the public authority dealt with the request for information in accordance with the EIR.

Steps Required

93. The Commissioner requires no steps to be taken.

Right of Appeal

94. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

95. 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.
96. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 7th day of March 2011

Signed

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

Legal Annex

Regulation 2 - Interpretation

Regulation 2(1)

In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and

- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

Regulation 12(5)

For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect

–

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 1. was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 2. did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 3. has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

Regulation 13 - Personal data

Regulation 13(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.

Text of request – 14 September 2009

I would like to request a list of any and all correspondence which has been sent by Prince Charles to each minister in your department between September 1 2006 and September 1 2009. I assume that this would cover letters, emails, faxes and any other forms of correspondence.

I would like to request a list of any and all correspondence which has been sent by each minister in your department to Prince Charles between 1 September 2006 and September 1 2009. I assume that this would cover letters, emails, faxes and any other forms of correspondence.

For each piece of correspondence, I would be grateful if you could list the recipient of the correspondence, the sender of the correspondence and the date of the correspondence.

I would like to request complete copies of each piece of correspondence listed above between ministers in your department and Prince Charles between September 1 2006 and September 1 2009. This request covers correspondence which has been both received and sent by ministers in your department, to and from Prince Charles. I assume that this would cover letters, emails, faxes and any other forms of correspondence.

Your department will be aware that the Information Commissioner has been examining the government's refusal to release information relating to correspondence between Prince Charles and ministers in response to freedom of information requests from myself and others. I asked for similar information relating to this correspondence for an earlier period, between September 2004 and April 2005. In response to the Information Commissioner's investigation, government departments conducted a further public interest test and concluded that the balance of public interest falls in favour of confirming whether or not the department holds any information which falls within the scope of my request. I believe that therefore your department should confirm whether or not your department holds the requested information in response to this request.

I would also ask your department, on answering the above request, to comply with a further request under the freedom of information act. This request is to provide a schedule of documents which are relevant to the above request. I believe that there should be a brief description of each relevant document including the nature of the document, the date of the document, and whether the document is being released or not. I believe that providing such a schedule would clarify what documents are being released and what is being withheld. This is a specific request for information to which I believe I am entitled to under the freedom of information act, and would also represent best practice in open government.