

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

### **Decision Notice**

**Date: 7 March 2011**

**Public Authority:** Department for International Development  
**Address:** 1 Palace Street  
London  
SW1E 5HE

### **Summary**

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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 part of the information in the scope of the request was environmental and therefore caught by the Environmental Information Regulations 2004 (EIR). 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 the information caught by the Act was exempt on the basis of the exemption at section 37(1)(a). He further found that part of the environmental information was exempt on the basis of the exception at regulation 12(5)(f) and the remainder was exempt on the basis of regulation 13.

### **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 (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

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3. The complainant submitted a request to the Department for International Development (DfID) on 14 September 2009 which asked for all correspondence exchanged between The Prince of Wales and any Minister in the DfID for the period 1 September 2006 and 1 September 2009. The complainant also requested that the DfID provide him with a list and schedule of this correspondence. The full request is included in the annex attached to this notice.
4. The DfID contacted the complainant on 12 October 2009 and confirmed it held information within the scope of the request. The DfID 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 DfID wrote back to the complainant on 18 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 DfID on 18 November 2009 and asked for an internal review of this decision to be undertaken.
7. On 21 January 2010 the DfID informed the complainant of the outcome of the review; this upheld the application of the exemptions as set out in the refusal notice of 18 November 2009.

## The Investigation

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### Scope of the case

8. The complainant contacted the Commissioner on 22 January 2010 in order to complain about the DfID's decision to withhold the information he had requested. The complainant argued that it was incorrect for the DfID 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 DfID on 10 February 2010 and asked to be provided with a copy of the information falling within the scope of the request.
10. The Commissioner contacted the DfID again on 13 December 2010. The Commissioner 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 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 DfID to provide him with submissions to support the application of these exemptions and exceptions. However, the Commissioner explained to the DfID that if 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 DfID might wish to make.
11. The DfID contacted the Commissioner on 25 January 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 DfID 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 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 DfID when it may have been the case that it was provided by another public authority, most notably, the Cabinet Office.
13. At the time that this Notice is being issued the DfID'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. However, in the submissions (which the DfID has chosen to adopt in this case) made by the public authorities in the previous set of complaints in relation to information of a similar nature to that withheld in this case, they explained that although in their view, the withheld information did not constitute 'environmental information' if any of 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 DfID 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

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### **Is any of the requested information 'environmental'?**

16. Having carefully reviewed the withheld information, the Commissioner first considered whether all or any of it fell within the scope of the EIR.
17. 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)'

18. 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.

19. 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).

20. 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.'

21. 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'.
22. 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.'
23. 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.’

24. The Commissioner has reviewed the withheld information and has concluded that some of the information constitutes environmental information because it falls within the definition in regulation 2(1) of the EIR. This information must be dealt with under the EIR rather than the Act. Furthermore, the Commissioner has also established that some of the environmental information constitutes information on emissions and as is discussed below this means that two of the exceptions cited by the DfID cannot apply.<sup>1</sup> The information that does not fall within the scope of the regulations in 2(1) must be considered under the Act.
25. However, the Commissioner is not able to explain which sections of the withheld information he considers to be environmental, and why, 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 DfID but not the complainant, an explanation of which parts of the withheld information he has concluded is environmental information and why. He has also included an explanation in the confidential annex of which parts of the environmental information he considers constitutes information on emissions.

### **Exemptions and exceptions**

26. Given that the Commissioner has found that some of the withheld information is environmental information and some is not, the Commissioner must consider both the exceptions contained in the EIR and the exemptions contained in the Act. The Commissioner has considered the non-environmental information first.

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<sup>1</sup> Specifically, regulations 12(5) (d) and (f) because regulation 12(9) excludes the application of the exceptions at regulations 12 (5) (d) – (g) to information relating to emissions.



## **The request for the correspondence**

### **Section 37(1)(a)**

27. This section states that:

'37 – (1) Information is exempt information if it relates to –

(a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household'.

28. The Commissioner is satisfied that the non – environmental information clearly falls within the ambit of this exemption given that it consists of information sent to, or sent by, The Prince of Wales.

### **Public interest test**

29. Section 37 is a qualified exemption and is therefore subject to the public interest test set out in section 2(2)(b) of the Act, i.e. whether in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If the public interest arguments on both sides are equally weighted the public interest the Act requires disclosure of the information.

### **Public interest arguments in favour of maintaining the exemption**

30. The DfID argued that the prime reason for maintaining the exemption is to ensure that the confidentiality that was essential to two conventions was not undermined. The first is 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 DfID 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 DfID argued that the convention that The Prince of Wales will be informed about the business of government in order to prepare for his reign as Sovereign 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 the communications between them remain confidential.



31. The DfID 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 political neutrality is compromised because it cannot be restored on accession to the throne. The DfID argued that if correspondence between The Prince of Wales and government Ministers was routinely disclosed The Prince of Wales' political neutrality would be put at risk.
32. The DfID explained that it was strongly in the public interest that these conventions were not undermined because preserving the political neutrality of the Royal Family was essential to ensuring the stability of the constitutional Monarchy.
33. Furthermore the DfID argued that disclosure of the information could lead to a chilling effect in respect of The Prince of Wales, and those he corresponds with, altering the manner in which they communicate, for example by comments no longer being recorded or the nature in the which the comments are recorded being less free and frank. Such an effect would not be in the public interest because it would result in The Prince of Wales being less prepared for the business of government when he is Monarch and furthermore might undermine The Prince of Wales' ability to carry out his role as a Privy Councillor or Counsellor of State and any duties he may be called upon to undertake in line with the Regency Act 1937.
34. The DfID has also argued that disclosure of this information may also have a wider chilling effect because it could deter other private individuals from contacting the government if they felt their correspondence would be disclosed under the Act. The DfID has argued that it is in the public interest that anyone should feel free to correspond with members of the government on any subject and that such an input has been a valuable source of information about the public's view on many matters. Consequently, a valuable channel of communication between government and governed could break down to great public detriment. Not only would the government lose access to otherwise unreachable ideas, citizens deprived of this long-

established channel for expressing opinions to their political leaders could come to feel alienated from government.

35. The DfID also argued that given the broad scope of section 37(1)(a), the public interest extended to protecting the privacy and the dignity of the Royal Family. It would not be in the public interest if disclosure of the withheld information infringed this privacy.

### **Public interest arguments in favour of disclosing the requested information**

36. There is a public interest in disclosure of information to ensure that the government is accountable for and transparent in its decision making processes.
37. 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.
38. 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 DfID 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.
39. 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.
40. 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.
41. Linked to this argument, is the fact that disclosure of the withheld information could further public debate regarding the constitutional role of the Monarchy and particularly the Heir to the Throne. Similarly,

disclosure of the information could inform the broader debate surrounding constitutional reform.

### **Balance of the public interest arguments**

42. In the Commissioner's opinion, the nature of the content of information which can fall within the scope of section 37(1)(a) can be very broad because communications, and information relating to such communications, could potentially cover a huge variety of different issues. Therefore establishing what the inherent public interest is in maintaining the exemption contained at section 37(1)(a) is more difficult than identifying the public interest inherent in a more narrowly defined exemption, for example section 42, which provides specific protection for legally privileged information.
43. The Commissioner believes that the following four public interest factors can be said to be inherent in the maintaining the exemption and relevant in this case:
  - Protecting the ability of the Sovereign to exercise Her right to consult, to encourage and to warn Her Government and to preserve her position of political neutrality;
  - Protecting the ability of the Heir to the Throne to be instructed in the business of government in preparation for when he is King and in connection with existing constitutional duties, whilst preserving his own position of political neutrality and that of the Sovereign;
  - Preserving the political neutrality of the Royal Family and particularly the Sovereign and the Heir to the Throne to ensure the stability of the constitutional Monarchy; and
  - Protecting the privacy and dignity of the Royal Family.
44. The Commissioner considers that the scope of the constitutional convention in respect of the Heir to the Throne is relatively narrow. That is to say it will only cover correspondence in which The Prince of Wales is in fact being educated in the ways and workings of government; it cannot be interpreted so widely as to encompass all of The Prince of Wales' communications with the government. For example, the convention would not cover correspondence about His Royal Highness' charitable work or information of a particularly personal nature. (This is not to say that the withheld information in this case includes examples of either class of information).
45. However, where the information does fall within the convention, the Commissioner accepts that there is a significant and weighty public interest in preserving the operation of this convention, so it would not be in the public interest for the operation of the convention to be

undermined. This is particularly so as the convention is designed to protect communications at the heart of government, between government Ministers and the Heir to the Throne.

46. The Commissioner also accepts the argument that disclosure of the information covered by the convention could undermine The Prince of Wales' political neutrality for the reasons advanced by the DfID. The Commissioner considers that significant weight should be attributed to that argument, as 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. The political neutrality of the Monarchy is key to the position of the Sovereign in a constitutional democracy.
47. The Commissioner considers 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. As noted above, the Commissioner accepts that it is inherent in the exemption contained at section 37(1)(a) that it is in the public interest for the political neutrality of all members of the Royal Family to be preserved.
48. Turning to the chilling effect arguments, as the DfID correctly suggests such arguments are directly concerned with the loss of frankness and candour in debate and advice which would flow from the disclosure of information. Such arguments can encompass a number of related scenarios:
  - Disclosing information about a given policy or decision making process, whilst that particular process is ongoing, will be likely to affect the frankness and candour with which relevant parties will make future contributions to that policy/decision making;
  - The idea that disclosing information about a given policy or decision making process, whilst that process is ongoing, will be likely to affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates and decision making processes; and
  - Finally an even broader scenario where disclosing information relating to the formulation and development of a given policy or decision making process (even after the process is complete), will be likely to affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates and decision making processes.

49. In the Commissioner's opinion the first two scenarios are potentially relevant here: some of the withheld information can be seen to relate to discussions on issues where the policy debate or decision making can still be seen as 'live', e.g. they relate to policy matters under consideration.
50. With regard to attributing weight to the argument that disclosure of the withheld information would have a chilling effect on the way in which The Prince of Wales and/or government Ministers would correspond, the Commissioner believes that it is difficult to make an assessment of such an argument given the unique nature of this relationship and thus the lack of any clear precedents.
51. However, the Commissioner is aware of the authorised biography of The Prince of Wales by Jonathan Dimbleby which was published in 1994.<sup>2</sup> 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'.
52. 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

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<sup>2</sup> J Dimbleby, *The Prince of Wales: A Biography*, (Bath: Chivers Press, 1994)

evidence by the Cabinet Office that the inclusion of details of The Prince of Wales' correspondence in this book has resulted in any sort of chilling effect.

53. 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 in the Dimbleby biography. To some extent, as Dimbleby himself acknowledges, his book was been 'self-censored': extracts have not been included that would undermine the confidential nature of communications between 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.
54. 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 would lead The Prince of Wales, and possibly the Minister with whom he corresponds, to feel constrained or more reluctant to take part in the process of being educated about the business of government. Therefore, given the protection which the Commissioner believes should be provided to the convention itself, it follows that notable weight should be given to the argument that disclosure of information which falls within the scope of the convention would result in a chilling effect.
55. With regard to attributing weight to 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 is unlikely to dissuade individuals from making frank and candid comments in the future. In the circumstances of this case the Commissioner accepts that if any of the correspondence was considered not to be covered by the convention, it is still 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. (This is not to say that such information, i.e. information which falls outside the Commissioner's definition of the convention, necessarily falls within the scope of this request.)

56. Again, as with the concept of political neutrality, the Commissioner accepts that a chilling effect on the 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.
57. However, the Commissioner is not prepared to accept that disclosure of this information would have a chilling effect on the way in which other individuals communicate with the government. In the Commissioner's opinion it is not logical to suggest that because some of The Prince of Wales' correspondence with government is disclosed, private individuals would fear that their correspondence would also be disclosed. The significant public interest factors which would have to be present to justify such disclosure would almost inevitably be related to the position that The Prince of Wales holds rather than simply the content of the information itself. Consequently, the Commissioner considers that the public would easily distinguish disclosure by the government of specific pieces of correspondence with The Prince of Wales under the Act and the potential disclosure of information sent to the government by private citizens. Without any evidence to the contrary the Commissioner considers that such an argument does not attract any particular weight.
58. With regard to the final argument, i.e. the privacy considerations inherent within section 37, the Commissioner's view is that these should not be dismissed lightly. 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. To the extent that disclosure of the withheld information would undermine The Prince of Wales' dignity by invasion of his privacy, the Commissioner accepts that this adds further weight to maintaining the exemption.
59. 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 arguments relevant to this case in relation to The Prince of Wales' relationship with government Ministers deserve to be given particular weight.

60. In reaching a conclusion as to where the balance of the public interest lies the Commissioner has to focus on the specific content of the information. In this case, for the information which falls within the scope of the convention, the Commissioner believes that the public interest in maintaining the exemption is very strong because of the weight that should be attributed to maintaining the convention (i.e. a confidential space in which the Heir to the Throne can communicate with Ministers) and the concepts which underpin it (i.e. political neutrality and confidentiality) along with the weight that should be given to the chilling effect arguments applicable to such correspondence. Even when taken together the Commissioner does not feel that the public interest arguments in favour of disclosing the particular information which falls within the scope of this request overrides the weighty public interest in maintaining the exemption.
61. In relation to any of the information which may fall outside the Commissioner's understanding of the convention, the Commissioner believes that the public interest is more finely balanced because the argument in favour of maintaining a constitutional convention attracts far less weight. (It should not be inferred that such information is indeed contained within the scope of this request.) Therefore, it would certainly be possible (and easier) to envisage a scenario where disclosure of the correspondence between The Prince of Wales and government Ministers would be in the public interest. However, as noted above just because information does not fall within the scope of the convention this does not mean that its disclosure would not undermine two key concepts inherent to it: political neutrality and the confidentiality of the Heir to the Throne's correspondence with Ministers. Given the content of the withheld information in this case the Commissioner considers that in all the circumstances the public interest in maintaining the exemption outweighs that in disclosure of the requested information.
62. In light of the Commissioner's decision in respect of section 37(1)(a) he has not gone on to consider whether the non – environmental information is also exempt from disclosure on the basis of sections 40(2) and 41(1).

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

63. The DfID 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).

64. As the Commissioner has concluded that some of the information falling within the scope of this request is environmental information, he has considered the application of these exceptions to environmental information which does not relate to emissions (for reasons already stated above), starting with 12(5)(f). 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;'

65. 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.<sup>3</sup>

66. 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.
67. The Commissioner accepts that the correspondence in this case which the DfID 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).
68. With regard to the correspondence that the DfID sent to The Prince of Wales the Commissioner has taken into account the arguments advanced by the DfID 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'. DfID argued that this sub-section should be interpreted broadly to include information about a person, as well as information actually provided by a person.
69. 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 DfID'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.
70. In the Commissioner's opinion there has to be a significant degree of similarity between the information which the DfID has sent to The Prince of Wales and the information which The Prince of Wales originally provided to the DfID 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.
71. 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.

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<sup>3</sup> These guiding principles in relation the engagement of exceptions contained at regulation 12(5) were set out in the Tribunal case *Archer v Information Commissioner & Salisbury District Council* (EA/2006/0037)

72. The Commissioner has carefully considered the environmental information which falls within the scope of this request and he is satisfied that it is contained within communications sent to the DfID by The Prince of Wales. He also finds that part of the information sent by the DfID to The Prince of Wales is sufficiently focused on information The Prince of Wales originally provided and therefore meets the criteria above. However, he also finds that part of the correspondence sent to The Prince of Wales is not information sufficiently focused on information The Prince of Wales originally provided and does not therefore meet the criteria above. For the environmental information which the Commissioner found did not meet the required criteria, he has instead considered further below whether the information was exempt on the basis of the exception at regulation 13.
73. The Commissioner has included an explanation in the confidential annex of which parts of the environmental information he considers to meet the criteria above that the information should have been obtained from a third party, in this case, The Prince of Wales.
74. Before considering the nature of the adverse effect, the Commissioner has considered whether the three limbs of regulation 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 discussed above, 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.
75. The nature of the adverse effect which the DfID has argued would occur if the withheld information was disclosed effectively mirrors that discussed above in relation to the application of the public interest test in relation to section 37. In essence, if the information were disclosed this would adversely affect The Prince of Wales because not only could it appear to undermine his political neutrality but it also could have a chilling effect on the way in which he corresponds with government Ministers and thus impinge upon the established convention that he is able to correspond confidentially with government Ministers. Moreover, disclosure would impinge upon The Prince of Wales' privacy. For the reasons set about above the Commissioner accepts that disclosure of the withheld information could well have these effects.

76. In relation to the likelihood of such effects occurring, the Commissioner believes that the threshold of 'would adversely affect' is met. This is because there a 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 increased.
77. 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). This test is effectively the same as the test set out in section 2 of the Act and states that information may only be withheld 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.
78. In the Commissioner's opinion, the public interest arguments in favour of maintaining regulation 12(5)(f) in this case are very similar to the public interest arguments in favour of maintaining section 37(1)(a). The public interest arguments in favour of disclosing the information are also very similar. Therefore the Commissioner does not indeed to set out in full his public interest considerations in respect of 12(5)(f). Rather he is satisfied that, for the reasons set out above in relation to section 37(1)(a), the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exception contained at regulation 12(5)(f).

### **Regulation 13(1)**

79. As set out above the Commissioner has concluded that not only is some of the withheld material environmental information it is also information 'on emissions'. Regulation 12(9) states that:

'To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs 5(d) to (g).'

80. Therefore for the information which is on emissions, the DfID cannot rely on regulation 12(5)(f) nor regulation 12(5)(d) to withhold the information and the Commissioner has instead considered whether the information is exempt by virtue of regulation 13(1).

81. The Commissioner also considered whether the information which he found not exempt under regulation 12(5)(f) is instead exempt by virtue of regulation 13(1). Regulation 13 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.’

82. 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’

83. 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.’

84. The DfID has argued that the withheld information constitutes The Prince of Wales’ personal data because it sets out his opinions and views on the various matters discussed in the correspondence.
85. The Commissioner has reviewed remaining withheld information and accepts that it falls within the definition of personal data as defined by the DPA because it relates to The Prince of Wales’ discussions with the DfID.
86. The DfID has 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.

87. The DfID has argued that disclosure would breach the first data protection principle for reasons which overlap with and buttress those for upholding the exemption at section 37(1)(a) following the application of the public interest test. 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.

88. 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.



89. Although it is publicly acknowledged that The Prince of Wales corresponds on occasion with 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, the Commissioner accepts that the correspondence which is the focus of this case was clearly exchanged on the basis that all parties believed that it should be kept private. Both the operation of the constitutional convention relating to the education of the Heir to the Throne, 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.
90. 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' 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.
91. 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 the DfID can rely on regulation 13(1) to withhold the environmental information to which regulation 12(5)(f) does not apply and to information on emissions.

### **The requests for the lists and schedules**

92. In addition to asking for copies of correspondence exchanged between The Prince of Wales and Ministers at the DfID, 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.

93. The DfID has argued that a list/schedule of documents which The Prince of Wales sent to the DfID 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 DfID sent to The Prince of Wales is exempt from disclosure on basis of sections 37(1)(a) and 40(2).
94. In relation to the application of section 37(1)(a), the DfID 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.
95. The DfID 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 DfID 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 DfID 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 DfID argued that the same considerations applied in the context of this case.
96. In relation to the application of section 37(1)(a) to the lists and schedules detailing the correspondence passing between The Prince of Wales and DfID, the Commissioner accepts that the exemption applies and he also accepts that the balance of the public interest favours maintaining the exemption. The reasons given in relation to the correspondence itself apply equally here. In reaching this conclusion the Commissioner has also 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.

97. 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**

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98. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act and the EIR.

## **Steps Required**

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99. The Commissioner requires no steps to be taken.

## Right of Appeal

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100 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](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

101 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.

102 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 7<sup>th</sup> day of March 2011**

**Signed .....**

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

## Legal Annex

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### Communications with Her Majesty.

#### Section 37(1) provides that –

“Information is exempt information if it relates to-

- (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household, or
- (b) the conferring by the Crown of any honour or dignity.”

#### 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 –

- (c) international relations, defence, national security or public safety;
- (d) 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;
- (e) intellectual property rights;
- (f) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (g) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (h) 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

- (i) the protection of the environment to which the information relates.

**Regulation 12(9)**

To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

## **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.

Under the act, 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 September 1 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.

Under the act, 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 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 the public interest is again in favour of confirming whether or not your department holds the requested information and that therefore your department should confirm whether or not your department holds the requested information in response to this request.

I would also like to 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



Reference: FS50293634



I believe I am entitled under the freedom of information act and would also represent best practice in open government.