

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

Decision notice

Date: 29 March 2017

Public Authority: Department for Environment Food and Rural Affairs

Address: Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested from the Department for Environment, Food and Rural Affairs (Defra) copies of any correspondence held between the Prince of Wales and (a) Nick Brown and (b) Margaret Beckett, which referred to foot-and-mouth disease. Defra refused to confirm or deny whether information relevant to either of the requests was held, citing the exemptions in section 37(2) (communications with the Royal Family), section 40(5) (third party personal data) and section 41(2) (information provided in confidence) of FOIA.
2. The Commissioner considers that the requests may cover both environmental and non-environmental information and should therefore have been dealt with under the EIR and FOIA respectively. She has further found that Defra breached section 10(1) of FOIA and regulation 5(2) of the EIR by failing to issue a response in accordance with each piece of legislation within the specified timeframe. Insofar as FOIA applies, the Commissioner considers that Defra is entitled to neither confirm nor deny whether information is held under section 37(2) of FOIA. Where the EIR applies, however, the Commissioner requires the public authority to take the following step to ensure compliance with the legislation:

- Respond to the complainant's requests under the EIR
3. The public authority must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. Following correspondence with Defra about an earlier set of requests, on 20 July 2015 the complainant clarified the information he was seeking:
 - (a) Copies of all communications between Nick Brown and the Prince of Wales in 2001 (until Mr Brown ceased to be MAFF Minister) which refer to foot-and-mouth disease.*
 - (b) Copies of all communications between Margaret Beckett and the Prince of Wales in 2001 (after she became Secretary of State) and 2002 which refer to foot-and-mouth disease.*
5. Defra acknowledged receipt of the request the following day but, despite further reminders, the complainant notified the Information Commissioner on 8 October 2015 that he had not received a response. The Commissioner subsequently reminded Defra of its responsibilities under the legislation and on 12 January 2016 Defra issued a refusal notice to the complainant.
6. In its refusal notice, Defra advised the complainant that it was unable to confirm or deny whether it held information falling within either of the requests. Defra explained that the duty to confirm or deny whether the information was held, set out in section 1(1)(a), did not apply by virtue of sections 37(2), 40(5)(b) and 41(2) of FOIA.
7. The complainant wrote to Defra on the same day that the refusal notice was received and asked it to reconsider its response. In particular, the complainant argued that the request should be dealt with under the EIR rather than FOIA.
8. On 2 February 2016 Defra provided the complainant with the outcome of its internal review. This upheld the original decision to consider the requests under FOIA and found that the exemptions cited had been applied correctly. The reviewer did though accept that it had failed to comply with the requests in a timely manner.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his requests for information had been handled. The complaint itself had two parts. Firstly, corresponding with the points raised when asking for an internal review, the complainant considered that the request should have been dealt with under the EIR and not FOIA. Secondly, the complainant disputed in any event Defra's reliance on the 'neither confirm nor deny' provisions in FOIA.

Reasons for decision

10. When considering the complaint, the Commissioner has been guided to a significant extent by the approach set out in the decision notice issued under the case reference FER0586914¹ (9 November 2016). This concerned two requests to the Cabinet Office which both asked for copies of communications between Tony Blair (in his position as Prime Minister) and the Prince of Wales but respectively on genetic modification and foot-and-mouth disease.
11. The Cabinet Office refused under section 37(2) of FOIA to confirm or deny whether the requested information was held by virtue of 37(1)(aa).

Is the requested information environmental information?

12. In order for any information to be relevant to either of the requests it will need to be contained in correspondence which makes reference to foot-and-mouth disease. A question then arises as to whether information captured by the requests would be environmental information as defined by regulation 2(1) of the EIR. If so, it would be necessary to consider the requests under the EIR rather than FOIA.
13. In FER0586914 the Commissioner considered the question of whether information relating to foot-and-mouth disease would be environmental information and set out her position as follows:

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1625391/fer_0586914.pdf

13. For item 2 of the request, the Commissioner considers that correspondence relating to the foot-and-mouth disease would likely relate to the disease itself, and its impact upon the farming industry. The complainant was very specific to mention that he wanted correspondence from 2001, in which there was an outbreak of the disease that had a monumental impact on farming within the United Kingdom, so it seems logical that discussions relating to farming were part of the complainant's reason for submitting the request. For both the disease itself and the impact upon the farming industry, the Commissioner considers that this can be seen as environmental as per regulation 2(1)(f) of the EIR – which specify the “contamination of the food chain”. However, as for the reasons above, the request only asks for information that refers to foot-and-mouth disease. It is entirely possible that the disease was mentioned in reference to another matter, or put in passing, without it being the sole purpose of the communication. Therefore, the Commissioner considers that information potentially within the scope of the request could be caught under the provisions of both the Act and the EIR.

14. Although the specific form of the relevant requests considered in FER0586914 differs, the Commissioner is of the view that the same principles outlined above equally apply here. In this regard, the Commissioner has considered whether FOIA, or the EIR, or both, would apply to the requests. Like FER0586914, she has concluded that Defra would be required to consider the requests under both pieces of legislation on the balance of probabilities that they may cover a mixture of environmental and non-environmental information.
15. In light of her finding, the Commissioner considers that Defra is required to respond to the requests under the EIR in respect of any information potentially held that relates to foot-and-mouth disease or otherwise falls within any of the definitions of environmental information in regulation 2(1) of the EIR.
16. Insofar as the requests refer to non-environmental information, the Commissioner has been required to consider Defra's reliance on the exemptions in FOIA to refuse to confirm or deny whether the requested information is held. She began by looking at the Defra's application of section 37(2) of FOIA.

Section 37(2) of FOIA – communications with the Royal Family and the awarding of Honours

17. The exemption in section 37 of FOIA covers communications with The Queen, other members of the Royal Family and the Royal Household and the awarding of Honours by the Crown.
18. Section 37(1)(aa) specifically states that information is exempt information if it relates to – communications with the heir to, or the person who is for the time being second in line of succession to, the Throne. This would therefore refer to communications with the Prince of Wales.
19. Section 37(1)(aa) is class-based and an absolute exemption. This means that if the requested information were held and it fell within the class of information described in the exemption in question, it would be exempt from disclosure. Section 37(1)(aa) is not subject to the public interest test.
20. The Commissioner accepts that the definition of “communications” in the exemption is a broad one. As clarified in FER0586914, it does not simply relate to written correspondence by the Prince of Wales but also includes discussions, whether made in person or by telephone. The exemption also goes beyond being only from the Prince himself, it includes his officials and staff that are communicating on his behalf.
21. Under section 1(1) of FOIA, a public authority in receipt of a request will normally be required to confirm or deny whether it holds information of the nature described. Section 37(2) of FOIA provides, however, that this duty does not arise where the act of confirming or denying would in itself disclose exempt information specified by section 37(1)(aa).
22. The requests in this case both ask for correspondence relating to the Prince of Wales which, due to his position as the heir to the throne, would by definition be captured by section 37(1)(aa). Furthermore, the Commissioner is satisfied that section 37(2) of FOIA is engaged on the basis that to confirm or deny whether the requested information was held would undermine the protection afforded by the application of section 37(1)(aa).
23. As the Commissioner has found that section 37(2) is engaged, she has not been required to consider the other exemptions cited by Defra.

Procedural delays

24. Under section 10(1) of FOIA and regulation 5(2) of the EIR, a public authority is required to respond to a request in accordance with the relevant legislation within 20 working days.

25. The Commissioner has found that Defra failed to issue an appropriate FOIA and EIR response within the prescribed timeframe and therefore breached the aforementioned provisions.

Right of appeal

26. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

27. 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.
28. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Steve Wood
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Information Commissioner's Office
Wycliffe House
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