IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0185**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50348825
Dated: 26 July 2011

Appellant:	**John Kirkhope**
First Respondent:	**Information Commissioner**
Second Respondent:	**The National Archives**
Date of hearing:	**7 and 8th February 2012 in Central London CJC** **23rd May 2012 at Field House**
Date of decision:	**15 January 2013**

Before

Anisa Dhanji
Judge

and

Mr Andrew Whetnall
Mr Michael Hake
Panel Members

Representation

For the Appellant: Joseph Barrett, Counsel
For the First Respondent: Robin Hopkins, Counsel,
For the Second Respondent: Jonathan Swift QC, and Amy Rogers, Counsel

Subject matter

FOIA section 40(2) - whether information is personal data; whether disclosure would breach the first data protection principle
FOIA section 41(1) - whether disclosure of the information would constitute an actionable breach of confidence.

Authorities

Core legislation
Data Protection Act 1998, section 1, Schedule 1, Schedule 2
European Convention on Human Rights, Articles 8 and 10
Freedom of Information Act 2000, sections 40, 41

Other legislation
Administration of Estates Act 1925, section 46
Civil List Act 1952, section 2
Commissioners of Revenue and Customs Act 2005, sections 18, 19 and 23
Crown Proceedings Act 1947, sections 38(3) and 40(2g)
Duchy of Cornwall, Management Act 1863, section 38
Finance Act 1989, section 182
Great Charter 1337
Human Rights Act 1998, sections 2, 3 and 6
Inheritance Taxes Act 1984, section 49
Official Secrets Act 1911, section 2 (now repealed)
Official Secrets Act 1989
Public Records Act 1958, sections 3, 5, 10
Taxation of Chargeable Gains Act 1992, sections 60 and 80
Taxes Management Act 1970, section 6 and Schedule 1

Case law
A G v Sir John St. Aubyn and others (1811) (Wight 167)
A G v Mayor and Commonalty to the Borough of Plymouth (1754) (Wight 134)
Anderson v IC & Parades Commission EA/2007/0103, 29 April 2008
Attorney General v Observer Ltd 1990] 1 AC 109
Bluck v IC & Epsom NHS Trust [2011] 1 Info LR 1017
British Union for the Abolition of Vivisection v The Home Office and the Information Commissioner [2008] EWCA Civ 870
Bruton v IC & Duchy of Cornwall EA/2010/0182
Campbell v MGN [2004] 2 AC 457
Chasyn v Stourton (1553) (1 Dyer 94a) (73 ER 205)
Coco v AN Clark (Engineers) Limited [1968] FSR 415
Commissioners for HMRC v Banerjee [2009] 3 All ER 930
Common Services Agency v Scottish Information Commissioner [2011] 1 Info LR 184
Corporate Officer of the House of Commons v IC & Ors [2008] EWHC 1084
Derry City Council v IC [2011] 1 Info LR 1105
Douglas v Hello (No 3) [2008] 1 AC 1
Durant v FSA [2004] FSR 28
Higher Education Funding Council v IC & Guardian News, EA/2009/0036, 13 January 2010
Hobbs v Weeks (1950) (100 L.J. 178)
Home Secretary v BUAV & IC [2008] EWHC 892 (QB)
Corporate Officer of the House of Commons v IC and Norman Baker MP [2011] 1 Info LR 935
HRH The Prince of Wales v Associated Newspapers Ltd [2008] Ch 57
Imerman v Tchenguiz and Others [2011] Fam 116
In Re S (A Child) (Identification: Restrictions on Publication) [2005] 1 AC 593

Johnson v Medical Defence Union [2008] Bus LR 503
Kennedy v Charity Commission and Information Commissioner [2012] 1 WLR 3524
Kennedy v Charity Commission EA/2008/008
Mayor of Penryn v Holm (1876-1877) (L.R. 2 Ex. D.)
McKennit v Ash [2008] QB 73
Padfield v Minister of Agriculture, Fisheries & Food [1968] AC 997
PricewaterhouseCoopers v IC & HMRC [2011] UKUT 372 (AAC), 13 September 2011
R (on the application of Wilkinson) v Inland Revenue Commissioners [2005] 1.W.L.R. 1718
R v Braintree DC ex p Halls (2000) 32 HLR 770
R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed & Small Businesses Limited [1982] 1 AC 617
R v IRC, ex p National Federation of Self-Employed & Small Businesses Ltd [1982] 1 AC 617
Rowe v Brenton (1828) 8 Barnewell and Cresswell 737
Solicitor to the Duchy of Cornwall v Canning (1880) (5 P.D. 114 Probate)
Sugar v BBC [2012] 1 WLR 439
The Prince's Case (1606) (8 Co. Rep 1)
The Sunday Times v United Kingdom (1979) 2 EHRR 245

Strasbourg authorities
Fressoz & Poire v France (2001) 31 EHRR 28
Kenedi v Hungary [2009] ECHR 786
Niemietz v Germany (1993) 16 EHRR 97
Plon v France (2004) ECHR 200
Standard Verlags GmbH v. Austria (no. 3) (Appln 34702/07), 10 January 2012
Tarsasag a Szabadsagjogokert v Hungary (2011) 53 EHRR 3
Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy (C-73/07) (2010) (2008) ECR. I-9831
Von Hannover v Germany [2005] 40 EHRR 1
Z v Finland (1998) 25 EHRR 371

OTHER MATERIAL

Textbooks
Halsbury's Laws volume 12(1), paragraphs 80 and 320
Information Rights: Law and Practice, 3rd ed, Coppel, Hart 2010, 25-038
Simon's Taxes A3.412
The Constitutional Position of the Prince of Wales P.L. 1995, Aut 401-413

Other
www.duchyofcornwall.org/abouttheduchy.htm
www.princeofwales.gov.uk/finances/expenditure
Parliamentary Report of the Select Committee on the Civil List 1971 – 1972
House of Commons Public Accounts Committee Investigation into the Duchies of Cornwall and Lancaster - Oral Evidence 7th February 2005

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INFORMATION RIGHTS

DECISION

The Tribunal upholds the Decision Notice dated 26 July 2011 and dismisses the appeal.

The Confidential Annex

Annex A will not be provided to the Complainant, nor published with the determination on the Tribunal's website or elsewhere.

Signed

Anisa Dhanji
Tribunal Judge

REASONS FOR DECISION

Introduction

1. This is an appeal by Mr John Kirkhope (the "Appellant"), against a Decision Notice issued by the Information Commissioner (the "Commissioner"), on 26 July 2011.

2. The Appellant requested access, under the Freedom of Information Act 2000 ("FOIA"), to a closed file held by the National Archives ("TNA") concerning the liability of the Duchy of Cornwall to tax. The content of this file comprises the disputed information in this appeal.

3. TNA is a government department and an executive agency of the Ministry of Justice. It was formed in 2003, bringing together the Public Record Office (the "PRO") and the Royal Commission on Historical Manuscripts. In 2006, it merged with Her Majesty's Stationery Office and the Office of Public Sector Information. It holds and preserves material regarded as being of potential value for historical research and as a resource for government departments in relation to their past policies and decisions.

4. The Appellant seeks the disputed information as part of his research for a thesis on the constitutional treatment of the Duchy of Cornwall, through which he hopes to inform public knowledge and debate.

5. TNA refused the Appellant's request. The Appellant complained to the Commissioner who upheld TNA's decision. The Appellant has appealed to the First-tier Tribunal challenging the Commissioner's decision.

The Request for information

6. The Appellant submitted his request for information to TNA on 13 March 2010. His request was for the file with the name "IR 40/16619 – Liability of the Duchy of Cornwall to tax: covering dates 1960-62".

7. The file had been transferred to the Public Records Office (now TNA), by the Inland Revenue in 1996 along with a number of other files. The Inland Revenue successfully applied for extended closure of the file on the basis that it contained "personal tax information supplied in confidence". The application was to close the file for 75 years to ensure that it was closed for the lifetime of the individuals to whom the tax information in the file related. The file is closed until 2038.

8. TNA refused the Appellant's request on 30 March 2010, after consulting both HMRC and the Cabinet Office. TNA relied on the exemptions in FOIA sections 40(2) (personal data), and 41(1) (information provided in confidence).

9. On 19 April 2010, the Appellant requested an internal review. On 19 August 2010, TNA informed him that having conducted an internal review, it was maintaining its decision.

The Complaint to the Commissioner

10. On 4 September 2010, the Appellant complained to the Commissioner under section 50 of FOIA. The Commissioner inspected the disputed information, and as part of his inquiries, he also contacted both HMRC and TNA.

11. The Commissioner decided that TNA had correctly applied section 40(2) of FOIA, and that the disputed information was exempt from disclosure under that provision. In particular, he found that:

- the disputed information comprised the personal data of the Prince of Wales in his capacity as Duke of Cornwall, as well as the personal data of Her Majesty the Queen.

- the disputed information was passed to HMRC in the reasonable expectation that it would not be disclosed to the public. That expectation was reflected in TNA's approach to the closure of this file and others like it.

- disclosure pursuant to the Appellant's request would breach that reasonable expectation and the privacy of the data subjects.

- in the circumstances of this case, there were no countervailing legitimate interests sufficient to outweigh the detriment to the data subjects.

12. Having reached the view that the disputed information was exempt under section 40(2), the Commissioner considered that he did not need to go on to consider whether the exemption in section 41(1) was also engaged.

The Appeal to the Tribunal

13. The Appellant has appealed to the Tribunal against the Decision Notice.

14. He says that the Commissioner's factual analysis and legal reasoning are flawed, in particular:

- the Commissioner erred in his analysis as to the nature, character and purpose of the Duchy. The Duchy is not an ordinary private estate and this has been recognised by the First-tier Tribunal in **Bruton v IC & Duchy of Cornwall,** which rejected the claim that the Duchy is a private estate as opposed to a public body, without a separate legal personality;

- the tax liability or exemptions of the Duchy, and its income as paid to the Prince of Wales (or to the Monarch during the minority of the Prince), cannot properly be regarded as personal data or private information;

- the disputed information is not analogous to the tax details of an ordinary private tax payer, but relates to the taxation which HMRC chooses to levy, or more importantly refrains from levying, on public funds paid to the Queen and Prince of Wales because of their respective constitutional roles. The funds are deployed solely for public functions and official duties and pursuant to public interest;

- any privacy or confidentiality interest is at best slight, and the extraordinarily privileged treatment which the Duchy's revenues are accorded should be exposed to public knowledge, debate and scrutiny; and

- the Commissioner attached too much weight to privacy considerations, and too little weight to the public interest.

15. TNA was joined in the appeal as the Second Respondent. An oral hearing took place over two days, and the panel later reconvened for a third day to hear arguments in relation to section 10 of the European Convention on Human Rights ("ECHR") following promulgation of the decisions in **Kennedy v Charity Commission** and **Information Commissioner,** and **Sugar v BBC.**

16. The parties have lodged extensive written material including a bundle containing more than 60 authorities, and much historical material. We were also referred to further authorities relating to Articles 8 and 10 of the ECHR. The Tribunal is grateful to the parties for their assistance. We have considered all the material before us, but have not attempted to refer to all of it in this determination, nor to every turn of argument, still less to attempt a summary of the long history of the Duchy and the tax treatment of its revenues.

17. During the course of the hearing, we heard evidence from the following witnesses:

- Sir Alex Allan
- Ms Sue Walton
- Ms Susan Healy
- Sir Michael Peat
- Sir Walter Ross

18. We have summarised their evidence below but record here our appreciation for the assistance the witnesses have provided to the Tribunal.

19. It may be convenient to mention here one matter in relation to the material placed before us. Just before the third day of the hearing, the Appellant, through his Counsel, lodged a witness statement from himself and certain

documents relating to other cases concerning FOIA and the constitutional position of the Prince of Wales. He also supplied a speaking note for his closing submissions which drew in part on these new materials. The late lodging of these papers was strongly resisted by TNA, on the grounds that its own witnesses had not had an opportunity to be questioned on the matters addressed in the new witness statement, and that there had been no opportunity to cross examine the Appellant on the opinions and facts belatedly presented. It was claimed that selections and extracts from evidence and expert witness statements submitted in another case which the Appellant was now seeking to rely on was similarly unbalanced and unfair, not least because of the limited time for other parties to consider them. The Tribunal does not adhere to strict rules of evidence, but is of course mindful of ensuring fairness to all parties. However, while we do not condone this late submission, we consider that the new material tends only to reinforce arguments already advanced. We do not consider that the other parties have suffered any real prejudice by the late admission of these papers, nor that the Appellant's position has been materially advanced by them.

The Tribunal's Jurisdiction

20. The scope of the Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Decision Notice is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other Notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.

21. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the Notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, as in this case, the Tribunal will often receive evidence that was not before the Commissioner.

Issues

22. The key issues before us in this appeal can be simply stated:

    a. Is the disputed information exempt under section 40(2)? It will be exempt if the disputed information is personal data and if disclosure would breach any of the data protection principles.

    b. If the information is not exempt under section 40(2), is it exempt under section 41(1) on the basis that disclosure would amount to an actionable breach of confidence?

23. It may be helpful to mention one issue that we will not be addressing. During the first two days of the hearing, Counsel for the Appellant argued that developments in the law expected shortly after the hearing may indicate an unqualified right to information under Article 10 of the ECHR in certain circumstances, including where information is sought by a public

watchdog or academic researcher. The foundation for this claim was strongly resisted by TNA. By the time the hearing reconvened for a third day, similar or comparable arguments had come before the Court of Appeal and the Supreme Court, which had decided that Article 10 was not engaged in the manner claimed by the Appellant. Recognising that we are bound by these decisions, the Appellant did not pursue the point and therefore, there is no issue before us to decide in relation to Article 10.

24. More generally, we would note that the Appellant has made wide-ranging submissions in relation to the specific constitutional and public status of the Prince of Wales in his capacity as heir to the throne and as Duke of Cornwall. We consider this to have been useful background material, but largely outside the scope of the issues we need to decide.

Evidence

Overview – The Duchy

25. The historical material before us spans nearly eight centuries since the Great Charter of 1337 ("the 1337 Charter") that established the Duchy of Cornwall. The summary that follows is inevitably brief and intended only to provide a general context for the issues in this appeal. Where the matters referred to are not contentious, we have drawn, in part, on the summary in **Bruton** at paragraphs 33 et seq., as well as the summary set out in TNA's Skeleton Argument.

26. HRH Prince Charles, the Prince of Wales, is the 24th Duke of Cornwall. The title "Duke of Cornwall" was created by Edward III under the 1337 Charter for his son, and for each future eldest surviving son of the Monarch and heir to the throne. The 1337 Charter provides that the eldest son of the Monarch, the heir apparent, succeeds to the title of Duke of Cornwall. With that title, come rights and responsibilities with respect to the Duchy. The Charter provides that the Duke is entitled to its income, net of all expenses, but not to the capital, thereby preserving the estate for his successors. When there is no Duke, the Duchy estate reverts to the Monarch and the annual Civil List is then reduced, by the amount of the income generated by the Duchy. If there is a Duke, but he is a minor, then eight-ninths of the net revenues from the Duchy estate are placed at the disposal of the Monarch and are again used to reduce her income from the Civil List.

27. The Duke as Prince of Wales does not receive funds from the Civil List. Instead, he derives an income from the Duchy which funds his public, charitable and private activities. Since 14th November 1969 (when he came into his majority), the Prince of Wales has been entitled to the entirety of the net revenues generated by the Duchy.

28. The Duchy is managed by the Duke, supported by the Prince's Council which meets twice a year and provides advice to the Duke on the management of the estate. The Duchy publishes annual accounts which are submitted to the Treasury and then presented to Parliament.

29. The nature of the Duchy is a point in dispute between the parties. We note here that a differently constituted Tribunal concluded in **Bruton**, that the Duchy is a public authority for the purposes of the Environmental Information Regulations 2004. That decision is currently under appeal.

30. The Prince of Wales is liable to income tax on all of his income except for the income he receives from the Duchy. Following a Law Officer's Opinion in 1913 (reaffirmed by a further Law Officer's Opinion in 1921), no income tax has been levied on the revenue from the Duchy. The Appellant considers that the reasoning in the Law Officers' Opinions is inadequate and is based on an error as to the nature of the Monarch and the heir's rights in respect of the Duchy.

31. From the date of his majority in 1969 until his marriage in 1982, the Prince of Wales made a voluntary contribution to the Exchequer of 50% of the gross income he received from the Duchy each year. Thereafter, until 1993, he paid 25%. Since then, he has paid the sums set out in a Memorandum of Understanding between the Queen and the Prince of Wales in 1993, as varied on 23 July 1986 ("the MoU"). The MoU records, *inter alia*, that as of 6 April 1993, he would voluntarily pay income tax on income arising from the Duchy to the extent that this was not used to defray expenditure in connection with official duties.

32. The amount paid by the Duchy to the Duke annually is information that is available in the public domain, as is the portion of that income that is used for public functions and official duties, and the amount he pays to the Exchequer under the arrangement set out in the MoU.

The Disputed Information

33. As in all FOIA cases, the requester does not see the disputed information and cannot know, therefore, the extent to which his arguments are fully relevant to the disputed information. The absence of even a summary of the disputed information can compound the difficulties for a requester in such circumstances. That has certainly, in our view, been an issue in the present case. To alleviate the problem, in part at least, we encouraged TNA to provide the Appellant with a summary of the disputed information. This summary was produced at the hearing. We have reservations about what was produced (for reasons we made clear to TNA during the course of the hearing), and consider that it will not have enlightened the Appellant very far.

34. A detailed description of the disputed information and TNA's arguments referring to it, are set out in Annex A. Although we are obviously constrained in what we can say about the disputed information in this public part of the decision, we consider it important, in order to explain our findings in relation to the disputed information, that we should give at least a broad description of the information. Although we find, for the reasons set out below, that the disputed information is exempt, that finding relates to the specific content rather than the general nature of the disputed information, and what we say here does not transgress on those aspects we consider are exempt.

35. The papers comprising the disputed information date from 1960 to 1962. They concern certain specific revenue sources and involve exchanges between the Duchy's representatives and Inland Revenue officials, as well as internal exchanges and minutes between Inland Revenue officials discussing their responses to questions raised by the representatives of the Duchy. While they include the replies given by the Inland Revenue to questions raised, the file does not include a final substantive response on all the issues.

36. The disputed information can conveniently be divided into 3 groups, (1), (2), and (3). Groups (1) and (3) relate to income received by the Duchy from two different sources, respectively. With one exception relating to group (1), they do not mention any specific amounts of money. They also do not refer directly to disbursements of net revenues to the Duke or the Queen.

37. Group (2) comprising two letters, relates to the correspondence referred to above, but deals only with what might be described as a process issue about how those exchanges of communications should be dealt with.

Witness Evidence

38. The witnesses who gave evidence each lodged written statements. They were cross-examined in open sessions, save where certain parts of their evidence addressed the disputed information directly. Those parts were addressed in closed sessions, in the absence of the Appellant and his Counsel. We were mindful to ensure that the evidence heard in closed sessions was limited to matters dealing specifically with the disputed information.

Sue Walton

39. Sue Walton, Director of Central Policy in HMRC, explained HMRC's policy on the confidentiality of tax information. Confidentiality has long been fundamental to the relationship between members of the public and HMRC, and its predecessor, the Inland Revenue. The long-standing and consistent practice has been that discussions with individuals or with companies or other legal entities in relation to their specific tax affairs are treated as being in confidence. The confidentiality of tax records is a fundamental feature of the UK tax system, enshrined in legislation since at least the Income Tax Act of 1842, the rationale being to assure the public that personal details will remain confidential, and to help foster trust and candour between them and the tax authorities. Undermining this trust would make it significantly more difficult to collect tax.

40. When the disputed information was created, its confidentiality would have been protected under the Official Secrets Act 1911. The Taxes Management Act 1970 required tax inspectors and commissioners to take an oath of confidentiality and there is now a strict duty of confidentiality under the Commissioners for Revenue and Custom Act 2005, section 19 of which makes the disclosure of revenue and customs information relating to an identifiable individual without lawful authority, a criminal offence. Ms Walton believes that if the disputed information was still held by HMRC, its

disclosure would be a criminal offence, and this in turn would have engaged section 44(1)(a) of FOIA. An application for disclosure made to HMRC would have been refused.

41. Transfer of the file to TNA would have involved a process of selection assessing the historic value of the file. The IR 40 series concerned the general oversight of Inland Revenue taxes, and questions of taxation policy. In the main, such files deal with general points raised by individuals, professionals and representative bodies, and contain correspondence on such matters between the Board of Inland Revenue and central government. Guidance relevant to the time of transfer of the disputed information to TNA was contained in the PRO Manual of Records Administration 1993, exhibited to the statement of Susan Healy, and the files and records chapter of the Inland Revenue's Head Office Manual of 1996. This identifies records of significance relating to notable events or persons when the records add significantly to what is already known and are worthy of permanent preservation. Where such files contain personal or confidential information, an application would be made for extended closure beyond the usual 30 year closure period, and each year TNA would contact HMRC for guidance on any files due to become open, so that a sensitivity review could be carried out.

42. At the internal review stage, HMRC formed the view that the disputed information did not fall within the scope of section 41 of FOIA, and that the disputed information related to the Duchy and that the Duchy was wholly distinct from the Prince of Wales, so that section 40 of FOIA was not engaged. Following the advice of the Cabinet Office, HMRC revised this opinion, and by the time the internal review was completed, it was clearly of the view which it still maintains, that the disputed information comprises the personal data of the Prince of Wales, and that the information was clearly communicated in confidence with the expectation that it would not be disclosed.

Susan Healy

43. The witness statement of Susan Healy, on behalf of TNA, explains the policies and legal considerations relevant to holding files relating to personal taxation. She explains that extended closure of files in the IR 40 series is not unusual. With the aim of protecting the privacy of living individuals, those that contain personal tax information are generally subject to 75 year closure. More recently, a closure period of 84 years has been adopted reflecting changed lifespan assumptions. Of nearly 20,000 files in the series, 3,640 are closed, of which 2,877 are closed for 75 years.

44. She gives a chronology of the transfer of the file containing the disputed information to TNA in 1996, the procedures completed to ensure that the closure period (to 2038), was appropriate and consistent with policy, the facility to review this from time to time, and the consultative steps taken before decisions were made on the Appellant's application to see the file. Her witness statement also explains why she considers that there is no inconsistency in relation to other files relating to taxation matters and the Duchy that are open. For the most part, this is because older files relate to

earlier Dukes, no longer living. Later files do not contain the same level of detail on personal taxation matters as the closed file, and therefore do not display the same sensitivity which normally justify closure on grounds of privacy.

Sir Alex Allan

45. Sir Alex's evidence draws on his experience as a civil servant in HM Customs and Excise, the Treasury, the Cabinet Office and the Department of Constitutional Affairs, including periods where his duties, for example as Principal Private Secretary to the Prime Minister, included regular meetings with the Queen's Private Secretary and other periods of regular contact with the Royal Household.

46. Although not personally involved with the decisions or discussions on the Appellant's request, he reviewed the disputed information and the Cabinet Office records of the case. All Government Departments are under instruction from the Ministry of Justice to consult the Cabinet Office when considering FOI requests relating to the Royal Family, the Royal Household, or the Duchies of Cornwall or Lancaster. In such cases, the Cabinet Office liaises with the Royal Household, or through them, with the officers of the Duchy concerned, to obtain their views on the disclosure being sought. This is in line with general practice to consult third parties when requests are made for information relating to them. The Cabinet Office will take into account the views of the Household and Officers of the Duchy concerned, but will reach its own views on whether the information should be disclosed, and will advise the Government Department receiving the request accordingly.

47. In the present case, having been informed of the HMRC's view that the documents were exempt from disclosure under sections 40 and 41, the Cabinet Office consulted the Royal Household to ascertain its views, and established that the Household did not consent to disclosure. The Cabinet Office then confirmed to TNA that it concurred with the view that the information was exempt under sections 40 and 41.

48. The taxation of income received by the Prince of Wales from the Duchy is governed by the MoU, which includes provision that the Prince of Wales is entitled to the same privacy and confidentiality in respect of his tax affairs (including as to treatment of his income from the Duchy of Cornwall) as any other taxpayer. Sir Alex agrees with the position of the Cabinet Office, that the information contained in the file is private and confidential and that its disclosure would be an actionable breach of confidence. The information in the file relates to the Prince, and also to the Queen because during the Prince's minority, eight-ninths of the Duchy revenue was paid to the Sovereign. The first data protection principle would be breached by disclosure of the file.

49. This was the position of both HMRC and the Cabinet Office when the initial request for information was refused. When the Cabinet Office was consulted in the course of the internal review, HMRC's position, subject to the views of the Cabinet Office, had changed. They were content for the file to be

released and did not consider its content to be sensitive. The Cabinet Office strongly disagreed. In their view, this was not consistent with HMRC's general position on the confidentiality of taxpayer information. Having consulted again with the Royal Household, the Cabinet Office maintained its initial view. HMRC then reverted to its initial position. TNA, having considered the views of the HMRC and the advice of the Cabinet Office, also maintained its original position.

50. Sir Alex stresses the provisions in the Trustee Report and MoU, concerning the voluntary taxation arrangements agreed to by both the Queen and the Prince of Wales which give assurances on privacy and confidentiality. Paragraph 17 of the Trustees' Report provides that they "will be entitled to the same privacy and confidentiality in relation to their tax affairs as any other taxpayer. Accordingly the Government will not be publishing any information relating to monies paid under these voluntary arrangements." Paragraph 32 of the MoU repeats that privacy and confidentiality will be respected as for any other taxpayer "but this shall not preclude any exchange of information between the Treasury and the Inland Revenue which is necessary for the proper implementation of these arrangements." Sir Alex notes the principle of consistency of treatment in respect of the closure of archive files is also made clear in the Public Record Office's manual of Records Administration issued in 1993.

51. On the question whether the Duchy is a public body or a private estate, Sir Alex says that the advice given to him by officials in the Constitution Unit of the Cabinet Office, is that the Duchy of Cornwall is regarded by government as a private estate created to provide an income for each Duke of Cornwall. That this has been the Government view for a significant period is confirmed by answers to Parliamentary Questions in 1832, 2009 and 2011. Notwithstanding the First-tier Tribunal's decision in **Bruton** (which as already noted is under appeal to the Upper Tribunal), the Government remains of the view that the Duchy is, in general, a private estate.

Sir Michael Peat, GCVO

52. Sir Michael gave evidence based on his experience of having held various senior positions in the Royal Household as Director of Property Services, Treasurer to the Queen, Receiver General of the Duchy of Lancaster, Principal Private Secretary to the Prince of Wales, and his service on the Prince's Council. He is also a Fellow of the Institute of Chartered Accountants. He was closely involved with discussions relating to the 1993 Memorandum.

53. He says that the Duchy of Cornwall is not itself subject to taxation. This is not a matter of an exemption being applied, but reflects the fact that only natural and legal entities can be subject to taxation. The Duchy is not a separate legal entity, so for example it is not a corporation, and is not and never has been liable to corporation tax. The net revenue of the Duchy (ie total revenue after deducting costs and expenses), is paid to the person entitled to receive it at the relevant time, ie to the Duke of Cornwall if the Duke is in his majority, or the Sovereign if there is no Duke. When the Duke is a minor, eight-ninths is paid to the Sovereign and the balance to the Duke.

There is no question of capital gains liability because neither the Sovereign nor the Duke is entitled to the capital of the Duchy. The only issue of taxation which arises is whether the Duke or the Sovereign is liable to income tax on the revenue they receive from the Duchy. The arrangements for taxation at the present time are as set out in the MoU. Prior to the MoU, the Prince of Wales was liable to income tax on all of his income other than the income he received from the Duchy, such income being exempt from taxation by virtue of the "Crown exemption". However, he made a voluntary contribution to the Exchequer of 25% of the gross income he received from the Duchy each year. As from 6 April 1993 these voluntary payments ceased. Instead, the Prince voluntarily pays tax on the income arising from the Duchy to the extent that it is not used to defray expenditure in connection with his official duties, or official duties performed by the Princess of Wales/Duchess of Cornwall. Appendix B to the MoU contains rules for determining the amount of income to be taxed. Annual audited reports are published.

54. The Queen and the Prince of Wales expect to retain privacy and confidentiality in relation to their tax affairs in the same way as any other taxpayer. This was made clear in paragraph 32 of the MoU. Sir Michael says that the intention was to make the Queen and the Prince's tax affairs similar to those of other individuals. On the Appellant's observation that the title of the file containing the disputed information refers to "the liability of the Duchy of Cornwall to tax" and not "personal tax calculations relating to the Duke of Cornwall", Sir Michael observes that as the Duchy is not a legal entity for the purposes of taxation, it is "neither liable to pay tax nor exempt from paying tax in its own right". In practical terms the description "liability of the Duchy of Cornwall to tax" is a reference to taxation of the revenues in the hands of the Duke, or where relevant, the Sovereign. Any discussions with the HMRC conducted by or on behalf of the Duchy are therefore "conducted in order to establish the rights and obligations of the person entitled to receive the net income from the Duchy estate." The Duchy will, in effect, act as the agent of the taxpayer and the Prince of Wales' agents are subject to the same confidentiality provisions as their principals.

Sir Walter Ross KCVO

55. Sir Walter gave evidence as the Secretary and Keeper of the Records of the Duchy of Cornwall. He is also a member of the Prince's Council. To the extent that his witness statement confirms and supports that of Sir Michael Peat on the tax treatment and agreements set out in the MoU and expectations of confidentiality concerning dealings with the Revenue/HMRC, we do not repeat it here. Other key points he made are that the Dukedom is an hereditary title, that the Duke has no constitutional role, that the Duchy of Cornwall estate "is a collection of land and other capital assets which are bound together as 'the Duchy' under the 1337 Charter in order to generate an income for the benefit of present and future Dukes of Cornwall'', that the Duke is entitled to the net revenues but not the capital assets of the Duchy (historically the assets were inalienable but this has been somewhat relaxed to facilitate practical estate management); that there are separate bank accounts for capital accounts or revenue accounts; that the Duke was

entitled to a revenue account surplus of £17.8m which was generated from capital assets valued at approximately £700m in 2011.

56. In Sir Walter's view, although the Appellant deals at length with the nature and activities of the Duchy of Cornwall estate, the majority of issues he raises are not relevant to the issues in the appeal. This should not be taken to mean that the Appellant's statements are correct. The Duchy of Cornwall estate is not publicly funded. Its principal activity is the sustainable and commercial management of estate land and properties (a mission statement to this effect is set out in the Annual Report and Accounts). The Commissioner was correct to describe the Duchy of Cornwall as a private estate of the Prince of Wales. The Duchy is managed by the Prince of Wales himself, supported by the Prince's Council acting effectively as an advisory board and by the offices of Secretary and Keeper of the Records and by the Receiver General of the Duchy who has oversight of the financial affairs of the estate.

Findings and Reasons

Statutory Framework

57. Under section 1 of FOIA, any person who makes a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information.

58. The duty on a public authority to provide the information requested does not arise if the information sought is exempt under Part II of FOIA. The exemptions under Part II are either qualified exemptions or absolute exemptions. Information that is subject to a qualified exemption is only exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Where, however, the information requested is subject to an absolute exemption, then, as the term suggests, it is exempt regardless of the public interest considerations.

59. In the present case, the Commissioner found that the disputed information was exempt under section 40(2) of FOIA. Under this provision, personal data of third parties is exempt if disclosure would breach any of the data protection principles set out in Part 1 of Schedule 1 of the Data Protection Act 1998 ("DPA"). The exemption is absolute.

60. The data protection principles regulate the way in which a "data controller" (in this case TNA), must "process" personal data. The word "process" is defined in section 1(1) of the DPA to include disclosure to a third party or to the public at large.

61. The first question to address is whether the disputed information is personal data. If it is not, then it is not exempt under section 40(2), and must be disclosed unless another exemption applies. TNA has also relied on section 41(1) (information provided in confidence), so if the disputed information is not exempt under section 40(2), we will still need to consider if it is exempt under section 41(1).

General Findings

62. It may be helpful if we begin by addressing one point that has exercised the parties and on which they, and the Appellant in particular, have concentrated much of their evidence and arguments. It is about whether the Duchy is a separate legal entity with a distinct legal personality, and whether it is a public or private body. It is the Appellant's position, running throughout his arguments in this appeal, that the Duchy cannot properly be regarded as a private institution and therefore, any analogy with the position of a private taxpayer is entirely misconceived. Indeed, he says that it is the proper characterisation of the Duchy that unlocks this case. In support of his position the Appellant has put forward wide-ranging arguments and evidence, including as to the constitutional position of the Duke and Duchy.

63. The questions the Appellant raises as to the nature of the Duchy are not ones that lend themselves to easy answers. Indeed, we note that even the Appellant, whose considerable research and scholarship is evident, has not always claimed that the Duchy is a public body. In his article in the Plymouth Law Review in 2010 *"A Mysterious Arcane and Unique Corner of our Constitution" The Laws relating to the Duchy of Cornwall* (OB128), the assertion that the Duchy of Cornwall is a private estate is certainly questioned, but it is not argued that it is a public body in any ordinary sense of the term.

64. However, we consider that the issues in this appeal do not require us to make a finding as to the legal nature of the Duchy. The most we would say is that we agree that there is a likely valid distinction to be drawn between the Duchy as holder of assets in perpetuity and receiver of associated revenues, and the Duke or, in the minority of or absence of a Duke, the Sovereign, as the persons entitled to receive the revenues net of costs of maintaining the estate.

65. The reason that we do not need to go further is because whatever its status, and to whatever extent the disputed information relates to the Duchy, it relates to the Duchy as a receiver of revenues, rather than, for example, the Duchy as a contracting party. The disputed information concerns, for the most part, the taxation of those revenues. It is clear from the evidence that the Duchy is not itself taxed directly. Whether that position is correct and whether it should be taxed, are not questions relevant to this appeal. Sir Michael says, and we accept, that for practical purposes, the fact that the Duchy is not taxed directly means that the "liability of the Duchy of Cornwall to tax" (which is the title of the file the Appellant has requested), means that taxation of the Duchy's income is, in effect, taxation of that income in the hands of the Duke, or in certain cases, the Queen. Discussions with the Inland Revenue or HMRC conducted by or on behalf of the Duchy are effectively conducted in order to establish the rights and obligations of the person entitled to receive the net income from Duchy estate. Even if the Duchy, properly characterised, is a separate legal entity (of whatever description), the fact that all net revenues of the Duchy accrue for the benefit of the Duke, and at times, the Queen, means that any discussion about the

tax treatment of the Duchy's revenues relates to the Prince and the Queen. Our finding in this regard informs our approach on the key issues in this appeal, in particular, as to whether the disputed information is personal data, whether disclosure would breach any of the data protection principles, and whether the disputed information is exempt because disclosure would constitute a breach of confidence.

Is the disputed information personal data?

66. We turn now to consider whether the disputed information constitutes personal data. The legal definition of "personal data" as found in section 1(1) the DPA (and incorporated into FOIA by section 40(7)), is as follows:

> *"personal data" means 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 intentions of the data controller or any other person in respect of the individual;*

67. The DPA gives effect to Directive 95/46/EC of 24 October 1995 on The Protection Of Individuals With Regard To The Processing Of Personal Data And On The Free Movement Of Such Data which defines "personal data" as follows:

> *"… any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity"*

68. In the Court of Appeal's decision in **Durant v Financial Services Authority** "personal data" was defined by Auld LJ as follows:

> *"…not all information retrieved from a computer search against an individual's name or unique identifier is personal data within the Act. Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction*

or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity."

69. If the disputed information is personal data, it is common ground between the parties that it must, at the least, be the personal data of the Duke of Cornwall and the Queen. They were the only people entitled to the net revenues of the Duchy at the relevant time. The Duke was a minor and therefore, the Queen was the beneficiary in respect of eight-ninths of the revenues and the Duke was entitled to the remaining ninth.

70. As to whether the disputed information is in fact personal data, the Respondents say that the question is essentially a simple one. The Duchy has no separate legal personality; it is a private estate. Since the only individuals entitled to benefit from the net revenues of the Duchy during the period covered by the disputed information were the Duke of Cornwall and the Sovereign, the information relating to the tax treatment of the revenues of the Duchy is, in effect, information about the financial affairs of the Duke and the Queen. It is their personal data.

71. The Appellant's main argument as to why the disputed information is not personal data is that the Duchy is not a private estate and that therefore, information concerning the tax liability of Duchy cannot properly be regarded as personal data or private information.

72. We have already found that a discussion about the tax treatment of the Duchy's revenues relates to the income of the Duke, and in some cases the Queen. As a result, any tax issues relating to the Duchy necessarily affects their income. Since there can be no doubt that a person's financial affairs constitutes his or her personal data, it follows that information about the tax affairs of the Duchy, amounts to the personal data of the Duke and the Queen. The information relates to them and they can be identified from it. It comes squarely within the definition of personal data in section 1 of the DPA. On the **Durant** test, the connection to the data subjects is not merely incidental. The information is about their income. The constitutional position of the data subjects and whatever legitimate public interest there may be in transparency about their financial affairs, may be relevant to the question of whether disclosure would breach any of the data protection principles. It is not relevant, however, to the question of whether the information is personal data.

73. We emphasise that our finding does not turn on the nature of the Duchy. Even if the Duchy, properly characterised, is a separate legal entity (of whatever description), the fact that all its net revenues accrue for the benefit of the Duke and Queen would mean that any discussion about the tax treatment of the Duchy's revenues in the Duchy's hands still relates to them. The tax treatment has a direct impact on their income and therefore, it still constitutes their personal data. This is regardless of whether the Duchy itself is characterised as a private estate or something else, and is regardless of

the historical and legal arguments advanced by the parties as to the status of the Duchy.

Would disclosure breach any of the data protection principles?

74. Having found that the disputed information is personal data, the next question is whether disclosure would breach any of the data protection principles.

75. In the case of the Queen, the fact that the Civil List is reduced by the amount received from the Duchy, that Civil List payments are intended solely to meet her public expenses as Head of State, and that the amount she receives from the Civil List is fully in the public domain, may support a different finding from the case of the Duke as to whether disclosure would breach the data protection principles. However, it is not a point that we need to decide. We have already found that the disputed information is also the personal data of the Duke and we must consider, therefore, whether disclosure in relation to him would breach the data protection principles, regardless of whether it would do so in relation to the Queen.

76. The parties agree that only the first data protection principle is relevant. This provides that personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met. In his Decision Notice the Commissioner concluded that disclosure of the disputed information would not be fair. He did not go on, therefore, to consider whether any conditions in Schedule 2 were met.

77. It is also common ground between the parties that the only relevant condition in Schedule 2 is in paragraph 6(1) which provides as follows:

> *The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.*

78. "Necessary" in this context has been held to reflect the meaning attributed to it by the European Court of Human Rights when justifying an interference with a recognised right, namely that there should be a pressing social need and that interference must be both proportionate as to the means, and fairly balanced as to ends. See **Corporate Officer of the House of Commons v IC & Ors**, paragraph 43, and **The Sunday Times v United Kingdom**, paragraph 59.

79. It is clear from the wordings of condition 6(1), that when assessing whether the condition is met, the interests of the data subject as well as the data user (here, the Appellant), and where relevant, the interests of the wider public, must be taken into account. This balancing exercise is also necessary when assessing fairness. A wide approach to fairness is endorsed by the observations of Arden LJ in **Johnson v Medical Defence Union** at paragraph 141:

"Recital (28) [of Directive 95/46] states that "any processing of personal data must be lawful and fair to the individuals concerned". I do not consider that this excludes from consideration the interests of the data user. Indeed the very word "fairness" suggests a balancing of interests. In this case the interests to be taken into account would be those of the data subject and the data user, and perhaps, in an appropriate case, any other data subject affected by the operation in question."

Although that case concerned the provisions of the Freedom of Information (Scotland) Act 2002, the principles apply equally in relation to FOIA.

80. The following passage in **Corporate Officer of the House of Commons v IC and Norman Baker MP** at paragraph 28, also offers helpful guidance about the balancing exercise to be undertaken:

"If A makes a request under FOIA for personal data about B, and the disclosure of that personal data would breach any of the data protection principles, then the information is exempt from disclosure under the Act: this follows from section 40(2) read in conjunction with section 40(3)(a)(i), or (when applicable) section 40(3)(b) which does not a apply in these appeals. This is an absolute exemption - section 2(3)(f)(ii) FOIA. Hence the Tribunal is not required to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure under section 2(2). However… the application of the data protection principles does involve striking a balance between competing interests, similar to (though not identical with) the balancing exercise that must be carried out in applying the public interest test where a qualified exemption is being considered."

81. This does not mean, however, that one starts with the scales evenly balanced. The continued primacy of the DPA, notwithstanding freedom of information legislation, and the high degree of protection it affords data subjects has been strongly emphasised by Lord Hope in **Common Services Agency v Scottish Information Commissioner** where he states (at paragraph 7):

"In my opinion there is no presumption in favour of the release of personal data under the general obligation that [FOIA] lays down. The references which that Act makes to provisions of DPA 1998 must be understood in the light of the legislative purpose of that Act …. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data."

82. The position is different however, where public officials are concerned and where the purpose for which the data are processed arise through the performance of a public function. As stated by the Tribunal in **Corporate Office of the House of Commons v IC and Norman Baker MP** at paragraph 77:

> *"…when assessing the fair processing requirements under the DPA … the consideration given to the interests of data subjects, who are public officials where data are processed for a public function, is no longer first or paramount. Their interests are still important, but where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would the case in respect of their private lives. This principle still applies even where a few aspects of their private lives are intertwined with their public lives but where the vast majority of processing of personal data relates to the data subject's private life."*

83. We turn now to task of applying these principles in the present case.

84. The Respondents say that disclosure would be neither fair nor lawful. It would not be lawful because it would constitute a breach of confidence and potentially also an unjustified interference with the Duke's rights under Article 8 of the ECHR.

85. They also say that disclosure would not be fair. They give two principal reasons for this. First they say that information about a person's financial and tax affairs is, by its very nature, intensely private. That basic principle holds true regardless of whether or not the data subject is a member of the Royal family. HMRC's long-standing practice has been to keep personal and commercial tax information strictly confidential, and both TNA and HMRC have treated the disputed information as confidential in the same way as they would for other individuals.

86. Second, the data subject would have had a reasonable expectation that the disputed information would be kept confidential. The correspondence in question dates from the early 1960s, some 40 years before the introduction of FOIA. There would have been no expectation on the part of anyone concerned that the information would enter the public domain. On the contrary, as is clear from Sir Michael's evidence, the Prince and indeed the Queen, have always considered such information to be confidential and the Prince's Household has also confirmed that he would not consent to disclosure.

87. In addition, the Respondents say that none of the conditions in paragraph 6(1) of Schedule 2 is satisfied. Whatever the Appellant's interests in relation to his academic research might be, disclosure would prejudice the Duke's right to privacy and confidentiality and this prejudice is unwarranted. Disclosure is not "necessary" for the purposes of any legitimate public interest. Given the extent of transparency that already exists concerning the principles of the Inland Revenue's approach to the revenues of the Duchy in the hands of the Duke, there would be no incremental gain in public understanding from disclosure. Even if there is some legitimate interest in disclosure on the basis that the Duke uses a portion of his Duchy income to fund his official expenditure as Prince of Wales, it does not follow that disclosure is "necessary" for the purposes of any such interest. It is entirely for him how he chooses to spend the income he receives from the Duchy.

There is no requirement that he uses any part of that income for "official" purposes.

88. The Appellant's arguments in favour of disclosure rest not so much on his own particular academic interests, but rather on the strong public interest he asserts exists in the disputed information being made public which he says clearly outweigh any privacy considerations. His arguments are wide-ranging. Amongst other things, he says that:

- the beneficiaries receive the income that the Duchy produces only in their public and official role. This means that there is a stronger and different public interest in transparency than if the Prince was an ordinary private tax-payer;
- the disputed information relates to public money paid in respect of the performance of public functions and for this reason, too, there is a legitimate public interest in disclosure;
- the Duchy is entirely funded by public money, both as regards the initial transfer of capital that was vested within in it by Act of Parliament at its inception, and on an on-going basis (via tax-payer under-written exemptions from capital gains, income tax and corporation tax);
- the Duchy enjoys a privileged tax position, and any papers showing whether such tax treatment has been reconsidered or reviewed, are of particular public interest. The historic arrangements (relating to a period more than 50 years ago) between two public bodies, the Duchy and the Inland Revenue, concerning this uniquely privileged tax position of the Duchy should be open to public discussion and scrutiny; and
- there is a legitimate interest on the part of the public in being informed about the principles taken into account when deciding how matters relating to the taxation of Duchy revenues are settled and in transparency and accountability of HMRC performing its functions.

89. The Appellant also says that other documents relating to the tax status of the Duchy of Cornwall, created both earlier and more recently than the disputed information, are already in the public domain. He drew our attention to the open files on the tax status of the Duchy, including *inter alia*, the Law Officers' opinions of 1913 and 1921, files on proposals for dealing with the taxation of the Duchy dated 9 years after the date of the file containing the disputed information, the Parliamentary Select Committee report on the Civil List of 1971/72, the Public Accounts Committee's consideration of the taxation status of the Prince in 2005, the annually published Duchy Accounts, the Prince of Wales' website and the Report of the Royal Trustees (Memorandum of Understanding on Royal Taxation) dated 11 February 1993. He argues that all these documents confirm that the tax status of the Prince as Duke of Cornwall is a matter of significant public interest, and that with the above information being already in the public domain, it is anomalous to refuse to disclose the disputed information on the basis of privacy considerations.

90. In reaching our findings we have carefully considered the arguments advanced by the parties, in light of the relevant case law referred to above, and the specific content of the disputed information.

91. As we have already noted, the disputed information can be conveniently divided into 3 groups. Groups (1) and (3) relate to income received by the Duchy from two specific sources, and group (2) comprises two letters dealing with what we have described as a process issue. We are satisfied, for the reasons set out below, that in respect of the information coming within groups (1) and (3), disclosure would not be fair and would not meet the conditions in paragraph 6(1) of Schedule 2. Having reached this finding we have not dealt here with whether disclosure would also be unlawful. The Respondents' argument in that regard is based on the assertion that disclosure would be a breach of confidence and we will deal with that issue in relation to section 41(1).

92. First, we find that there is a general presumption that the tax affairs of individuals are private to them. If this principle needs authority, we have been referred to the statement of Henderson J. in **Commissioners for HMRC v Bannerjee** at paragraph 34, where he states:

> *"In my opinion any taxpayer has a reasonable expectation of privacy in relation to his or her financial and fiscal affairs, and it is important that this basic principles should not be whittled away."*

Disclosure would clearly compromise the privacy interests of the Prince.

93. Notwithstanding that he disputes that the Prince should be treated like any other tax payer in relation to the income he receives from the Duchy, the Appellant quite fairly accepts that the "details of [his] income, reliefs and allowances may be confidential". He has also said that he is not interested in that type of information. What he is interested in is the basis upon which liability or non-liability to tax in respect of revenues from the Duchy is determined. He says, and we accept, that papers showing whether such tax treatment has been reconsidered or reviewed, are a matter of legitimate public interest. As already noted, the Appellant considers that the Law Officers' Opinion in 1913 (to the effect that the "crown exemption" applies so that the Duke is not liable to pay tax upon the Duchy's revenues), is flawed.

94. However, the disputed information in groups (1) and (3) does not deal with the question of liability to tax. It does not reflect a reconsideration or review of that tax treatment. It simply deals with the application of the known principle to two specific revenue streams and does not re-visit the principle itself. In our view the disputed information falls outside the scope of the Appellant's public interest arguments. It concerns specific details about the Prince's tax affairs, which we consider are confidential (and which we understand the Appellant accepts may be confidential) notwithstanding the Prince's public role.

95. Second, we consider that the Prince would have had a legitimate expectation that the disputed information would be kept confidential. Our finding in this regard is not based on TNA' s argument that the disputed information came into being long before the introduction of Freedom of

Information legislation and there would have been no expectation, therefore, on the part of anyone concerned that the information could enter the public domain. That would be true of course of any pre-FOIA information and the argument cannot be used to thwart Parliament's intention in enacting FOIA.

96. It is also not based on the express expectation of confidentiality at paragraph 32 of the MoU which provides as follows:

> *"In relation to anything done in respect of this voluntary agreement The Queen and The Prince of Wales shall be entitled to full privacy and confidentiality in the same way as any other tax payer; but this shall not preclude any exchange of information between the Treasury and the Inland Revenue which is necessary for the proper implementation of the arrangements."*

The MoU considerably post-dates the disputed information and cannot be taken to be evidence of the expectation at the time. The same is true of the the report of the Royal Trustees dated 11 February 1993 which annexes the MoU and which reiterates the expectation that "the Queen and the Prince of Wales will be entitled to the same privacy and confidentiality in relation to their tax affairs as any other tax payer".

97. Rather, we consider that the reasonable expectation of confidentiality flows from the general presumption that the tax affairs of individuals are private. There is also evidence before us, in relation to the actual expectation as reflected in the contents of the disputed information, which contain an express expectation as to confidentiality.

98. The Appellant argues and we accept that there is no evidence of any loss or harm to the data subject that would arise from disclosure. However, there is no requirement that there be actual loss or harm. We are satisfied that disclosure of this type of information would compromise the data subject's privacy. We are not persuaded by the Appellant's argument that disclosure would not compromise his privacy because other related material is already in the public domain. The Appellant has pointed, in this regard, to a number of other files related to the Duchy in the public domain. However, we note that three of the five files relate to previous Dukes of Cornwall who are no longer alive. Two files, LCO2/5136 relate to a legal issue concerning the next of kin during the minority of the Duke of Cornwall and not to personal tax information. The fifth file relates to a proposal in 1969 concerning the proportion of the revenues of the Duchy of Cornwall which the Prince of Wales could be asked to surrender to the Civil List Consolidated Fund, in lieu of tax. Again, it does not relate to a discussion of the Prince's specific tax affairs. None of the information the Appellant refers to comprises correspondence with the tax authorities on particular tax issues.

99. Against these factors, we have considered whether and to what extent disclosure is "necessary" for the purposes of the legitimate interests of the Appellant or the wider public. As already noted, the Appellant relies not so much on his own interests, but the wider public interest. That public interest cannot of course be viewed in isolation but needs to be considered in the context of condition 6(1) and the specific content of the disputed information.

100. We would say at the outset that while we do not doubt that there is a legitimate public interest in disclosure of the disputed information, on the facts of this case, we do not consider that interest to be of the compelling nature that the Appellant asserts. While we accept the importance in terms of public interest of ensuring that the principles of taxation of members of the Royal family are clear and transparent, we do not consider that those interests are materially furthered in the case of the disputed information, or would add to any significant extent to what is already in the public domain. The information does not assist in understanding the justification for the tax treatment of the income. It does not address the principles of the treatment of Duchy revenues for tax purposes.

101. We also do not consider that the Appellant's arguments based on "public funding" or "public money" engage concepts that are particularly useful in the present case. As already noted, the disputed information concerns quite specific issues and does not deal with the general principles that underlie what the Appellant describes as the Duchy's privileged tax position.

102. To the extent that the Appellant argues that there is a public interest in the disputed information because the revenues of the Duchy are paid to the Prince in respect of the performance of public functions, we accept from the evidence before us that the income from the Duchy is not hypothecated to public functions and the Duke has discretion on how it is spent. Indeed, the words of the 1337 Charter do not speak of funding public functions and official duties, but rather of a desire to make specific provision in perpetuity for the maintenance of the heir to the throne "that he may be able to preserve the State and Honour of the said Duke according to the nobility of his kind" and to correct a "deficiency of Titles Honours and Degrees of rank".

103. In short, while we accept that there is a relationship between the revenues of the Duchy and tax payer-funded monies, that is of an entirely different nature from the situation of MP's expenses, for example, where the information concerned expenses which were entirely taxpayer funded claimed by those holding elected office. Also, what made the public interest compelling in those cases was the concern raised about impropriety in connection with the funds. That is no such concern in the present case. Although the Appellant considers the Law Officer's Opinion of 1913 to be flawed, to the extent he is saying that the correct position is that the Prince should be liable to income tax on the revenues of the Duchy, that is an argument that is independent of the disputed information and disclosure of the information would not materially advance his position.

104. The Appellant has also argued that the Commissioner's decision and the Respondents' case leaves out entirely what he regards is a weighty public interest in transparency and accountability of HMRC carrying out its duty to perform its statutory function of collecting monies. He argues that HMRC has granted the Duchy an extraordinary exemption from tax and has usurped what should be the proper function of Parliament. As we have already noted, however, the disputed information simply applies the principle that the Duchy's revenues are not subject to income tax and therefore, there is no tax for them to collect. In any event, if the Appellant's position is that

that principle based on the Law Officers' Opinions is wrong, his argument does not depend on the disputed information. There is also the point advanced by the Respondents, which we accept, that there is a public interest in fostering candour and trust in the exchange of information individuals may have with the tax authorities which would be compromised should such information be subject to disclosure.

105. For all these reasons, we consider that, in relation to the disputed information in groups (1) and (3), disclosure would not be fair and that the conditions in paragraph 6(1) of Schedule 2 are not met. We find, therefore, that the information is exempt under section 40(2) of FOIA.

106. We consider that TNA and the Commissioner should have explicitly considered the different items comprising the disputed information separately. The information coming within group (2) is of a different nature dealing only with what we have described as a process issue. It contains no information about the tax affairs of the data subject. However, it does contain an express expectation of confidentiality. We consider that disclosure of this information would be unlawful in that it would give rise to an actionable breach of confidence on the basis of the principles we have set out below in relation to section 41(1). We also consider that there is no material public interest in disclosure of this information. We find therefore, that this information is also exempt under section 40(2).

Section 41

107. On the basis of our findings above in relation to section 40(2), it may be that we do not need to go further and consider the position under section 41(1). We will do so, however, for completeness, although relatively briefly.

108. Section 41(1) of FOIA provides as follows:

> "*Information is exempt information if –*
>
> *(a) it was obtained by the public authority from any other person (including another public authority), and*
>
> *(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

109. The exemption is absolute. It follows that if engaged, it is not necessary to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure. However, a public interest defence may be available in some cases against an action for breach of confidence and therefore public interest considerations may still be relevant.

110. It is not in dispute that an "actionable" breach of confidence is one in respect of which a claim would, on the balance of probabilities, succeed (rather than being simply arguable). There have been numerous judicial pronouncements about the elements necessary to found an action for breach of confidence. The most often cited is that of Megarry J in **Coco v**

AN Clark (Engineers) Limited where he set out three elements to such a claim:

> *"First, the information itself ... must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it. "*

111. We find that the requirement of section 41(1)(a) is met because the information was obtained by the public authority (TNA) from another public authority (HMRC). We find, for the reasons set out below, that the requirement of section 41(1)(b) is also met. We are satisfied that disclosure would constitute a breach of confidence. It has not been argued that it would be actionable by HMRC, but rather that it would be actionable by the Prince and/or the Queen. Section 41(1)(b) refers of course to the breach of confidence being actionable not just by the party from whom it was obtained, but also by "any other person".

112. As to why we find that disclosure would amount to an actionable breach of confidence, we note that the information coming within groups (1) and (3) relate to specific tax issues. We accept that there is a general convention to protect the confidentiality of individual taxpayers and that this does not depend on the extent or degree of any invasion of privacy that would flow from treating them as public. We note and accept the evidence of Sue Walton that the long-standing and consistent practice of HMRC (and previously Inland Revenue) is that discussions with individuals or with companies or other legal entities in relation to their specific tax affairs are treated as private and in confidence.

113. TNA have also referred us to the following passage from *Simon's Taxes*:

> *"A general duty of confidentiality is owed by officers of HMRC, and it has long been the case that information provided to them is strictly confidential and should not be disclosed."*

114. The House of Lords has reiterated these obligations of confidence in **R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed & Small Businesses Limited** in which Lord Wilberforce stated that "such assessments [of taxes] and all information regarding taxpayers' affairs are strictly confidential" and that "[no] other person is given any right to make proposals about the tax payable by any individual: he cannot even inquire as to such tax. The total confidentiality of assessments and of negotiations between individuals and the revenue is a vital element in the working of the system." In the same judgment Lord Scarman referred to the "very significant duty of confidence" owed by the Inland Revenue "in investigating, and dealing with, the affairs of the individual taxpayer".

115. The Respondents say that the principle of confidentiality of tax records has also been enshrined in legislation and that in the period when the disputed information was created, the confidentiality of tax information was protected under section 2 of the Official Secrets Act 1911 under which it was a criminal

offence to disclose any information entrusted in confidence to a person holding office under Her Majesty to another person without authorisation. Section 2 applied to all information held in confidence by Inland Revenue offices, both personal and non-personal information. Subsequently, under the Taxes Management Act 1970, tax inspectors, commissioners and special commissioners were required to take an oath of confidentiality upon taking office. Section 2 of the Official Secrets Act 1911 was repealed by the Official Secrets Act 1989. Additional protections were enacted in relation to confidentiality, by way of section 182 of the Finance Act 1989. This makes it a criminal offence to disclose tax information relating to an identifiable person, unless the disclosure is made with lawful authority. The Inland Revenue merged with HMRC in 2005. Officials of HMRC are now subject to a statutory duty of confidentiality under section 18 of the Commissioners for Revenue and Customs Act 2005 ("CRCA) which provides:

> *"Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs."* By section 19(1) a person commits a criminal offence *"if he contravenes section 18(1) … by disclosing revenue and customs information relating to a person whose identity: (a) is specified in the disclosure, or (b) can be deduced from it.*

116. The Appellant disputes that the information in issue would have been covered by the Official Secrets Act, but that is not itself a point of great significance. What is clear is that if the disputed information was still held by HMRC, disclosure would be prohibited. Under section 19 of the CRCA, disclosure would have been a criminal offence and the information would have been exempt from disclosure under FOIA (section 44).

117. While these prohibitions on disclosure do not by themselves mean that the information "has the necessary quality of confidence about it", we consider that they reflect the intrinsically confidential nature of an individual's tax information. The disputed information consists, for the most part, of communications with the Inland Revenue on behalf of a potential taxpayer (in this case the Prince of Wales or the Sovereign), and exchanges internal to the Inland Revenue directly address the communications received. In our view, it would be a rare case when such information would not have the quality of confidence. We are entirely satisfied that the first limb of **Coco v Clark** is met.

118. In relation to the information coming within group 2, although these do not relate to any specific tax matters, they contain an express expectation as to confidentiality. We consider that in any event, it would be artificial to divorce them from the series of correspondence of which they form a part and which does have the necessary quality of confidence.

119. We consider that the second limb is met in relation to all the information in issue. We find that it was "imparted in circumstances importing an obligation of confidence". We note that the Inland Revenue sought extended closure in 1995 when the file was transferred to the Public Records Office (now TNA). We consider this to be a clear indication that the confidentiality attaching to

the information in the hands of HMRC was intended to continue notwithstanding the transfer to TNA.

120. In relation to those items of information originating with the Duchy' advisers (as opposed to being internally generated at the Inland Revenue), there is, in addition, clear evidence as to the expectations of the senders in relation to the confidentiality of the communication. There can be no doubt from the express terms of the communication, that it was being sent on the expectation that it would be kept confidential.

121. As to whether disclosure would amount to an "unauthorised use of that information to the detriment of the party communicating it" (the third limb of **Coco**), we acknowledge the debate in some cases as to whether this is an independent requirement, particularly where the private information of an individual is involved rather than commercial information. We are satisfied that where the information is private information, it is not necessary to show specific detriment. Loss of confidence and privacy suffice: see for example **McKennitt v Ash**, **Douglas v Hello**, and **British Union for the Abolition of Vivisection v The Home Office and the Information Commissioner**. We consider this to be the case even where the information is not specific as to amounts of income or tax payable. There would be a breach of a legitimate expectation that questions could be asked to HMRC and legal arguments presented in confidence.

122. TNA say, and we accept that **Coco v Clark** is "only part of the story, so far as section 41 is concerned" and that disclosure would also be a misuse of private information, the modern form of action for breach of confidence underpinned by the duty on public authorities by section 6(1) of the Human Rights Act 1998 not to act in a way which is incompatible with Article 8 of the ECHR. However, based on our findings above, we do not consider that we need to go any further that we have.

123. As already noted, although the exemption in section 41(1) is absolute, an action for breach of confidence can be met with a public interest defence and therefore public interest considerations are still relevant. In the terms articulated by Lord Phillips in **HRH Prince of Wales v Associated Newspapers** at paragraph 68:

> *" The court will need to consider whether, having regard to the nature of the information, and all of the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public."*

124. We have already addressed the relevant factors public interest factors above, in relation to section 40(2). For the reasons set out there, while we acknowledge the public interest considerations involved in relation to the Prince and the tax treatment of the revenues from the Duchy, we do not consider them to be material having regard to the content of the disputed information.

125. For all these reasons we find that the disputed information is exempt under both section 40(2) and section 41(1) of FOIA.

Decision

126. We dismiss the appeal. Our decision is unanimous

Signed:

Anisa Dhanji
Tribunal Judge

Date: 6 January 2013