



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2011/0090-0094

ON APPEAL FROM:

**The Information Commissioner's
Decision Notices dated 7 March 2011
FS50293634; FS50296946; FS50303563; FS50306615; FS50311868**

Appellant: Rob Evans

First Respondent: Information Commissioner

**Additional Parties: (1) Department of Health
(2) Department for Culture Media and Sport
(3) The National Archives
(4) Department for International Development
(5) Department for Communities and Local Government**

Considered on the papers

Before
John Angel
(Judge)
and
Suzanne Cosgrave and
Malcolm Clarke

Subject matter: "Advocacy correspondence"

**Cases: *Evans v Information Commissioner & Ors* [2012] UKUT 313 (AAC)
R (on the application of Evans) and another v Attorney General [2015] UKSC**

Decision

We find that some of the disputed information is “advocacy correspondence”. The National Archives should disclose this information to Mr Evans or set out which exemptions it still relies on and its public interest analysis, if relevant, within 30 days of this decision.

If the case still requires further consideration by the Tribunal then the parties should agree as far as possible proposed directions for the Tribunal to consider in order to complete the proceedings within 14 days of The National Archives complying with the above order.

Reasons for Decision

Background

1. Mr Evans appealed against each of the Decision Notices. The appeals were consolidated and then stayed in the light of the appeals being heard in the Upper Tribunal in similar cases. The decision in *Evans v Information Commissioner & Ors* [2012] UKUT 313 (AAC) (“**Evans 1**”) was overruled by the Attorney General issuing a certificate under section 53(2) FOIA and regulation 18(6) of the Environmental Information Regulations 2004 which then ceased to have effect. Judicial review proceedings followed which eventually ended with the Supreme Court decision in *R (on the application of Evans) v Attorney General* [2015] UKSC 21 finding that the certificate was invalid.¹ As a result the stay was lifted in the present appeals and directions provided.
2. In light of **Evans 1** the Additional Parties’ disclosed much of the requested Information in the present appeals subject to redactions. Mr Evans did not challenge the basis of those redactions and does not pursue his appeals in respect of that redacted information.
3. Therefore we are left to deal with fewer documents. The parties agreed that we could deal with them on the basis of the papers before us. The Additional Parties were permitted to make closed submissions so we provide a confidential annex to this decision which refers in detail to the documents under consideration.
4. The documents we have to consider relate to four of the Decision Notices. The first relates to Mr Evans’ request dated 14 September 2009 that the Department of Health (DoH) provide copies of all correspondence exchanged between the Prince of Wales and any Minister in the DoH for the period 1 September 2006 to 1 September 2009. He also asked for a

¹ This resulted in the Decision Notices in *Evans 1* being substituted on 8 July 2015 - [2015] UKUT 0382 (AAC).

schedule of this correspondence. Most of the documents held by the DoH relating to the request have been disclosed. Only 1 remains for us to consider.

5. The second Decision Notice relates to Mr Evans' request dated 14 September 2009 which asked for all correspondence exchanged between the Prince of Wales and any Minister in the Department for International Development (DfID) for the period 1 September 2006 to 1 September 2009. He also asked for a list and schedule of this correspondence. One document has been disclosed and only one is in dispute.
6. The third Decision Notice relates to Mr Evans' request to the Department for Culture Media and Sport (DCMS). Mr Evans requested on 15 September 2009 that he be provided with copies of all correspondence exchanged between the Prince of Wales and any Minister in the DCMS for the period 1 September 2006 and 1 September 2009. Mr Evans also requested that the DCMS provide him with a list and schedule of this correspondence. Only one document is in dispute.
7. The fourth Decision Notice dated 7 March 2011 involves the National Archives (TNA). Mr Evans requested on 14 September 2009 that the TNA provide him with access to the closed file FD 23/4224: 'Discussions with Prince of Wales: correspondence via Lord Jellicoe concerning the Prince's interest in alternative medicine: covering dates, 1985-1986'. A number of documents have been disclosed or were already in the public domain. Those remaining are still in dispute.

Issues before the Tribunal

8. The parties have asked the Tribunal to decide:
 - i. Whether any of the non disclosed information requested by Mr Evans from the TNA is "advocacy correspondence" in the sense that term was given by the Upper Tribunal in **Evans 1**;
 - ii. Whether any of the remaining correspondence identified in the Confidential Schedule to the Additional Parties' Amended Response is "advocacy correspondence" in the sense that term was given by the Upper Tribunal in **Evans 1**.
9. We have been provided with a closed witness statement of Roger Smethurst made on behalf of the Additional Parties. Mr Smethurst is a senior civil servant within the Cabinet Office, currently holding the position of Head of Knowledge and Information Management. He contends that none of the withheld information is advocacy correspondence.

The Law

10. We are bound by the Upper Tribunal's decision in **Evans 1**, in particular as to the meaning of "advocacy correspondence".

11. In its Decision and Reasons the Upper Tribunal described its use of the term “advocacy correspondence” as follows:

“7. As part of this role he explained in his Annual Review 2004 that he has been “identifying charitable need and setting up and driving forward charities to meet it”, and has also been promoting views of various kinds. It is those two features of Prince Charles’s activities which in our view provide a touchstone for identifying “advocacy correspondence”. It will not usually be difficult to identify whether a context for correspondence, or parts of correspondence, involves either or both of these features. When it does, then in our view it will generally be right to characterise this material as “advocacy correspondence”...”²

12. Further understanding of the term can also be gained from considering how the Upper Tribunal resolved disputes as to whether specific pieces of correspondence were or were not “advocacy correspondence”. See the “June 2015 Annex”.³

13. It is accepted by all parties that information that can be categorised as “social or personal” correspondence is not “advocacy correspondence”.

Mr Evans’ submissions

14. Mr Evans is unable to see the disputed information so is limited in the submissions he can make. However he asks us to consider the following points:

- (1) “Advocacy correspondence” is not a statutory definition, but a descriptive term adopted by the Upper Tribunal. It is a description that will be apt when correspondence is conducted, partly or wholly, in the context of “identifying charitable need and setting up and driving forward charities to meet it” and/or “promoting views of various kinds” (the two “touchstones”);
- (2) It is the context in which the correspondence is conducted that is determinative, not the specific content of any particular piece of correspondence. Letters that simply set out information, for example, may be advocacy correspondence if the chain of correspondence as a whole involves (e.g.) identifying charitable need or promoting views;
- (3) There is nothing in the Upper Tribunal’s reasoning that would limit the description to correspondence between The Prince of Wales and Ministers (or their respective proxies). It is quite conceivable (and highly likely) that The Prince of Wales would conduct similar

² See also [108]-[109].

³ (UTAAC Ref GI/2146/2010-10) at [37], [47], [53], [60], [68], [73]-[75], [84], [91], [95]-[97], [102], [108], [115], [123], [129] & [135].

exchanges with others. If it is the contention of the TNA that the information requested from them is not advocacy correspondence because Lord Jellicoe was not a Minister at the relevant time, then that contention, Mr Evans' argues, is misconceived.

- (4) In the June 2015 Annex the only clearly defined category of correspondence that is not "advocacy correspondence" is correspondence where the context is purely social and personal. Exchanges that cannot be characterised as "purely social and personal" may therefore very well be advocacy correspondence.⁴

The material already released by The National Archives

15. Mr Evans makes particular submissions relating to the information held by the TNA. Some of the information contained in the file requested by Mr Evans ('Discussions with Prince of Wales: correspondence via Lord Jellicoe concerning the Prince's interest in alternative medicine, covering dates 1985-1986') has been released. The publicly available pages are in the open bundle at [Tab 10, pages 1 - 18]. Their contents, viewed in context, give strong support, he says, to the suggestion that some or all of the withheld documents must be advocacy correspondence in the relevant sense. Mr Evans makes the following points:

- (1) Since the early 1980's, the Prince of Wales had demonstrated an interest in, and forcefully advocated greater use of, complementary medicine. He had engaged with the medical professional bodies on that issue;⁵
- (2) On 23 April 1986, the public TNA documents reveal, the Prince of Wales attended a dinner with the Chairman and Secretary of the Medical Research Council ('MRC'), the President of the Royal College of Physicians, and "four representatives of complementary medicine organisations". The invitees included a consultant from the Royal London Homeopathic Hospital [Tab 10, page 8 – letter of 18.03.86], the Chairman of the Research Council for Complementary Medicine [Tab 10 pages 9 and 10 – letter of 18.03.86], and an osteopath [Tab 10 pages 11 and 12 – letter of 20.03.86].
- (3) The event had been in the planning since at least January 1986. Lord Jellicoe (Chairman of the MRC at the time) had indicated that the number of guests should be restricted so that the event would be "productive"; [Tab 10 page 3 – letter of 15.01.86]
- (4) The purpose of the dinner, according to the MRC's minutes [Tab 10, page 18] was "to discuss orthodox attitudes and alternative approaches to medicine";

⁴ Though at [96]-[97] of the June 2015 Annex the Upper Tribunal considers an exchange which was apparently neither.

⁵ See Open Annex 2 to the Upper Tribunal's Decision and Reasons, at [27]-[28]

- (5) Prior to the dinner, the Prince of Wales “*had been informed of recent developments in research on alternative medicine and expressed interest in the Council’s work to evaluate different forms of treatment for back pain. He had also been informed of the Research Council for Complementary Medicine fellowship on the evaluation of alternative medicine, half the costs of which are being provided by the MRC.*” [Tab 10, page 18];
- (6) The Research Council for Complementary Medicine was a charity at the time (see its notepaper: [Tab 10, pages 9 and 10 – letter of 18.03.86]);
- (7) Following the dinner, in May 1986, the MRC “*agreed that it would be important to keep a watching brief on alternative/complementary medicine...*”, [Tab 10, page 18] suggesting that views in favour of complementary medicine had been advanced to the MRC by some of those who attended the dinner.
16. In light of these facts, it seems highly likely, Mr Evans contends, that the whole context for the Prince of Wales engagement with Lord Jellicoe at the time concerned the engagement of charities in the field of complementary medicine and/or the promotion of the Prince’s view that complementary medicine was an important and undervalued resource. Mr Evans therefore concludes that correspondence in anticipation of the 1986 dinner or following it is likely to have been in that context, and therefore he contends advocacy correspondence.

The Commissioner’s Decision Notice in the TNA case

17. In relation to the Commissioner’s Decision Notice in the TNA case Mr Evans argues that the term “advocacy correspondence” had not been coined at the time the Commissioner made the decisions now under appeal but it is common ground that it was apt to describe the majority of the requested material in the DoH, DCMS, DfID and DCLG cases, which has now been released. If the withheld material in the TNA case were categorically different from the material in those cases, one would have expected this to be indicated in the TNA Decision Notice (issued on the same date as the other four Decision Notices).
18. Mr Evans continues that the TNA Decision Notice is in substantially the same terms as all the other Decision Notices, analysing and balancing the competing public interests in exactly the same way. The only substantially different material is found in paragraphs [40] and [50]-[51]. In those paragraphs the Commissioner does note relevant differences between the TNA case and the other cases, but those differences are said to be (a) the age of the material (1985-86), and (b) the fact that the subject matter of the material in the file, and some of the file contents, were already public.

“Advocacy”, but not “correspondence”?

19. Mr Evans contends that if it were to transpire that the TNA file includes (for example) a record of verbal exchanges at the MRC dinner in which the Prince of Wales spoke about his charities or expressed his views on complementary medicine, then Mr Evans invites the Tribunal to treat such a document as falling within the scope of the appeal. The TNA file name suggests that its contents are “correspondence” and it has not been suggested by the Additional Parties that the TNA documents are not “advocacy correspondence” on the basis they are not “correspondence” at all. Mr Evans has limited his appeal to “advocacy correspondence” because he recognises the distinction, drawn by the Upper Tribunal, between the Prince’s advocacy activities and other interactions he may have with third parties, such as personal or social exchanges, not because oral advocacy is of any less public interest than written advocacy. It would be unfair Mr Evans contends, in those circumstances, to permit documents to be withheld purely because (unknown to him) they record advocacy exchanges conducted orally rather than in writing.

The Documents listed in the Confidential Schedule to the Additional Parties’ Amended Response

20. Mr Evans further argues that the Additional Parties describe these as “three short Ministerial letters” (Amended Response [4]). He invites the Tribunal to consider the context in which these letters came to be written. If the context was the Prince “identifying charitable need and setting up and driving forward charities to meet it” and/or promoting views of various kinds, then the letters should be classified as “advocacy correspondence” and (subject to any valid exemption being made out on other grounds) Mr Evans maintains they should be disclosed.

Our conclusions

21. We have considered Mr Evans submissions and the submissions of the other parties and the evidence of Mr Smethurst. We note that the Additional Parties largely do not take issue with Mr Evans’ contentions on the interpretation of the findings of the Upper Tribunal in **Evans 1**. We are clearly bound by and guided by the findings and application of the findings of the Upper Tribunal as set out above in coming to our conclusions.

22. We have unanimously concluded that:

- i. Much of the withheld TNA information is advocacy correspondence largely on the basis that the dinner which the Prince of Wales attended in 1986 hosted jointly by the MRC and the Royal College of Physicians provided a forum for the Prince to promote his views on alternative medicine. It may have also helped him identify a charitable need and set up charities to meet it, but we have no evidence before us in relation to this; and
- ii. The other withheld information is not advocacy correspondence. The withheld DoH, DfID and DCMC

correspondence (three letters) either relate to the Prince of Wales being educated in the business of government or undertaking royal duties of state.

23. We provide our analysis of all the documents in the confidential annex. We have divided it into two parts. Part B can be made public if the TNA disclose all the information referred to therein or at a subsequent hearing the Tribunal determines that it should all be disclosed whichever is the later. Part A cannot be disclosed and must remain confidential. This direction is subject to the decision of any higher tribunal or court on appeal.
24. The TNA should disclose the information identified in Part B of the Confidential Annex and/or state which exemptions it still relies on and its public interest analysis, if relevant, to Mr Evans within 30 days of this decision. The Additional Parties should bear in mind when considering redactions that some personal data is already in the public domain and that some named individuals will no longer be living and so not data subjects under the Data Protection Act 1998.
25. If the case still requires further consideration by the Tribunal then the parties should agree so far as possible proposed directions for the Tribunal to consider in order to complete the proceedings, within 14 days of the TNA complying with the above order.

Signed:

Prof. John Angel
Judge

Date: 15 September 2015