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

Decision Notice

Date: 17 December 2009

Public Authority: Department for Environment, Food and Rural Affairs (Defra)
Address: 3-8 Whitehall Place
London
SW1A 2HH

Summary

The complainant asked Defra for copies of any letters or other communications sent by two ministers to The Prince of Wales which referred to genetic modification. Defra refused to confirm or deny whether it held any information falling within the scope of the request by citing the exemptions contained at sections 37(2) (communications with the Royal Household) and section 40(5) (personal data) of the Act. During the course of the Commissioner's investigation Defra also cited the exception contained at regulation 13(5) (personal data) of the EIR as a further basis to refuse to confirm or deny whether it held any information. The Commissioner has concluded that the request should be dealt with under the EIR and that Defra was entitled to rely on regulation 13(5) to refuse to confirm or deny whether it held any information falling within the scope of this request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

2. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

3. The complainant sent the following message to Defra on 19 September 2007:

> 'I am sending this request under the Environmental Information Regulations to ask for the following information:
>
> (a) Copies of any letters or other communications sent from Nick Brown to the Prince of Wales while Mr Brown was MAFF Minister which refer to genetic modification;
>
> (b) Copies of any letters or other communications sent from Margaret Beckett to the Prince of Wales while she was Defra Secretary of State which refer to genetic modification.'

4. Defra responded on 17 October 2007 and explained that whether it held information meeting the terms of the request was not environmental information as defined by the EIR. Defra therefore considered this point, i.e. whether it held information falling within the scope of the request, under the Act and explained that it was relying on section 37(2) to refuse to confirm or deny whether it held information falling within the scope of the request. Defra went on to explain why it considered the public interest in maintaining the exemption outweighed the public interest in confirming whether or not information was held. The response noted that the request was specifically made under the EIR. Defra explained that if information of the nature requested did exist – and it was not confirming or denying whether it did – it believed it would be exempt from disclosure by virtue of regulation 12(5)(d) (confidentially of proceedings). Again, Defra detailed why it believed that the public interest would favour maintaining the exception.

5. The complainant asked Defra to conduct an internal review of this decision on 17 October 2007.

6. Defra contacted the complainant on 14 November 2007 and confirmed that it was maintaining its position to refuse to confirm or deny whether it held information on the basis of section 37(2) of the Act.

The Investigation

Scope of the case

7. On 23 November 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the fact that in his opinion regulation 12(5)(d) was irrelevant to his request.

Chronology

8. Due to a backlog of complaints received about public authorities' compliance with the Act, the Commissioner was unable to begin his investigation of this case immediately. Therefore it was not until 21 August 2008 that the Commissioner wrote to Defra in relation to this complaint. The Commissioner informed Defra that his preliminary view was that if a request is made for information, which if held, would fall within the definition of environmental information, that request must be dealt with under the EIR rather that the Act. The Commissioner suggested that in his view if information was held in this case it was likely that it would fall within the scope of environmental information as set out within regulation 2(1). In light of this the Commissioner suggested to Defra that it would need to confirm or deny whether it held any information which fell within the scope of this request because the only exception in the EIR cited by Defra, regulation 12(5)(d), did not allow a public authority to refuse to confirm or deny whether it held information. The Commissioner sought Defra's comments on this view. The Commissioner also asked Defra to confirm to him (but obviously not to the complainant) whether it held information falling within the scope of the request and if so to be provided with a copy of that information.

9. The Commissioner received a response from Defra on 8 January 2009. This letter provided a detailed response to the various points raised by the Commissioner. Defra explained why it believed that even if information was held and it was determined to be environmental information as defined by the EIR, it was still entitled to rely on section 37(2) of the Act to refuse to confirm or deny whether it held information falling within the scope of this request. Defra also explained that it believed it was entitled to refuse to confirm or deny whether it held information on the basis of section 40(5) (personal data), again even if it was determined that the requested information, if held, constituted environmental information. Similarly, Defra explained that if the Commissioner concluded that this request should be handled entirely under the EIR it would seek to rely on regulation 13(5) (personal data) to refuse to confirm or deny whether any information was held.

Analysis

Which access regime applies?

10. As the paragraphs above which summarise the Commissioner's and Defra's correspondence on this matter imply, central to the consideration of this complaint is the question as to which access regime this request should be handled under, i.e. the Act, the EIR or both.

11. As noted in paragraph 8 the Commissioner's initial view was that the wording of the request should be used to help determine the access regime under which a request for information should be handled.

12. In submissions to the Commissioner, Defra has argued that this is the incorrect approach and in its view the appropriate access regime should be determined by

the nature of the information which falls within the scope of the request, not by the precise wording of the request.

13. In the Commissioner's opinion there is a fundamental flaw Defra's position that the appropriate access regime is determined solely by the nature of the information which falls within the scope of a request. Such a flaw is exposed by scenarios where a public authority does not hold any information falling within the scope of a request or cannot for some reason examine the information which falls within the scope of a request.

14. The following three scenarios are all examples of such situations:

15. Firstly, in cases where it is estimated that the cost of complying with a request would exceed the appropriate fees and the request is refused on the basis of section 12 of the Act, it may not be possible to view samples of the information being sought in order to determine which access regime the request should be handed under, albeit there is no dispute as to whether the requested information is in fact held.

16. Secondly, for requests which a public authority refuses on the basis that information is not held, then clearly the information itself cannot be examined in order to determine which regime the request should be dealt with under. However, regulation 12(4)(a) of the EIR allow a public authority to refuse a request on the basis that it does not hold information.

17. Thirdly, there are two exceptions within the EIR that allow public authorities to refuse to confirm or deny whether they hold requested information, regulations 12(5)(a) and 13(5). Given the way in which the principle of refusing to confirm or deny generally operates – i.e. it must be applied consistently in order for it not to be undermined – public authorities may refuse to confirm or deny under the EIR whether information is held in scenarios where they do hold information as well as in scenarios where they do not hold information.

18. Consequently, especially in the second and third examples, public authorities may therefore on occasion refuse a request for information under the EIR not by examining the content of the requested information but on the basis of the wording of the request.

19. Therefore in the Commissioner's opinion the wording of the request has to be taken into account when deciding whether to deal with a request under the EIR or Act. Such an approach is consistent with the Commissioner's advice to public authorities that requests should be dealt with under the most appropriate access regime (i.e. the Act, the EIR or the Data Protection Act 1998 (DPA)) from the outset.

20. The Commissioner anticipates that there will be instances where it is not immediately apparent that requests are seeking environmental information until some background or context to the request is considered. If the context or the wording of the request suggests that there is likely to be a mixture of

environmental and other information covered, then, in line with the precedence of EC law, the request should first be considered under EIR.

21. Applying this approach to this present case the Commissioner considers that the correct approach in order to determine which access regimes applies is as follows: where it can be reasonably determined from a request which access regime the withheld information falls under, then that regime should be applied. However, the Commissioner believes that where it is not immediately apparent that requests are seeking environmental information it may be necessary to look at background information in order to help the assessment as to the regime under which a request should be handled. Such background information can include how the public authority may hold the information, the purposes for which the information may be held and the nature of the public authority's functions, e.g. the Environment Agency is more likely to hold environmental information than HM Revenue and Customs. The Commissioner accepts that in cases where a public authority has refused to confirm or deny whether information is held, if the requested information is in fact held, the content of the information can be used to determine the access regime under which the request should be handled. Of course, in adopting this approach the public authority would not reveal to the applicant whether or not it held information.

22. Where relevant information is held and is examined by the Commissioner following receipt of a complaint, the Commissioner accepts that he is inevitably in a more knowledgeable position in order to make a determination as to the correct access regime. However, such an approach is similar to the Commissioner's approach in cases where the access regime is clear and the only matter left for discussion is whether the public interest favours confirming or denying whether information is held. In such cases the Commissioner will ask the public authority to confirm to him whether it holds information falling within the scope of the request, and if so to provide the Commissioner with a copy of such information. In such cases the Commissioner is therefore arguably in a position to make a more informed decision as to the balance of public interest compared to cases where no information is held.

23. By applying this approach to this present case, the Commissioner has concluded that the request should be dealt with under the EIR rather than the Act on the basis that if information is held it is more likely to be environmental information than not. The Commissioner has reached this conclusion for two linked reasons. Firstly, although the Commissioner accepts that the subject matter upon which the request focuses, genetic modification, can refer to scientific developments in a wide variety of sectors and industries, he believes that it is reasonable to assume that if The Prince of Wales was in correspondence with government in relation to this matter it is likely that the correspondence would focus on the issue of genetic modification and farming. This is because The Prince of Wales has publically voiced his clear interest in, and commitment to, the issue of genetically modified food.[1] Secondly, in the Commissioner's opinion, if The Prince of Wales

[1] An article by The Prince of Wales titled The Seeds of Disaster, The Daily Telegraph, 7th June 1998

was in correspondence with Defra about the issue of genetic modification, given Defra's remit it is likely that any correspondence would focus on specific policies, initiatives or measures relating to the issue of genetic modification and farming. In the Commissioner's opinion information on policies, initiatives or measures concerning genetically modified food and/or farming is likely to constitute environmental information for a number of reasons, for example discussions on this topic would be likely to focus on the impact on various elements of environment listed in regulation 2(1)(a).

Does confirmation or denial as to the existence of environmental information constitute environmental information?

24. In Defra's opinion confirmation as to the existence of whether environmental information is held by a public authority is not in itself environmental information. Therefore even if information was held, and this information was environmental information, then an applicant's right to know whether that information is held is provided for under the Act but an applicant's right to be provided with the information itself comes within the EIR.

25. Under this interpretation, in Defra's view in this case it is therefore entitled to rely on sections 37(2) and 40(5) of the Act to refuse to confirm or deny whether information of the nature requested is held.

26. The Commissioner disagrees with this view; in his opinion the confirmation or denial of whether requested information is held, where that requested information constitutes (or would constitute if held) environmental information, is in itself environmental information. The confirmation or denial is therefore to be provided under the EIR rather than the Act. Consequently in the Commissioner's opinion Defra cannot rely on sections 37(2) or 40(5) to refuse to confirm or deny whether it holds information of the nature requested in this case.

27. The Commissioner finds support for this position in the following:

28. Regulations 12(6) and 12(7) of the EIR state that:

> '12(6) For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).
>
> 12(7) For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.'

29. In the Commissioner's view regulation 12(7) clearly states that confirmation or denial of whether information exists is in itself a disclosure of information. The

Commissioner believes that this regulation is akin to section 1(1)(a) in the Act which provides a right of access to an applicant to know whether information they requested is held. Given that regulation 12(7) is specifically included in the EIR the Commissioner believes that the EIR and Directive upon which it is based, consider a confirmation as to the existence, or otherwise, of environmental information to be in itself a disclosure of environmental information.

30. The Commissioner finds further support for this view in the wording of regulation 12(6) and the principle of neither confirming nor denying. If confirming or denying whether environmental information was held does not constitute a disclosure of environmental information under the EIR then there would be no need under regulation 12(5)(a) and regulation 13(5) to absolve a public authority of its duty under the EIR (**not** under the Act) to confirm or deny whether it held information.

Separating out types of information

31. The Commissioner is conscious of fact that this approach has implications given the particular way in which the complainant has phrased his request and the Defra's desire to refuse to confirm or deny whether it holds information. That is to say, the complainant has not simply requested information on genetic modification, but has specifically requested 'copies of any letters or other communications' which refer to genetic modification. The Commissioner therefore accepts that what the complainant is actually seeking is not just information on genetic modification but also copies of letters in which a particular topic is mentioned. Consequently, the Commissioner accepts that such letters, if held, may include information which does not discuss genetic modification and moreover information on these other topics may not constitute environmental information as defined by regulation 2(1) of the EIR. Therefore the Commissioner accepts that in this case by concluding that the confirmation or denial as to whether any correspondence is held should be dealt with under the EIR, rather than under the Act, removes the Defra's ability to rely on 37(2) despite the fact that some information contained within any correspondence, if held, may not be environmental information. However, in the Commissioner's opinion this is simply the peculiarity of the interaction of the EIR and the Act and ultimately as the EIR is derived from an EU Directive this has to take precedence in such scenarios, including this case where the public authority is refusing to confirm or deny whether any information is held.

32. The Commissioner understands that in Defra's view, regulation 12(11) of the EIR provides a basis upon which it can still refuse to confirm or deny whether it hold information of the nature requested because of the particular way in which the complainant has phrased his request. That is to say it is not possible to reasonably separate out the two pieces of information being sought by the complainant – firstly the actual existence of any correspondence which may or may not be held and secondly a copy thereof.

33. Regulation 12(11) states that:

> 'Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other

> information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.'

34. The Commissioner has carefully considered the wording of this regulation which articulates Article 4(4) of the Directive and Article 4(6) of the Convention.[2] In the Commissioner's opinion the purpose of regulation 12(11) is not to provide public authorities with ability to refuse to confirm or deny in such cases such as this. Rather the Commissioner believes that the intention of this regulation is in fact to ensure that when part of the requested information is determined to be exempt, the public authority ensures that the non-exempt information is provided. The Commissioner finds support for such an interpretation in the comments of The Aarhus Convention Implementation Guide in relation Article 4(6):

> 'Once a public authority determines that certain information is confidential in accordance with one of the exemptions, this does not mean that the entire requested document may be refused. Under the Convention, public authorities must make the non-confidential portion of the information available'.

35. Thus in the Commissioner's opinion the rationale of regulation 12(11) is not to restrict the amount of information that is disclosed in response to a request but in fact to maximise it.

Exceptions

36. As the Commissioner has decided that this request should be dealt with under the EIR he has considered whether the exception contained at regulation 13(5) provides Defra with a basis upon which to refuse to confirm or deny whether it holds information falling within the scope of this request.

37. Regulation 13(5) states that:

> 'For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that –
>
> (a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded; or

[2] The EIR implement Council Directive 2003/4/EC on public access to environmental information and the source of the Directive is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, known as the Aarhus Convention.

(b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of the Act.'

38. Therefore for Defra to be correct in relying on regulation 13(5) as a basis upon which to refuse to confirm or deny whether it holds information the following conditions must be met:

- Confirming or denying whether information was held would reveal personal data of an individual;
- Disclosure of that data would breach one of the data protection principles, section 10 under the DPA or be exempt from disclosure on the basis of section 7(1)(a) of the DPA.

39. Defra has argued that confirmation as to whether information was held would reveal the personal data of The Prince of Wales and such a confirmation would be unfair because it would breach the first data protection principle.

Would the confirmation or denial that information was held reveal the personal data of The Prince of Wales?

40. Section 1(1) of the DPA defines personal data as:

'data which relate to a living individual who can be identified –
(a) from those data, or
(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

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

41. Defra noted that the request did not seek correspondence which The Prince of Wales sent to the two ministers named in the request, rather correspondence which The Prince of Wales received from the two ministers. Nevertheless Defra argued that confirmation or denial as to whether such information existed still constituted The Prince of Wales' personal data given the way in which the request was phrased, i.e. seeking information on a particular subject matter, it could be inferred by some (rightly or wrongly) that His Royal Highness had previously sent communications to either minister on the topic of genetic modification.

42. The Commissioner accepts that confirmation or denial as to whether information is held would reveal whether The Prince of Wales had received a letter from either minister, and moreover would reveal whether that letter had been on a particular topic and whether that letter had been received within a particular time period. Furthermore, the Commissioner accepts the logic of the argument advanced by Defra that if it was confirmed that The Prince of Wales had received a letter from either minister on the topic of genetic modification then it may well be inferred (correctly or not) that His Royal Highness had originally sent the ministers

a letter or has otherwise communicated with them on this topic. Therefore given the way in which this particular request is worded, the Commissioner accepts that confirmation or denial as whether information is held would constitute The Prince of Wales' personal data because it would reveal some biographical detail about him and moreover he would be identifiable from the information.

Would confirming or denying whether such information was held contravene any of the data protection principles?

43. As noted above, Defra has argued that confirmation as to whether information was held would breach the first data protection principle. This states that:

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

44. Defra argued that confirmation or denial would be unfair for two reasons. Firstly, Defra argued that The Prince of Wales was entitled to a degree of privacy when corresponding with government departments in the same way as any other data subjects. Confirmation or denial would represent an infringement of The Prince of Wales' privacy by revealing (if information were held) the topic on which His Royal Highness and the particular ministers had corresponded.

45. Secondly, Defra argued that disclosure of information about the nature of communications between The Prince of Wales and government ministers would be inconsistent with the operation of the constitutional convention that The Prince of Wales should be educated in, and about, the business of government. This purpose of this convention is to prepare The Prince of Wales for the time when he will be the Sovereign without that process putting at risk the political neutrality which is essential to the role and functions of the Sovereign. In order to ensure that The Prince of Wales' political neutrality is not put at risk both parties exchange communications with each other on the understanding that nature of the communications will remain confidential.

46. Defra explained that it is essential to the operation of the convention that The Prince of Wales should be able to express views to ministers on important issues of government and moreover should receive their views in response. This also ensures that The Prince of Wales can carry out his role as Privy Councillor, a Counsellor of State and as next in line to the throne he also has a statutory duty under the Regency Act 1937 to act for The Queen during her absence or incapacitation. Defra argued that the convention that The Prince of Wales is informed about the business of government in order to prepare for being Sovereign can only be maintained if both His Royal Highness and government ministers who advise and inform him about the business of government can be assured that their communications with each other remain confidential.

47. Defra explained that this convention is inextricably tied to the role of the Sovereign in the British constitution and the separate constitutional convention which the Sovereign has: namely to counsel, encourage and warn the government and thus to have opinions on government policy and to express

those opinions to her ministers. However, whatever personal opinions the Sovereign may hold she is bound to accept and act on the advice of her ministers and is obliged to treat her communications with them as absolutely confidential. Such confidentiality is necessary in order to ensure that the Sovereign's political neutrality is not compromised in case Her Majesty has to exercise her executive powers, e.g. initiating discussions with political parties in the scenario of a hung Parliament in order to ensure that a government can be formed. Consequently, The Prince of Wales must not be in a situation where his position of political neutrality is compromised (or appears to be compromised) because it cannot be restored on accession to the throne.

48. Therefore in light of the conventions discussed, Defra argued that confirmation or denial in this case would be unfair because it could undermine The Prince of Wales' political neutrality. This would be unfair because it would impair The Prince of Wales' ability to undertake his public duties as described above.

49. In addition to arguing that disclosure would be unfair, Defra also explained that in its opinion no condition in schedule 2 of the DPA could be met. The only condition which Defra made any detailed reference to was the sixth condition which states that:

> '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.'

50. Defra acknowledged that confirmation as to whether any information was held would allow the complainant, who is a journalist, to pursue his journalistic interests. However, in Defra's opinion this did not outweigh the prejudice to The Prince of Wales' rights, freedoms and legitimate interests that would occur if confirmation as to whether information was held was given.

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

- The consequences of disclosing the information (or in this case confirming whether information is held), i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
  - whether information of the nature requested is already in the public domain;
  - if so the source of such a disclosure; and
  - even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:

- what the public authority may have told them about what would happen to their personal data;
- their general expectations of privacy, including the affect of Article 8 European Convention on Human Rights;
- the nature or content of the information itself;
- the circumstances in which the personal data was obtained;
- particular circumstances of the case, e.g. established custom or practice within the public authority;
- whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused;
- whether the information relates to an individual's public/professional life or whether it is more closely related to their private life.

52. With regard to the reasonable expectations of The Prince of Wales the Commissioner accepts that any correspondence falling within the scope of this request would clearly have been exchanged on the basis that all parties believed that it should be kept private. Both the operation of the convention to the educate the Heir to the Throne and general way in which correspondence between key members of the Royal Family and government has been historically handled give rise to this expectation. The Commissioner believes that respect and recognition should be given to the operation of this constitutional convention and thus he believes that the expectations of the Prince of Wales when shaped by the convention are ones that are objectively reasonable. That is to say, Defra has not created an unrealistic or unreasonable expectation under which The Prince of Wales may assume his personal data will not be disclosed.

53. With regard to the consequences of confirming whether information is held, the Commissioner does not believe that any significant weight should be given to the argument that confirmation or denial would impact on The Prince of Wales' position of political neutrality. Such a confirmation or denial in this case would not reveal The Prince of Wales' views on the topic of genetic modification, but simply that The Prince of Wales had (or had not) received correspondence on this issue. Such a position is in contrast for example to a scenario where a public authority has confirmed that it holds correspondence between The Prince of Wales and government ministers but argued that disclosure of that correspondence would undermine His Royal Highness' position of political neutrality. Clearly in such a scenario if correspondence was disclosed that actually revealed The Prince of Wales' views and opinions on particular issues it would be far easier to understand how such a disclosure could impact on His Royal Highness' position of political neutrality.

54. With regard to extent to which confirmation or denial would impact upon The Prince of Wales' privacy the Commissioner has considered the impact of Article 8 ECHR which states that:

> '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society for the interests of national security, public safety or

> the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

55. In relation to the application of Article 8 to the circumstances of this case, the Commissioner is also conscious of submissions he has received from other central government departments on other separate cases which also involve complaints about its refusal to disclose correspondence with The Prince of Wales. In such cases the public authorities highlighted the fact that the concept of 'private life' within Article 8(1) is a broad one, based upon the need to protect a person's autonomy and relationships with others from outside interference. The public authorities argued that the right is not confined to activities which are personal in the sense of being intimate or domestic but can be extended to business or professional activities. To support this broad interpretation the public authorities quoted the European Court of Human Rights case of *Niemietz v Germany* and also noted that this judgment confirmed that Article 8(1) was intended to protect correspondence (i.e. the type of information which is the focus of this case):

> '[29]The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which an individual may choose to live his personal life as he chooses and to exclude entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.
> There appears, furthermore, to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world…'

56. And:

> '[32] In this connection, it is sufficient to note that the provision does not use, as it does for the word "life", any adjective to qualify the word "correspondence". And, indeed, the Court has already held that, in the context of correspondence in the form of telephone calls, no such qualification is to be made…in a number of cases relating to correspondence with a lawyer…the Court did not even advert to the possibility that Article 8 might be inapplicable on the ground that the correspondence was of a professional nature.'[3]

57. The Commissioner agrees that in respect of Article 8(1) the term 'private' should be interpreted broadly to ensure that a person's relationships with others are free from interference. The Commissioner also accepts that matters of a business and professional nature are covered by the protection afforded by Article 8(1).

[3] *Niemietz v Germany* (1993) 16 EHRR 97

58. However, as noted above in the Commissioner's opinion deciding whether confirmation as to whether information is held or not is unfair should involve a consideration of whether the information is related to an individual's professional/public life or their private life.

59. In determining whether the requested information (if held) would relate more to The Prince of Wales' professional or public life, rather than his private life, the Commissioner faces a particularly difficult dilemma given the unique position which His Royal Highness occupies. There is clearly significant overlap between the Prince of Wales' public role as Heir to the Throne and a senior member of the Royal Family and his private life; he only occupies such positions because of the family into which he was born. In the Commissioner's opinion The Prince of Wales' public and private lives can be said to be inextricably linked. Therefore for the purposes of this case, and the consideration of Article 8, the Commissioner believes that he has to adopt the position that the requested information which is the focus of this case can be said to more private in nature than public and thus this adds weight to the argument that confirmation as to whether information of the nature requested is held would be unfair.

60. Furthermore given the nature of the information actually being requested in this case, correspondence The Prince of Wales may have received on a particular topic, from a particular person within a specific time frame, the Commissioner accepts that confirmation or denial as whether information was held would represent a clear and identifiable invasion of his privacy. This is contrast for example to a public authority simply confirming that it holds correspondence to and from The Prince of Wales for a longer time period and/or where the request does not seek to identify the topic of such communications.

61. In light of the explicit and weighty expectations of confidentiality that The Prince of Wales has with regard to his correspondence with ministers and the infringement that would occur to His Royal Highness' privacy given the topic specific nature of this request, the Commissioner accepts that confirmation as to whether information is held which falls within the scope of this request would be unfair.

62. The Commissioner has also considered conversely whether it would be unfair to confirm that the two ministers named in the request did **not** write to The Prince of Wales on the subject of genetic modification in the time scale stipulated by the request (presuming of course that was the case). However, in this case the Commissioner believes that the approach taken in such a circumstance needs to be consistent with the approach taken in a circumstance when Defra does hold information and confirmation of such a fact would be unfair. (As indeed the Commissioner has established in the proceeding paragraphs.)

63. The approach taken between the two scenarios needs to be uniform otherwise it risks undermining the principle of neither confirming nor denying whether information is held. For example, if, every time it received a similar request in the future, i.e. did a particular minister write to The Prince of Wales about topic "X" within a particular time period, Defra, when it did not hold any information falling within the scope of the request, denied holding information , but when it did hold

relevant information refused to confirm or deny whether such information was held, by inference it would become clear over time that when Defra refused to confirm or deny it would essentially be confirming that information was in fact held. This would allow the public, over a period of time and by submitting a series of requests, to identify, by reasonable assumption, the subjects upon which the Prince of Wales corresponded with government ministers.

64. Therefore the Commissioner believes that confirming or denying whether the requested information is or is not held would be unfair and in breach of the first data protection principle. Consequently, the Commissioner has concluded that Defra is exempt from the duty to confirm or deny whether it holds any information falling within the scope of the request by virtue of regulation 13(5)(a).

65. As the Commissioner has concluded that confirming or denying the existence of the information would breach the first data protection principle because it would be unfair, he has not deemed it necessary to consider any of the conditions in Schedule 2 of the DPA.

Procedural Matters

66. The Commissioner has concluded that Defra breached regulation 14(1) of the EIR by failing to provide a refusal notice to the complaint citing the exception contained at regulation 13(5) upon which it later relied to refuse to confirm or deny whether it held any information (albeit that Defra maintains that such a confirmation or denial is not environmental). Defra also breached regulations 14(2) and 14(3) which require that such a notice is provided within 20 working days following the request and states the exceptions that are being relied upon.

The Decision

67. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:

- Defra was entitled to refuse to confirm or deny whether it held any information on the basis of regulation 13(5) of the EIR.

68. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:

- Defra breached regulations 14(1) to 14(3) of the EIR by failing to issue a timely refusal notice citing the exception contained at 13(5) upon which it later relied.

Steps Required

69. The Commissioner requires no steps to be taken.

Right of Appeal

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70. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 17th day of December 2009

Signed ……

Graham Smith
Deputy Commissioner

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Section 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Effect of Exemptions

Section 2(1) provides that –

"Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply."

Section 2(2) provides that –

"In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

Communications with Her Majesty

Section 37(1) provides that –

> "Information is exempt information if it relates to-
>
> (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household, or
> (b) the conferring by the Crown of any honour or dignity."

Section 37(2) provides that –

> "The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)."

Personal information

Section 40(2) provides that –

> "Any information to which a request for information relates is also exempt information if-
>
> (a) it constitutes personal data which do not fall within subsection (1), and
> (b) either the first or the second condition below is satisfied."

Section 40(3) provides that –

> "The first condition is-
>
> (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
>
> (i) any of the data protection principles, or
> (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
>
> (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

Section 40(5) provides that –

> "The duty to confirm or deny-
>
> (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
> (b) does not arise in relation to other information if or to the extent that either-
> (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
> (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

Environmental Information Regulations 2004

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(1)

Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

(a) an exception to disclosure applies under paragraphs (4) or (5); and
(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(5)

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

(a) international relations, defence, national security or public safety;
(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
(c) intellectual property rights;
(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
(f) the interests of the person who provided the information where that person –
 (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure; or

(g) the protection of the environment to which the information relates.

Regulation 12 (6)

For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

Regulation 12(7)

For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

Regulation 12(8)

For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

Regulation 12(9)

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

Regulation 12(10)

For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

Regulation 12(11)

Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.

Regulation 13 - Personal data

Regulation 13(1)

To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

Regulation 13(2)

The first condition is –

(a) in a case where the information falls within any paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –

(i) any of the data protection principles; or

(ii) section 10 of the Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(a) (which relates to manual data held by public authorities) were disregarded.

Regulation 13(5) For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that –

(a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded; or

(b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of the Act.