

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

Decision Notice

Date: 30 March 2010

Public Authority: Department of Health
Address: Richmond house
79 Whitehall
London
SW1A 2NS

Summary

The complainant submitted a seven-part request to the Department of Health ("the DH") concerning the correspondence which the DH may have exchanged with HRH The Prince of Wales and His Royal Highness' representatives. The DH initially refused to confirm or deny whether it held information falling within the scope of the request in reliance on section 37(2) of the Act – communications with the Royal Household. During the course of the Commissioner's investigations the DH confirmed to the complainant that it did hold information falling within the scope of his request. The DH also reconsidered its approach to the complainant's request and determined that it was not obliged to provide the information because to do so would exceed the appropriate cost limit under section 12(1) of the Act.

The DH provided the Commissioner with documents containing information relevant to the complainant's request. The Commissioner has determined that some of the information contained within them is environmental information and should therefore have been dealt with under the Environmental Information Regulations 2004 ("the EIR"). For the information which is not environmental, the Commissioner has decided that the DH is entitled to refuse the complainant's request on the basis that to comply with the request would exceed the appropriate limit and therefore section 12(1) of the Act applies. In respect of the environmental information, the Commissioner has decided that the DH is also entitled to refuse the request under regulation 12(4)(b) of the EIR on the basis that the request is manifestly unreasonable.

In its handling of the request the Commissioner has determined that the DH breached sections 1(1)(a), 10(1), 16 and 17(5) of the Act and regulations 9, 11(4), 14(2) and 14(3) of the EIR. The Commissioner requires no steps to be taken.

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.

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

2. On 22 February 2006 the complainant made the following request for information to the Department of Health ("the DH"):
 - 1... 'A list of all approaches made by HRH the Prince of Wales to the DH. This should include the date the Prince contacted the Department (for whatever reason) as well as the nature of the matter under discussion. These approaches could have been made by the Prince in person, by email or by post.
 - 2... A list of all approaches made by representatives or employees of HRH the Prince of Wales to the DH. This should include the date the representatives/employees contacted the Department as well as details about the nature of the approach and the issues involved. These approaches could have been made in person, by email, by telephone or by post.
 - 3... How many times has the HRH the Prince of Wales contacted any civil servant in the employ of the DH or any member of the Department's ministerial team. Please provide

details of these approaches, the dates they happened and the issues concerned.

- 4... How many times have employees or representatives acting on behalf of the Prince of Wales contacted any civil servant in the employ of the DH or any member of the Department's ministerial team. Please provide details of these approaches, the dates they happened and the issues concerned.
 - 5... How many times has HRH the Prince of Wales met with a senior member of staff from the DH or a member of the Department's ministerial team. Could you please provide details of these meetings, including the dates they took place, the venue they were held and the nature of the topics under discussion.
 - 6... Please provide all internal documents held by the DH which relate in any way whatsoever to approaches from the Prince of Wales and or employees or representatives acting on his behalf. These documents should include, among other things, all departmental minutes, emails, telephone transcripts, letters and reports which touch upon this matter.
 - 7... Please provide all correspondence between the DH and any outside organisation or (individual including other government departments) which relates to approaches from HRH the Prince of Wales and or employees/representatives acting on his behalf.'
3. The DH acknowledged the complainant's request on 21 March 2006. The DH informed the complainant that it estimated the Department would require an additional 20 days for it be able to respond to his request in order to consider the application of section 37(2) which is a qualified exemption.
 4. The DH responded to the complainant's request in an email dated 9 April 2006. The complainant was informed that the DH neither confirms nor denies that it holds information falling within the description specified in his request. The DH stated that the duty in section 1(1)(a) of the Freedom of Information Act does not apply by virtue of section 37(2) of the Act which relates to communications with Her Majesty, members of the Royal Family and the Royal Household. The DH informed the complainant that, 'while it is known and acknowledged by the public that HRH The Prince of Wales corresponds on occasions with ministers, it is not, however, publicly known with which ministers he corresponds or on what occasion'. The DH also provided the

complainant with an outline of the public interest arguments considered in support of its application of section 37(2).

5. On 9 April 2006 the complainant wrote to the DH to request an internal review of the Department's handling of his request. The complainant listed a number of points in support of his request which related to whether section 37(2) was appropriately applied and whether the public interest favoured disclosure of the requested information.
6. The complainant wrote to the DH again on 7 and 19 June 2006, and again on 13 July 2006, asking for an update concerning the progress of his request for an internal review.
7. Having concluded its internal review, the DH wrote to the complainant on 17 July 2006 to inform him of its decision. The DH informed the complainant that it had conducted a reasonable search for the information he had requested and that it upheld its previous decision to neither confirm nor deny holding information falling within the description he had specified. The DH confirmed its application of section 37(2) of the Act and provided an account of its public interest considerations.

The Investigation

Scope of the case

8. On 31 July 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant stated that he was unhappy with the Department's failure to provide any information in connection with his request and drew the Commissioner's attention to the length of time the Department had taken to conduct its internal review.

Chronology

9. Although the complainant originally contacted the Commissioner in July 2006, 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 19 February 2007 that the Commissioner contacted the DH in relation to this complaint. He began his investigation by asking the DH to provide the following details:

- Confirmation of whether or not the Department holds the requested information.
 - A description of the requested information if it is held and clarification in respect of what information falls within section 37(1)(a) or (b).
 - Clarification of why the Department considers that the duty to confirm or deny under section 1(1)(a) of the Act does not arise in relation to information which is the subject of this request.
 - Further clarification of the Department's application of the Public Interest Test to the complainant's request.
 - Whether the Department had considered if it holds relevant information, if any of that information is available in the public domain.
 - Clarification of the Department's view in respect of the complainant's request for lists 'of all the approaches made... to the DH'.
10. The Commissioner also contacted the Cabinet Office to discuss this case and a number of other cases of the same or similar nature which had been received by other government departments. The Cabinet Office was involved in co-ordinating the various departments' responses. (The Commissioner subsequently received a number of complaints about the responses provided by these public authorities.)
11. On 9 July 2007 the DH provided the Commissioner with a response to his letter of 19 February 2007. In this letter the DH explained its application of section 37(1)(a) in detail and in provided its rationale to neither confirm nor deny holding information relevant to the complainant's request. The DH also explained that it believed that the information was exempt from disclosure on the basis of section 41(1) of the Act because The Prince of Wales had written in the expectation that his correspondence would be treated in confidence by the government.
12. In March 2008 representatives of the Royal Household, the Cabinet Office and the Commissioner's office met to discuss the issues raised by the various complaints the Commissioner had received involving requests for The Prince of Wales' correspondence with government departments.

13. On 7 July 2008 the Commissioner wrote to the Royal Household in order to seek further views on the application of the exemptions in these cases.
14. The Commissioner received a response from the Royal Household in November 2008.
15. In December 2008 representatives of the Royal Household, the Cabinet Office and the Commissioner's office met again in order to further discuss the issues raised by these complainants.
16. On 27 January 2009 the Commissioner contacted the DH to explain that following discussions with the Cabinet Office and the Royal Household, it was his understanding that the DH was no longer refusing to confirm or deny whether it held information falling within the scope of these requests. The Commissioner therefore asked the DH to contact the complainant and confirm to him that it did in fact hold information which fell within the scope of his requests. The Commissioner also asked the DH to provide his office with copies of the information which fell within the scope of these requests.
17. As noted above, in March 2009 the DH contacted the complainant and confirmed that it held information but considered it to be exempt from disclosure on the basis of the exemptions provided by sections 37(1)(a), 40(2) and 41(1). The DH also confirmed that its position was that it did not hold a list or schedule of correspondence falling within the scope of the requests.
18. On 6 March 2009 the DH provided the Commissioner with copies of the information which it believed fell within the scope of these requests.
19. The Commissioner contacted the DH again on 7 September 2009 and asked it to clarify its position concerning the application of sections 37(1)(a), 40(2) and 41(1) to the withheld information.
20. The Commissioner wrote to the DH once more on 3 December 2009. He identified a number of issues raised by the complainant's request and the DH's response to it. He pointed out that the complainant's requests, numbered 1 – 5, do not seek copies of The Prince of Wales' correspondence; it sought lists of approaches made in respect of the Department to or by the Prince (or his representatives) and the number of times the Prince has met with, contacted or been contacted by the Department. Requests 6 and 7 do seek copies of documents and correspondence but they are not restricted to any stated period of time. This raised the questions as to whether the DH had considered section 12 of the Act (Cost of compliance) and how had it determined

that the request was limited to the pieces of information it had supplied previously to the Commissioner.

21. The Commissioner received a response to this letter from the DH on 30 December 2009. The DH confirmed that, in respect of the information it sent to the Commissioner on 6 March 2009, it had identified some information relevant to the complainant's request and had determined that it was exempt from disclosure in reliance on sections 37(1)(a), 40(2) and 41(1) of the Act. The DH explained how it had located the information which it had determined fell within the scope of the complainant's request. However, the Commissioner's letter of 3 December 2009 had prompted the DH to reconsider its approach to this request up to that date and in consequence it concluded that its handling of the request had been flawed.
22. The DH's reasons for this conclusion are:
 - It had arbitrarily refined the complainant's request and therefore had failed to consider section 12. The DH stated that this "should have formed the basis of our handling of [the complainant's] seven requests and led us to cite exemptions before comprehensively considering whether the entire request could in fact be answered within the cost limit".
 - It failed to notify or discuss this refinement with the complainant in accordance with its duty under section 16 of the Act, thereby risking deviation from the focus of his request.
23. The DH was therefore led to conclude that it may hold other information relevant to the complainant's request and that section 12 would be engaged because the estimated costs of complying with all seven parts of the request would exceed £600.

Findings of fact

24. The Commissioner has reviewed the sample of information provided by the DH. This information has helped him to reach a decision in this case. The Commissioner is mindful that this sample of information was provided before the DH concluded that it may hold other information falling within the scope of the complainant's request.

Analysis

25. A full text of the statutory regulations referred to below can be found in the legal annex at the end of this Notice.

Substantive Procedural Matters

Section 12 – where the cost of compliance exceeds the appropriate limit

26. Section 1(1) of the Act provides applicants with a general right of access to information held by public authorities. This right is broken down into two parts: firstly the right to know whether information is held by a public authority - section 1(1)(a); and secondly, if information is held, to have that information provided – section 1(1)(b).
27. Section 12(1) of the Act provides that public authorities do not have to comply with a request where the estimated cost of responding to that request exceeds the appropriate limit as specified by The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations'). However, section 12(2) confirms that a public authority must comply with the requirements of section 1(1)(a) of the Act unless the cost of simply confirming whether information is held would exceed the appropriate cost limit. The regulations provide that when a public authority receives two or more requests from a requestor, the public authority can aggregate the cost of complying with these requests.
28. Section 4(3) of the Fees Regulations sets out the basis upon which an estimate can be made:
- '(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in-
- (a) determining whether it holds the information,
 - (b) locating the information, or a document which may contain the information,
 - (c) retrieving the information, or a document which may contain the information, and
 - (d) extracting the information from a document containing it.

(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.'

29. The appropriate limit for central government departments such as the DH is £600, the equivalent of 24 hours' work.

The Department of Health's position

30. In February 2006 members of the Department's freedom of information team contacted officials working in the Secretary of State's private office. The FOI team asked the officials to identify, locate and retrieve information falling within the scope of the complainant's request. The DH determined that this was a sensible starting point for a comprehensive search for the requested information.
31. The DH maintain that the information found in the Secretary of State's private office, "inevitably represents only a portion of the information that could potentially be captured by requests that were limited neither in terms of time nor in terms of specific topics or policy areas within the Department".
32. It is possible that each business area within the DH could have received correspondence (or approaches) from, or held meetings with, The Prince of Wales or his employees or representatives. The DH does not hold a central database of all correspondence and/or contacts relating to His Royal Highness, nor is it likely that individual business areas would hold such a database. Therefore all potentially relevant files would necessarily have to be examined to locate any information within the scope of the complainant's request.
33. The DH is divided into 11 Directories, with each being sub-divided into a number of Divisions. Each Division consists of discrete Branches or Business Units.
34. Some business units, for example the Human Resources Operations within the Human Resources Division (part of the Finance and Operations Directorate) are unlikely to hold information relevant to the complainant's request. Nevertheless, the DH estimates that searches of 75% of its business areas, requiring at least half an hour per area, would be necessary to determine if information is held and to locate that information. Based on this estimate the DH calculates that at least 130 hours would be required to search for relevant information.

35. Because the complainant is seeking 'any' communications between The Prince of Wales (and his representatives) and any civil servant within the DH, it would also be necessary to carry out searches of the nine Regional Health teams and the two Executive Agencies (The Medicines and Healthcare Products Regulatory Agency and the NHS Purchasing and Supply Agency). The DH estimates that it would take 13 hours to search these areas for relevant information.
36. Additionally, potentially relevant records may have been archived within the Department's Records Office. The DH asserts that it cannot be certain that relevant information would have been filed under titles that would automatically indicate relevance to the complainant's request. Searching for file titles containing the words 'Prince of Wales' or 'Royal Household' would therefore offer no guarantees of a comprehensive capture of documents.
37. The DH clarified its position regarding the information it had identified prior to its consideration of section 12(1) of the Act. It considers that this does not offer a secure basis to extrapolate the likely areas of interest to The Prince of Wales, or any basis that would allow it to refine its search for information. The DH maintains that the information already identified does not affect its estimate of the time necessary to thoroughly respond to the complainant's request.

Is the requested information environmental information?

38. Regulation 2(1) of the EIR defines 'environmental information' as any information in any material form on:

'(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c)'.

39. The Commissioner considers that the phrase "any information... on" should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc in question. In other words, information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.

40. The Commissioner finds support for this approach in two Information Tribunal decisions. In *The Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth* (EA/2007/0072) the Tribunal held:

'that the Decision Notice [where the Commissioner had concluded that none of the requested information was environmental information] fails to recognise that information on "energy policy in respect of supply, demand and pricing" will often fall within the definition of "environmental information" under Regulation 2(1) EIR. In relation to the disputed information we find that where there is information relating to energy policy than that information is covered by the definition of environmental information under EIR. Also we find that meetings held to consider "climate change" are also covered by the definition.' (Tribunal at paragraph 27).

41. In reaching this conclusion the Tribunal placed weight on two arguments advanced by Friends of the Earth; that information on energy policy, including supply, demand and pricing issues, will often affect or be likely to affect the environment and, the term 'environmental information' should be interpreted broadly:

'23. Mr Michaels on behalf of Friends of the Earth contends that policies (sub-para (c)) on "energy supply, demand and pricing" often will (and are often expressly designed to a) affect factors (sub-para (b)) such as energy, waste and emissions which themselves affect, or are likely to affect, elements of the environment (sub-para (a)) including, in particular and directly, the air and atmosphere and indirectly (in respect of climate change) the other elements.

24. He provides by way of simple and practical example, national policy on supply, demand and pricing of different energy sources (e.g., nuclear, renewable, coal, gas) has potentially major climatic change implications and is at the heart of the debate on climatic change. Similarly, national policy on land use planning or nuclear power has significant effect on the elements of the environment or on factors (e.g. radiation or waste) affecting those elements.

25. Mr Michaels further argues that the term 'environmental information' is required to be construed 'very broadly' so as to give effect to the purpose of the Directive. Recognition of the breadth of meaning to be applied has been recognised by the European Court of Justice, by the High Court and by this Tribunal in *Kirkaldie v Information Commissioner and Thanet District Council* (EA/2006/0001). The breadth is also recognised in the DEFRA guidance, 'What is covered by the regulations'. It does not appear, Mr Michaels argues, that the Commissioner has adopted such an approach.'

42. In reaching this conclusion the Tribunal appeared to reject BERR's arguments that there must be sufficiently close connection between the information and a probable impact on the environment before it can be said that the information is 'environmental information'.
43. In *Ofcom v Information Commissioner and T-mobile* (EA/2006/0078) involving a request for the location, ownership and technical attributes of mobile cellular base stations, Ofcom argued that the names of Mobile Network Operators were not environmental information as they did not constitute information 'about either the state of the elements of the environment... or the factors... that may affect those elements.'
44. The Tribunal disagreed, stating that:

'31. The name of a person or organisation responsible for an installation that emits electromagnetic waves falls within the meaning of the words "any information... on... radiation". In our

view it would create unacceptable artificiality to interpret those words as referring to the nature and affect of radiation, but not to its producer. Such an interpretation would also be inconsistent with the purpose of the Directive, as expressed in the first recital, to achieve, "... a greater awareness of environmental matters, a free exchange of views [and] more effective participation by the public in environmental decision making...". It is difficult to see how, in particular, the public might participate if information on those creating emissions does not fall within the environmental information regime.'

45. The Commissioner has considered the information sent to him by the DH, taking into account that it represents the position of the DH before it considered of the wider implications of the complainant's request. He has also considered the wider role and responsibilities of the public authority against the known interests of HRH The Prince of Wales and the likely contexts in which he would correspond with this particular government department. The documents sent to the Commissioner contain information which can properly be described as environmental information. That information relates to one of the elements of the environment listed in regulation 2(1)(a) and to one of the measures listed in regulation 2(1)(c). The documents also contain information which is not environmental information.
46. Where an information request covers both environmental and non-environmental information, the Commissioner's view is that the Fees Regulations allow the cost of dealing with the entire request to be taken into account under section 12 of the Act.
47. Any valid information request under section 8 the Act, including requests for environmental information to which the exemption at section 39 would apply, are requests where access is technically provided for by the Act. Nevertheless the actual access regime under which any environmental information may be disclosed is the EIR.
48. The Commissioner, therefore, has initially considered whether the cost of locating and retrieving all potentially disclosable information would exceed the appropriate cost limit and therefore whether the DH can rely on section 12(1) of the Act. The Commissioner accepts on the facts of the case that the cost of complying with these requests can be aggregated.

Section 12

49. In considering whether the each part of the complainant's request can be aggregated under Regulation 5 of the Fees Regulations¹, the Commissioner has adopted the test provided by the Information Tribunal in *Fitzsimmons v Information Commissioner and DCMS* (EA/2007/0124). The Tribunal confirmed that requests need only to relate to 'any extent' to the same or similar information where there is an overarching theme or common thread running between them, in terms of the nature of the information that has been requested.
50. The Commissioner has carefully considered the terms of each part of the complainant's request. He has determined that the information sought can properly be said to relate to the approaches (and contact) from with HRH The Prince of Wales, or to approaches (and contact) with his representatives or employees. This characterisation leads the Commissioner to conclude that the individual parts of the complainant's request can be aggregated for the purpose of section 12.
51. In considering estimates relied on by public authorities in relation to section 12, the Commissioner has followed the approach of the Information Tribunal in *Alasdair Roberts v Information Commissioner* (EA/2008/0050) at paragraphs 9 to 13. The Tribunal confirmed that in deciding whether an estimate was reasonable, the following issues could be considered:
- A public authority only has to provide an estimate rather than a precise calculation;
 - The cost estimate must be reasonable and only based on those activities described in Regulation 4(3);
 - Time spent considering exemptions or redactions cannot be taken into account;
 - Estimates cannot be taken into account relating to data validation or communication;
 - The determination of a reasonable estimate can only be considered on a case-by-case basis; and
 - Any estimate should be 'sensible, realistic and supported by cogent evidence'.²
52. In this case the DH did not provide the Commissioner with an overall estimate of the time which would be needed to comply with any part, or whole, of the complainant's request. Rather than provide this estimate, the DH provided an account of the Department's structure.

¹ <http://www.foi.gov.uk/practitioner/feesguidance.htm>

² *Alasdair Roberts v Information Commissioner* (EA/2008/0050)

However it provided this to illustrate the problems of calculating an estimate, given the breadth of the complainant's request and the size of the task required for it to locate relevant information from any or all of its constituent parts, particularly given the variety of topics upon which The Prince of Wales may theoretically have contacted the Department.

53. The DH did however provide the Commissioner with its calculation of the time each business unit would be required to spend to search for relevant information. The DH accepts that business units within its Human Resources Operations (part of the Finance and Operations Directorate) would be unlikely to hold relevant information. Therefore, based on its Health Protection Division to calculate its number of business units, the DH determined that a search of 75% of these would take in the region of 130 hours.
54. Given the nature of the complainant's request and the diverse nature and size of the DH, the Commissioner is prepared to accept that the DH estimate is reasonable. The Commissioner finds that the time required to comply with the request would exceed 130 hours and therefore the appropriate limit of £600 for central government departments. He therefore concludes that in consequence of this finding the DH is entitled to refuse to comply with the request in reliance of section 12(1) of the Act.

Regulation 12(4)(b) – Manifestly unreasonable

55. The DH holds the position the complainant's request is refused under section 12(1) of the Act. However, the Commissioner has decided that the requested information does, and may, include environmental information and that therefore the DH should also have dealt with the request under the EIR.
56. The EIR provide a separate, free-standing right of access to environmental information. However, under the EIR there is no direct equivalent of section 12 of the Act. However, regulation 12(4)(b) provides that a request may be refused if it is manifestly unreasonable.
57. In the Commissioner's view regulation 12(4)(b) provides an exception to the duty to disclose environmental information in circumstances where the request is vexatious or where the time required to comply with the request is so substantial that it would significantly interfere with the normal conduct of the authority's activities or entail a significant diversion of resources from other functions. The Commissioner's view is supported by the Information Tribunal's decision in *DBERR v Information Commissioner and Platform*

(EA/2008/0096) in which the Tribunal accepted that a request could properly be described as manifestly unreasonable in such circumstances. However, the Tribunal made the following comment at paragraph 31 of its decision:

'It is clear to us that the expression means more than just "unreasonable". The word "manifestly" imports a quality of obviousness. What is in issue, therefore, is a request that is plainly or clearly unreasonable.'

58. To determine whether the cost of complying with a request would be manifestly unreasonable, the Commissioner will use the Fees Regulations as a guide to ascertain what costs or diversion or resources would be involved in answering the complainant's request. The Fees Regulations set the appropriate limit at £600 for central government departments, equating to 24 hours of work based on a rate of £25 per person, per hour. The Fees Regulations provide a useful starting point to consider what costs may be involved in complying with a request under the EIR. This does not mean that a request for environmental information will necessarily be manifestly unreasonable under regulation 12(4)(b) if it exceeds the appropriate limit. The Commissioner would point out that there is no equivalent to the appropriate limit under the EIR. A request made under EIR may be manifestly unreasonable under regulation 12(4)(b) by virtue of other factors that could be taken into consideration before concluding that environmental information can be withheld under this exception.
59. Again the Commissioner is assisted by the Information Tribunal's comments in *DBERR v Information Commissioner and Platform* (EA/2008/0096):

'36. Regulation 12(4)(b) is quite different. There is no appropriate limit to act as a cut off point. It is the request that must be manifestly unreasonable not just the time required to comply with it, nor indeed and single aspect of it. In our view, this means that Regulation 12(4)(b) requires the public authority to consider the request more broadly. This does not mean that the time required to comply with a request is irrelevant. Rather, it is one factor to be considered along with others when assessing whether a request is "manifestly unreasonable".

And

39. We note that recital 9 of the Directive calls for disclosure of environmental information to be "to the widest extent possible". Whatever the reasons may be, the effect is that public authorities

may be required to accept a greater burden in providing environmental information than other information.'

60. The establishment of a "reasonable" cost calculation has been considered by the Information Tribunal in its decisions in EA/2006/0093 and EA/2008/0042. Although this decision relates to consideration of section 12 of the Act, the Commissioner believes that it is relevant to the EIR, under which only the cost of locating the environmental information would be relevant to regulation 12(4)(b):

'the Commissioner and the Tribunal can enquire whether the facts or assumptions underlying the estimation exist and have been taken into account by the public authority. The Commissioner and the Tribunal can also enquire about whether the estimation has been made upon other facts or assumptions which ought not to have been taken into account. Furthermore the public authority's expectation of the time it would take to carry out the activities set out in regulation 4(3) a) to d) [of the Fees Regulations] must be reasonable.'

61. In this case, locating the environmental information would involve locating all information within the scope of the request as a preliminary step. The Commissioner therefore accepts that the full costs, included in the DH estimate, are relevant in determining the aggregated burden of answering all of the complainant's requests under the EIR in the circumstances of this case.
62. The Commissioner accepts that the facts underlying the estimate provided by the public authority are reasonable and that to determine the extent of the requested information held would in itself be manifestly unreasonable. In reaching this view the Commissioner considered the public authority's explanation concerning the extent of the searches that would be required in order to locate the environmental information relevant to the complainant's request.
63. The size and make-up of the DH and the diverse nature of the topics which are of interest to the Prince of Wales, coupled with the DH not having a system which collates and records contact between itself and the Prince and his representatives, lead the Commissioner to conclude that it would be necessary for the department to manually and electronically search all of the files, papers and databases it holds to locate relevant environmental information within all of its business units.
64. The Commissioner is satisfied that the costs involved in complying with the request would be considerable. However, as stated above, just

because a request would exceed the appropriate limit is not in itself grounds for refusing to disclose environmental information under the EIR. Therefore the Commissioner has taken into account other factors such as the likely impact the work necessary to fulfil the request would have on the activities of the public authority. The Commissioner recognises that the public authority is a large central government department and therefore he considers it unlikely that this work would actually prevent the public authority from performing its core functions. However the Commissioner does accept that complying with the request would involve a significant amount of searching within the public authority and the costs involved, including the staff and time required, would be considerable and amount to an unreasonable diversion of the public authority's resources away from its core functions. He considers that the wide scope of the request, and the unreasonable diversion of resources that would be required to answer it, are sufficient to mean that this request is plainly or clearly unreasonable. Therefore the Commissioner has decided that, to the extent that the request is for environmental information, it can be characterised as manifestly unreasonable.

Public interest test

65. For the reasons given above the Commissioner is satisfied that the request is manifestly unreasonable and therefore falls within the exception in regulation 12(4)(b) of the EIR. However under regulation 12(1)(b) the complainant's request, in so far as it relates to environmental information, may only be refused under this exception if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. (It should be noted that under regulation 12(2) there is a presumption in favour of disclosure.)

Public interest arguments in favour of disclosing the information

66. There is an inherent public interest in disclosure of information to ensure that the government is accountable for, and transparent about, its decision making processes.
67. Moreover, there is a specific public interest in disclosure of information which would increase the public's understanding of how the Government engages with the Royal Family, and in particular in the circumstances of this case, the Heir to the Throne and his representatives. This is because the Monarchy has a central role in the British constitution and the public is entitled to know how the various mechanisms of the constitution operate. This includes, in the

Commissioner's opinion, how the Heir to the Throne is educated in the ways of government in preparation for his role as Sovereign.

68. Disclosure of the information may allow the public to understand the influence (if any) exerted by The Prince of Wales on matters of public policy. If the withheld information demonstrated that the public authority or government in general had placed undue weight on the preferences of The Prince of Wales then the public interest in disclosure would be stronger.
69. Conversely, if the withheld information actually revealed that The Prince of Wales did not have undue influence on the direction of public policy, then there would be a public interest in disclosing the information in order to reassure the public that no inappropriate weight had been placed on the views and preferences of The Heir to Throne. In essence disclosure could ensure public confidence in respect of how the government engages with The Prince of Wales.
70. These two arguments could be seen as particularly relevant in light of media stories which focus on the Prince of Wales' alleged inappropriate interference in matters of government and political lobbying.
71. Linked to this argument is the fact that disclosure of the withheld information could further public debate regarding the constitutional role of the Monarchy and particularly the Heir to the Throne. Similarly, disclosure of the information could inform broader debate surrounding reform of the British constitutional system.

Public interest arguments in favour of maintaining the exception

72. The Commissioner feels that there are compelling arguments in favour of maintaining the exception because of the public interest in protecting the integrity of the Environmental Information Regulations and ensuring that they are used responsibly.
73. There is a public interest in the public authority being able to carry out its core functions without the distraction of having to comply with requests that would impose a significant burden in both time and resources. The Commissioner is also mindful of the fact that the public authority's ability to comply with other more focused requests for information would be undermined if it had to deal routinely with wide ranging requests for large amounts of information covering a timeframe of a number of years.

Balance of public interest arguments

74. The Commissioner recognises that the appropriate limit is not a barrier to the disclosure of information under the EIR. However, he considers that the appropriate limit is a useful benchmark for assessing the costs involved in responding to requests for information. Had the public authority's estimate of the costs it expects to incur in dealing with this request only just exceeded the appropriate limit, the Commissioner would have been more inclined to decide that the public interest in maintaining the exception does not outweigh the public interest in disclosure. However, it is clear that in this case the costs of complying with the request would considerably exceed the appropriate limit and therefore the public interest in protecting the ability of the public authority to not be diverted from its core functions is stronger. This leads the Commissioner to find that, in the circumstances of this case, there is greater weight in the public interest in favour of maintaining the exception.

Procedural matters

75. The Commissioner finds that the DH breached section 1(1)(a) of the Act by failing at the outset to inform the complainant that it holds information relevant to his request.

Section 16 – Advice and assistance

76. Section 16(1) of the Act requires public authorities to provide advice and assistance, so far as it would be reasonably possible, to applicants who propose to make or have made requests for information.

77. Section 16(2) of the Act states that a public authority in relation to the provision of advice and assistance, will have complied with the requirements of section 16(1) of the Act if it has conformed with the code of practice issued under section 45 of the Act³.

78. Paragraph 14 of the section 45 code of practice sets out the sort of advice and assistance that should be offered to applicants whose requests are refused on the basis of section 12(1) of the Act. This paragraph suggests that public authorities should consider providing an indication of what information is available within the cost limit and also consider advising the applicant that by reforming or refocusing their request, information may be available within the cost limit.

³ <http://www.foi.gov.uk/reference/imp/imp/imp/codepafunc.htm>

79. The Commissioner notes that the DH informed the complainant (albeit belatedly) that it held information relevant to his request and that the information it had initially found was exempt from disclosure by virtue of sections 37(1)(a), 40(2) and 41(1) of the Act. In the light of the DH's explanation to the Commissioner as to how relevant information may be held, i.e. within discrete business units, the complainant is now in a position to submit a request seeking information potentially held by one or more of the Department's directorates, divisions or business units. On the basis of these facts, it is possible for the complainant to submit a refined information request.
80. The Commissioner is satisfied that by the time this Notice is being issued the DH has in effect provided the complainant with sufficient advice and assistance so that he can submit a refined request that could be satisfied within the appropriate limit provided by section 12(1). Notwithstanding this however, the Commissioner considers that the DH should have provided sufficient advice and assistance to the complainant at the time of his request and in consequence of this he finds that the DH breached section 16 of the Act.

Regulation 9 – Advice and Assistance

81. Regulation 9(1) provides that a public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.
82. Regulation 9(3) provides that a public authority will have complied with regulation 9(1) where it has conformed to a code of practice issued under regulation 16 in relation to the provision of advice and assistance.
83. The 'Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004' ('The Code of Practice') sets out at paragraphs 8 to 23 what is expected of public authorities as regards the provision of advice and assistance. The Code of Practice states that appropriate assistance may include providing an outline of the different kinds of information that might meet the terms of the request.
84. The Commissioner considers that the DH failed to provide appropriate advice and assistance to the complainant in respect of his request, to the extent that it was for environmental information, and therefore he finds that the DH breached regulation 9 of the EIR.

Regulation 11 - Representations and reconsideration

85. Regulation 11(4) provides that where an applicant makes representations to a public authority regarding the public authority's alleged failure to comply with a requirement of the EIR:

"A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations."

86. In this case the complainant wrote to the DH on 9 April 2006 to ask that it carry out an internal review of his request for information. The DH presented the findings of its internal review on 17 July 2006, outside of the 40 working day deadline. This constitutes a breach of regulation 11(4).

Regulation 14 – Refusal to disclose information

87. By failing to respond to the request under the EIR the DH breached regulations 14(2) and 14(3) which provide that a refusal of a request must be made no later than 20 working days and shall specify the reasons for not disclosing the information, including details of the exception relied on and matters the public authority took into consideration in respect of the public interest.

The Decision

88. The Commissioner's decision is that the public authority dealt with following element of the request for information in accordance with the Act:
- The DH is entitled to refuse to comply with the request on the basis of section 12(1) of the Act.
89. The Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The DH breached sections 1(1)(a) and 10(1) by failing to confirm within 20 working days of the date of the request that it held relevant information.
 - The DH breached section 16 of the Act by failing to provide advice and assistance to the complainant at the time of his request.

- The DH breached section 17(5) of the Act by failing to issue a refusal notice citing section 12(1) within 20 working days of the request
90. In respect of environmental information held by the DH, the Commissioner has decided that the DH dealt with the following elements of the request in accordance with the EIR:
- The DH was not obliged to comply with the complainant's request because it was manifestly unreasonable under regulation 12(4)(b).
91. The Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:
- The DH breached regulation 9 by failing to provide advice and assistance to the complainant in respect of his information request.
 - The DH breached regulations 14(2) and 14(3) by failing to deal with the request under the EIR.
 - The DH breached regulation 11(4) by failing to respond to the complainant's request for an internal review within 40 working days.

Steps Required

92. The Commissioner requires no steps to be taken.

Right of Appeal

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

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 30th day of March 2010

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."

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that -

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."

Section 12(2) provides that -

"Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit."

Section 12(3) provides that -

"In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases."

Section 12(4) provides that -

"The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority -

- (a) by one person, or
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them."

Section 12(5) – provides that

“The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.

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(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

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."

Information provided in confidence.

Section 41(1) provides that –
"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."

Section 41(2) provides that –
"The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence."

Environmental Information Regulations 2004

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

"the Act" means the Freedom of Information Act 2000(c);

"applicant", in relation to a request for environmental information, means the person who made the request;

"appropriate record authority", in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

"the Commissioner" means the Information Commissioner;

"the Directive" means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

"historical record" has the same meaning as in section 62(1) of the Act;

"public authority" has the meaning given in paragraph (2);

"public record" has the same meaning as in section 84 of the Act;

"responsible authority", in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

"Scottish public authority" means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and

“working day” has the same meaning as in section 10(6) of the Act.

Regulation 9 - Advice and assistance

Regulation 9(1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

Regulation 9(2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall –

- (a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and
- (b) assist the applicant in providing those particulars.

Regulation 9(3) Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case.

Regulation 11 - Representation and reconsideration

Regulation 11(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant’s request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or

- (e) the request involves the disclosure of internal communications.

Regulation 14 - Refusal to disclose information

Regulation 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3) The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13;
and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).