

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 March 2010

Public Authority: Ministry of Defence
Address: Main Building
Whitehall, London
SW1A 2HB

Summary

The complainant requested various pieces of information relating to communications between HRH The Prince of Wales and the public authority. The public authority withheld the relevant information held on the basis of the exemptions sections 37(1)(a) (Communications with the Royal Household), 40(2) (Personal data), and 41 (Information provided in confidence). The Commissioner finds that a substantial part of the relevant information was correctly withheld on the basis of the exemption at section 41, and the remainder was also correctly withheld on the basis of the exemption at section 37(1)(a). He however finds the public authority in breach of section 17(1) (late reliance on the exemption from the duty to confirm or deny if information is held) and 17(1)(b) (late reliance on an exemption from disclosure) of the Act.

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 Request

2. The complainant submitted an email to the Ministry of Defence (MOD) on 27 July 2006. This email contained a number of requests which focused on correspondence which the MOD may have exchanged with HRH The Prince of Wales and representatives of His Royal Highness. The full text of this email is included in an annex which is appended to this Notice.

3. After some delay, the MOD issued a refusal notice on 23 August 2006 in which it refused to disclose the information held on the basis of the exemption at section 37(1)(a).
4. On 28 August 2006 the complainant asked the MOD to conduct an internal review of this decision.
5. The MOD informed the complainant of the outcome of the review on 24 October 2006. It upheld the original decision to withhold the relevant information on the basis of section 37(1)(a).
6. Following correspondence with the Commissioner, the MOD explained that it believed that all of the information was also exempt from disclosure on the basis of sections 41(1) and 40(2). The MOD confirmed that it did not hold a list or schedule of correspondence falling within the scope of the requests and, although it agreed that it could create one, it believed the contents would also be exempt from disclosure.

The Investigation

Scope of the case

7. The complainant contacted the Commissioner on 25 October 2006 and asked him to consider the MOD's refusal to provide him with the information that he had requested.
8. The complainant specifically asked the Commissioner to consider the MOD's decision to:
 - Withhold information the correspondence falling within the scope of his requests on the basis of section 37(1)(a), 40(2) and 41(1); and
 - Not provide a list and/or schedule of the correspondence which was held.

Chronology

9. Although the complainant originally contacted the Commissioner in October 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 MOD in relation to this complaint.
10. The Commissioner also contacted the Cabinet Office in order to discuss the issues relating to this case as a number of other government departments had received similar requests seeking details of correspondence with The Prince of Wales and his Household and the Cabinet Office was involved in co-ordinating the various public authorities' responses. (The Commissioner subsequently received a number of complaints about the responses provided by these public authorities).

11. On 31 May 2007 the MOD provided the Commissioner with a response to his letter of 19 February 2007. In this letter the MOD provided the Commissioner with a list of the information which it considered to fall within the complainant's requests. The MOD also explained that it believed that some of this information was exempt 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. The MOD also provided further submissions to support its application of section 37(1)(a) of the Act. The MOD also noted that the complainant had requested lists of approaches made to it and it believed that the fulfilment of these requests would involve creation of new information, something which it was not required to do as part of the Act.
12. On 8 August 2007 the Commissioner contacted the MOD and asked to be provided with copies of the information falling within the scope of the complainant's requests.
13. On 3 September 2007 the MOD supplied the Commissioner with the information withheld from the complainant which fell within its search of information.
14. 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 has received involving requests for The Prince of Wales' correspondence with government departments.
15. 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.
16. The Commissioner received a response from the Royal Household in November 2008.
17. 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.
18. The Commissioner contacted the MOD again on 09 September 2009 and asked it to clarify its position with regard to the application of the various exemptions.
19. The Commissioner received a response to this letter from the Cabinet Office on 7 October 2009 and from the MOD on 06 January 2010.

Findings of fact

20. As the information in the Chronology explains the Commissioner exchanged communications about this complaint both with the MOD to which the request was submitted to and also with the Cabinet Office. In some instances the Cabinet Office has provided the Commissioner with submissions on the application of a particular exemption and asked the Commissioner to consider these submissions when reaching his decision in all cases involving requests for correspondence with The Prince of Wales. The Commissioner has agreed to do so. Therefore

although for consistency and ease of reference the remainder of this Notice suggests that information or a particular submission has been provided by the MOD it may be the case that it was in fact provided by the Cabinet Office on its behalf.

21. At the time that this Notice is being issued the MOD's position is that **all** of the correspondence falling within the scope of the requests is exempt from disclosure on the basis the exemptions contained at sections 37(1)(a), 40(2) and 41(1) of the Act.
22. The MOD has also confirmed that it believed that a list and/or schedule of correspondence sent by The Prince of Wales would be exempt from disclosure on the basis of sections 37(1)(a), 40(2) and 41(1) of the Act and that a list and/or schedule of information sent to The Prince of Wales would be exempt on the basis of sections 37(1)(a) and 40(2) of the Act.

Analysis

Substantive Procedural Matters – what has the complainant actually asked for?

23. Before setting out his findings in relation to whether the information requested by the complainant should be disclosed, the Commissioner has clarified the nature of the information which he considers to fall within the scope of the complainant's requests.
24. In the Commissioner's opinion, the requests submitted by the complainant can be separated into three types:
 - The requests numbered '1 – 3' seek **lists of approaches** made by The Prince of Wales or his representatives to the MOD;
 - The request numbered '4' seeks the **number of times** The Prince of Wales or his representatives met with the MOD including the minutes of any such meetings, and
 - The request numbered '5' seeks various internal documents and pieces of correspondence.
25. The Commissioner notes that in early responses to the complainant and submissions to him, the MOD suggested that it did not hold a list of any such approaches (or indeed a record of the number of approaches) and that to provide such information would involve the creation of new information and under the Act it was not required to create new information.
26. The Commissioner's position is that where a request is made for a schedule or list of documents, even if no schedule has been compiled, if the information which would be in the schedule is held, the request can and should be complied with unless the contents of the schedule, once compiled, would also be exempt. The Commissioner originally outlined this view in decision notice FS50070854 involving a request to the Foreign and Commonwealth Office. Therefore in the

circumstances of this case the Commissioner believes that, as the MOD holds letters and emails from The Prince of Wales and his representatives, it is in a position to provide the complainant with a list of these approaches and confirm the number of such approaches, subject of course to the application of any exemptions.

27. As noted, the complainant's latter requests seek correspondence held by the MOD which relates to approaches from the HRH The Prince of Wales or representatives acting on his behalf'.
28. The Commissioner notes that in some of the submissions he received from the MOD it indicated that it did not believe that correspondence sent to it by The Prince of Wales actually fell within the scope of any of the complainant's requests.
29. The Commissioner wishes to clarify that in his opinion such a request, by seeking information which 'relates to correspondence' with the Prince of Wales or those who represent him does not exclude the actual correspondence itself. In other words these requests include correspondence between the MOD and The Prince of Wales and those who represent him, as well as any information which relates to such correspondence. This is because, in the Commissioner's opinion it is clear that any request which seeks information which relates to particular correspondence also covers the correspondence itself.
30. The Commissioner has initially considered whether the information falling within the scope of the third class of the complainant's requests – i.e. that which seeks internal documentation, correspondence and information relating to that correspondence – is exempt from disclosure on the basis of the exemptions cited by the MOD. He has then gone on to consider whether the information that would fulfil the complainant's first two classes of requests is exempt from disclosure.

Exemptions

The request for the correspondence, information relating to the correspondence and internal documentation

31. In this case the Commissioner has established that the MOD holds:
 - Correspondence from The Prince of Wales;
 - Correspondence from representatives of The Prince of Wales; and
 - Internal documentation relating to approaches from The Prince of Wales.

Section 41 – information provided in confidence

32. The Commissioner has been provided with detailed submissions to support the MOD's position that correspondence exchanged with The Prince of Wales is exempt from disclosure on the basis of section 41 of the Act.
33. This section states that:

'41-(1) 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.'

34. Therefore for this exemption to be engaged two criteria have to be met: the public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.

Section 41(1)(a)

35. The MOD has argued that correspondence sent to it by The Prince of Wales meets the first limb of section 41 because it is clearly information it received from another person. On this basis the Commissioner accepts that such correspondence, along with correspondence received by the MOD from representatives of The Prince of Wales, meets the requirements of section 41(1)(a).

36. However, the MOD has also argued that the requirement of section 41(1)(a) of the Act that information be 'obtained from another person' is sufficiently broad to include information about a person, as well as information actually provided by a person. To support this approach the MOD made the point that the modern law of breach of confidence (which is discussed in detail below) covers information not only obtained from a person, but also information about a person, for example a photograph.¹ On this basis the MOD has argued that correspondence to The Prince of Wales from the MOD also falls within the scope of section 41(1)(a) because the content of the correspondence clearly indicates what matters His Royal Highness has raised with Ministers.

37. The Commissioner recognises that deciding whether information has been 'obtained from any other person' requires an assessment of the content of information, not simply of the mechanism by which it was imparted and recorded.² However, the Commissioner does not agree with the MOD's assertion that simply because information it holds is about an identifiable individual it constitutes information obtained from that person. In the Commissioner's view such an interpretation of section 41(1)(a) is too broad for two reasons.

38. Firstly, although the Commissioner accepts – for the reasons set out below – that the modern law of breach of confidence needs to be taken into account when considering whether disclosure of information would constitute an actionable breach and thus engage section 41(1)(b), he does not believe that the case law

¹ The public authority referenced the case of *Campbell v MGN Ltd [2004] 2 AC 457* in which a claim was brought by Ms Campbell under the tort of breach of confidence in respect of details of drug addiction treatment and covertly taken photographs.

² The Tribunal confirmed that such an approach was correct in *DBERR v Information Commissioner and FoE (EA/2007/0072)* – see para 78.

referenced by the MOD is directly relevant to the engagement of section 41(1)(a). This is because the way in which section 41 of the Act is drafted means that information is not exempt simply if its disclosure would constitute an actionable breach of confidence as in common law. Rather the inclusion of section 41(1)(a) means that the MOD also has to have received that information from a third party. In effect section 41 of the Act creates an additional requirement for withholding information which is confidential under the common law and it would be inappropriate simply to apply the common law test to lower the threshold of engaging section 41 of the Act.

39. Secondly, the Commissioner believes that the approach suggested by the MOD effectively represents an attempt to broaden out the basis upon which section 41 is engaged to also ensure that it offers protection to an individual's privacy regardless of whether a public authority had 'obtained' information about that individual from a third party. However, in the Commissioner's view such an interpretation of section 41 is not necessary. Whilst this exemption may not always protect an individual's privacy in the way in which the MOD is arguing that it should, the Act clearly offers weighty protection to an individual's privacy in the form of the exemption provided by section 40 of the Act.
40. Therefore although the Commissioner accepts that it is possible for correspondence which was created by the MOD and sent to The Prince of Wales and his representatives to still be meet the requirements of section 41(1)(a), whether it does in any particular case will depend upon the content of the information which was communicated. By the same logic the Commissioner accepts that it is possible for internal documentation created by the MOD to meet the requirements of section 41(1)(a) if it closely replicates the content of information originally provided to the MOD.
41. In the Commissioner's opinion there has to be a significant degree of similarity to the information which the MOD is sending to The Prince of Wales or his representatives and the information which His Royal Highness or those who represent him originally provided to the MOD. In the Commissioner's opinion it is not sufficient that the information is simply on the same topic. The correspondence being sent to The Prince of Wales or his representatives has to reflect the actual views or opinions His Royal Highness, or those who represent him, raised on a particular topic. Again the same is true of any internal documentation held by the MOD.
42. The Commissioner has set out in the confidential annex which particular pieces of correspondence or parts of correspondence do not in his opinion meet the requirements of section 41(1)(a).
43. Having looked at the information held in relation to the request for internal document which relates to approaches from The Prince of Wales, the commissioner accepts that some of the information reflects the views of The Prince of Wales sufficiently closely that this correspondence meets the requirements of section 41(1)(a). This has also been set out in the confidential annex.

Section 41(1)(b)

The public authority's position on an actionable breach of confidence

44. The MOD has provided the Commissioner with detailed submissions to support its position that the disclosure of the correspondence between it and The Prince of Wales would constitute an actionable breach and thus meet the requirements of section 41(1)(b). The Commissioner has summarised these submissions below and then gone on to explain his view as to whether they apply to the information which has been withheld in this case.
45. In most cases involving the application of section 41 which the Commissioner has previously considered, the requested information has been of a commercial nature rather than the more personal information which is the focus of this case. The approach usually adopted by the Commissioner in assessing whether the disclosure of commercial information would constitute an actionable breach is to follow the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415 (the *Coco* test).
46. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:
- Whether the information had the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and
 - Whether an unauthorised use of the information would result in detriment to the confider.
47. In submissions to the Commissioner the MOD explained why the *Coco* test no longer represented the law in respect of information such as The Prince of Wales correspondence which fell within the scope of this case. These submissions are summarised below.
48. The MOD noted that the *Coco* test involved a claim in relation to commercially confidential information whereas the information which was the focus of this case, The Prince of Wales' correspondence, was essentially personal information. The MOD explained that more recent cases than *Coco v Clark* had considered the law of confidence and/or misuse of personal or private information in the context of Article 8 of the European Convention of Human Rights (ECHR). Such cases included *Campbell v MGN* and *HRH The Prince of Wales v Associated Newspapers Ltd*.³ The MOD argued that it was the approach to the law of confidence set out in these cases, rather than in *Coco* that should be considered in the circumstances of this case.
49. In support of this approach the MOD referenced the only High Court case to date to deal with the application of section 41 of the Act. This case involved a request

³ Full citation: *HRH The Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 (Ch), [2006] EWCA Civ 1776 [2008] Ch 57.

submitted to the Home Office by the British Union for Abolition of Vivisection (BUAV) for applications for licences to conduct animal experimentation.

50. The MOD highlighted the fact that in his judgment in this case Eady J confirmed that the *Coco* test was not the only test of confidence that existed and that recognition had to be given to how misuse of private information may give rise to an actionable breach of confidence and furthermore any assessment of confidence had to take into account the impact of the Human Rights Act.⁴
51. The MOD drew the Commissioner's attention to a number of sections of Eady J's judgment, including:

'[28] It is clear, for example, that the law of confidence is not confined to the principles governing the circumstances in which an equitable duty of confidence will arise; nor to the specialist field of commercial secrets. An obligation of confidence can arise by reason of an agreement, express or implied, and presumably also by the imposition of a statutory duty. Nowadays, in addition, it is recognized that there is a distinction to be drawn between "old-fashioned breach of confidence" and the tort law now characterized as "misuse of private information": see e.g. per Lord Nicholls in *Campbell v MGN Ltd* [2004] 2 AC 457 at [14] and the discussion by Buxton LJ in *McKennitt v Ash* [2008] QB 73, at 80 et seq., under the heading "A taxonomy of the law of privacy and confidence".

[29] [Counsel for the requester] described *Coco v Clark* as being "then and now the leading authority on breach of confidence". But there would seem to be traps for the unwary in placing unqualified reliance upon the case without paying due regard to what Lord Nicholls had to say about it in *Campbell v MGN Ltd* in the section of his speech entitled "Breach of confidence: misuse of private information".

'[32] It is thus important to bear in mind, for the present case, the broad principle, stated by Buxton LJ in *McKennitt* at [11], that "...in order to find the rule of the English law of breach of confidence we now have to look in the jurisprudence of articles 8 and 10." The Tribunal did not address these developments at all and thus proceeded on the basis of an incomplete understanding of the present law.'

52. The MOD also noted the fact that Eady J doubted that the first bullet point of the *Coco* test was still applicable to the modern of law of confidence:

'[33] It is also beyond question that some information, especially in the context of personal matters, may be treated as private, even though it is quite trivial in nature and not such as to have about it any inherent "quality of confidence": see e.g. *Browne v Associated Newspapers Ltd* [2008] QB 103, 113-114...*McKennitt v Ash*...and the remarks of Lord Nicholls in *Campbell v MGN Ltd*... Thus, an obligation of confidentiality may sometimes arise in respect of such information merely because it is imparted as being confidential, either expressly or impliedly. Also, the law may imply an obligation on the basis that a communication has

⁴ *The Home Office v British Union for the Abolition of Vivisection and Information Commissioner* [2008] EWCH 892 (QB) 25 April 2008.

taken place in the context of an established relationship, which would itself give rise to such a duty.'

53. Indeed in its conclusion the MOD highlighted the fact that Eady J suggested that only limb of the *Coco* test that may relevant was the second:

'[35] Another way of putting the point would be to say that the law will afford protection, sometimes, where only the second of the *Coco v Clark* tests is satisfied: that is to say, the right to protection arises because it is clear to those concerned that the circumstances in which the information was imparted themselves give rise to a reasonable expectation of privacy. I would prefer, however, not to be tied to *Coco v Clark* where it simply has no application. (It was not even cited in the Court of Appeal in *McKennitt, Browne* or *HRH The Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57).

[36]...in the light of the modern authorities there is no reason to suppose that even an "actionable" breach of confidence, where sued upon, must inevitably be founded on the formulation of Sir Robert Megarry.'

54. In light of this, the MOD explained that the test of confidence not only included the traditional breach as described in *Coco v Clark* but also claims to prevent the misuse of information entitled to protection under Article 8 ECHR. Article 8 provides 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. The MOD 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 MOD 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 MOD 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 at 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...’

‘[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.’⁵

56. Consequently, the MOD suggested that a number of different circumstances may arise in which a breach of confidence could exist:

- Some claims for the misuse of private information will cover information which has the quality of confidence, and which was imparted in circumstances inconsistent with a pre-existing relationship of confidence, but which is not entitled to protection under Article 8, e.g. trade secrets. Such claims would fall within the ambit of the traditional test set out in *Coco v Clark*.
- Some claims will cover private information which is disclosed in breach of Article 8 ECHR, but which was not imparted in circumstances importing an obligation of confidence.
- Further claims will concern information which was both confidential information in the sense that it was imparted in circumstances importing an obligation of confidence, and information entitled to protection under Article 8 ECHR, e.g. many claims in respect of private letters such as the information which was the focus of this present case.

57. In consideration of each of these circumstances the MOD noted that it was not necessary for any particular detriment to be demonstrated in order for a duty of confidence to be actionable. The MOD explained that this position was supported by the judge in *Coco v Clark* who questioned whether in fact detriment would always be a necessary ingredient of an actionable breach (para 421) and furthermore by the fact that in order for Article 8(1) to be engaged it was not necessary to demonstrate any detriment.

58. The MOD explained that in its view the withheld information in this case was confidential information within the sense of the traditional *Coco* test (albeit that for the reasons set out above it believed that this was incorrect test to apply) and also constituted confidential information because it attracted the protection of Article 8(1).

59. With regard to why the information met the three limbs of the *Coco* test the MOD emphasised the significance of the constitutional convention that The Prince of Wales should be educated in, and about, the business of government in order to

⁵ *Niemietz v Germany* (1993) 16 EHRR 97

prepare him 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. It is essential to the operation of the convention that His Royal Highness 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, as a Counsellor of State and as next in line to the throne, whereby he also has a statutory duty under the Regency Act 1937 to act for The Queen during her absence or incapacitation. The MOD argued that convention that The Prince of Wales will be 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.

60. The MOD 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 position where his position of political neutrality is compromised (or appear to be compromised) because it cannot be restored on accession to the throne. The MOD argued that if correspondence between The Prince of Wales and government Ministers was routinely disclosed His Royal Highness' political neutrality would be put at risk.
61. In light of the constitutional convention relating to the Heir to Throne, the MOD argued that it was clear that correspondence exchanged between the Prince of Wales and government departments had the quality of confidence: the content of such information was clearly not of a trivial nature but rather focused on the business of government. The information was clearly imparted in circumstances which had given rise to the obligation of confidence: all parties understood, because of the operation of the convention, the need to keep such communications private. Finally, the MOD argued that even if detriment needed to be identified, the harm which would occur to the operation of the convention, and the potential undermining of The Prince of Wales' political neutrality following disclosure of the information would constitute sufficient detriment to meet the third limb of the *Coco* test.
62. In relation to why the correspondence exchanged between the Prince of Wales and government departments constituted confidential information under the modern law of confidence, the MOD explained that it was clear that such correspondence engaged Article 8(1) where the topic of the correspondence was of a particularly private nature of topic, but also, in light of the quoted case law

above, where the correspondence reflects The Prince of Wales' opinions on matters of government business. Therefore disclosure of the correspondence would lead to a clear infringement of The Prince of Wales' right of privacy and thus constitute a breach of confidence.

63. Although section 41 of the Act is an absolute exemption and thus not subject to the public interest test contained at section 2 of the Act, the common law concept of confidence suggests that a breach of confidence will not be actionable in circumstances where a MOD can rely on public interest defence.
64. The MOD argued that in the circumstances of this case there was no effective public interest defence. In support of this position the public authority made the following arguments:
 65. Firstly, there is an inherent public interest in the preservation of confidences and their protection by law, which in itself is a weighty factor in favour of maintaining confidentiality.
 66. Secondly, in the circumstances of this case there was a specific public interest in maintaining the confidentiality of The Prince of Wales' correspondence with government in order to preserve the conventions discussed above, and specifically his political neutrality. It was strongly in the public interest to ensure the preservation of conventions in order to ensure the constitution was not undermined.
 67. Thirdly, it is not simply a question of whether the information is a matter of public interest, but rather whether in all of the circumstances of the case, it is in the public interest that the duty of confidence should be breached. The MOD highlighted the Court of Appeal in *Associated Newspapers Ltd v HRH The Prince of Wales* to illustrate this point:

'[68] But a significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence that are created between individuals. It is not enough to justify publication that the information in question is a matter of public interest. To take an extreme example, the content of a budget speech is a matter of great public interest. But if a disloyal typist were to sell as copy to a newspaper in advance of the delivery of the speech in Parliament, there can surely be no doubt that the newspaper would be in breach of duty if it purchased and published the speech.'
 68. Fourthly, to justify disclosure of confidential information on the grounds of public interest, it is not sufficient that the information is simply interesting to the public. Rather, the public interest in overriding confidentiality must be one of very considerable significance, whether that be related to, for example, the proper conduct of public affairs, public health, prevention of crime etc. Disclosure must in fact be 'necessary' in order to override obligations of confidentiality with the test of necessity reflecting both the traditional test of confidence and the test for justification with Article 8 rights under the ECHR. The MOD referenced the Court of Appeal in *McKennitt v Ash* which involved a confidence being overridden on the basis of allegations of misconduct:

'I would nevertheless accept that Mr Browne is broadly correct when he submits that for a claimant's conduct to "trigger the public interest defence" a very high degree of misbehaviour must be demonstrated'.

69. The public authority argued that it was clear from the content of the correspondence – both that sent to and that received by The Prince of Wales – no such level of significance was present to meet this high threshold.

70. Fifthly, it was important not to confuse the public interest with information which the public may be interested in. To illustrate this point the MOD referenced Blackburne J in his judgment at first instance in *HRH The Prince of Wales v Associated Newspapers*:

'[118]...it is important not to overlook the fact that what may be in the public interest to know and thus for the media to publicise in exercise of their freedom of speech is not to be confused with what is interesting to the public and therefore in a newspaper's commercial interest to publish. This is particularly so in the case of someone like the claimant whose every thought and action is, in some quarters at least, a matter of endless fascination.'

And noted that this point was subsequently accepted by the Court of Appeal at [70]:

'As heir to the throne, Prince Charles is an important public figure. In respect of such persons the public takes an interest in information about them that is relatively trivial. For this reason public disclosure of such information can be particularly intrusive. The judge rightly had regard to this factor...'

71. Finally, the MOD suggested that whatever public interest which may exist in disclosure of correspondence between the Prince of Wales and government departments could be best described as a public interest in knowing what matters of public importance The Prince of Wales raises with Ministers, and how they respond to him, in light of the access which his constitutional position affords him. However, the MOD suggested that disclosure of some of the correspondence would not serve this public interest at all because it related to purely administrative issues or focused solely on purely private matters.

The Commissioner's position on an actionable breach of confidence

72. At this stage the Commissioner wishes to highlight the fact that the MOD's submissions on the application of section 41 focus solely on correspondence exchanged between The Prince of Wales and government departments, in particular Ministers within those departments. Although the Commissioner agrees that information of this description falls within the scope of the complainant's requests – for the reasons set out above at the beginning of the Analysis section – he believes that the MOD holds other types of information which also fall within the scope of the complainant's requests, namely correspondence with representatives of The Prince of Wales and internal documentation relating to such approaches. Consequently the Commissioner has begun by considering the application of the section 41 submissions only in relation to correspondence

exchanged between The Prince of Wales and government departments before moving on to consider how these arguments apply to the remainder of the information which falls within the scope of these requests.

Correspondence between The Prince of Wales and government departments

73. The Commissioner agrees with the MOD that a strict and rigid following of the *Coco* test is not an appropriate approach to the test of confidence for the correspondence exchanged between The Prince of Wales and government departments. The Commissioner's reasoning for this mirrors the arguments highlighted by the MOD namely the recent case law which has been referenced, most notably *BUAV*, and also the impact of the ECHR. Therefore when considering whether personal and private information is confidential the Commissioner agrees that consideration of Article 8 ECHR as well as consideration of Article 10 ECHR (the right to freedom of expression) in the context of the public interest defence is necessary.
74. However, the Commissioner does not believe that some of the concepts raised in *Coco v Clark* should be abandoned completely as they can still be useful in determining whether information of a personal and private nature is confidential. Indeed as Eady J noted in his conclusion at [35] whether information was imparted in circumstances where there was an expectation of confidence can be relevant to determining whether there would be an actionable breach if information of a private and personal nature was disclosed.
75. Therefore for information which is of personal and private nature, such as correspondence between The Prince of Wales and government departments, rather than use the three limbed test employed by *Coco v Clark*, the Commissioner will consider:
- Whether information was imparted with an expectation that it would be kept confidential (be that an explicit or implicit expectation); and
 - Whether disclosure of the information would infringe the confider's right of privacy as protected by Article 8(1) ECHR.
76. In relation to the first criterion the Commissioner accepts that the constitutional convention which provides that the Heir to the Throne should be educated in the ways and workings of government means that both The Prince of Wales and those he corresponded with will have had an explicit (and weighty) expectation that such communications would be confidential.
77. In reaching this conclusion the Commissioner wishes to clarify his position in relation to the scope of the constitutional convention provided to the Heir to the Throne. In the Commissioner's opinion given that the purpose of this convention is to allow the Heir to the Throne to be educated in the ways and workings of government, the only information which will attract the protective confidentiality of this convention is information which relates to The Prince of Wales being educated in the ways and workings of government. In the Commissioner's opinion this convention cannot be interpreted so widely as to encompass **all** of The Prince of Wales' communications with the government; for example it does not

cover correspondence in which His Royal Highness may be discussing his charitable work or indeed information of a particularly personal nature. (This is not to say of course that the withheld information in this case includes examples of either class of information.)

78. Nevertheless, the Commissioner accepts that for communications between the parties that do not fall within his interpretation of the convention, there is still a weighty expectation that such correspondence will be kept confidential. The Commissioner finds support for such a conclusion given the established practice that communications between The Prince of Wales and government Ministers have not been disclosed or commented on by either party, regardless of the content of the correspondence. Moreover, it is the Commissioner's understanding that the public authority's position is that all correspondence the Prince of Wales exchanges with government Ministers falls within the scope of the convention and thus the individuals involved in exchanging this correspondence will have had a weighty and explicit expectation that such information will not be disclosed.
79. In relation to the second criterion, the Commissioner agrees with the MOD 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). Furthermore, in the quoted case reference to 'correspondence' confirms that Article 8(1) can apply to information contained within the format which is the focus of this request.
80. In light of this broad reading of Article 8(1) the Commissioner accepts that disclosure of correspondence exchanged between The Prince of Wales and government departments would place in the public domain details of His Royal Highness' views and opinions on a number of issues and such an action would amount to an invasion of his privacy. Thus the Commissioner accepts that disclosure of this information would constitute an infringement of Article 8(1) and would constitute an actionable breach of confidence.
81. For these reasons the Commissioner accepts that disclosure of such correspondence would constitute an actionable breach of confidence.
82. However, before he can conclude that such correspondence is exempt from disclosure by virtue of section 41, the Commissioner has to consider whether there is a public interest defence to disclosing the information, which includes an assessment of the weight that should be attributed to Article 10 ECHR.
83. As explained above the MOD identified only a very general and limited public interest in disclosure of The Prince of Wales' correspondence. In the Commissioner's opinion there are a number of further public interest arguments in favour of disclosing such correspondence that have not been identified by the public authority and he has set out below what he believes these interests are. The Commissioner has then gone on to consider whether such arguments provide a sufficient public interest defence.

Additional arguments in favour of disclosing correspondence with The Prince of Wales

84. There is a public interest in disclosure of information to ensure that the government is accountable for, and transparent in, its decision making processes.
85. Moreover, there is a specific public interest in disclosure of information that would increase the public's understanding of how the government interacts with the Royal Family and the Royal Household, and in particular in the circumstances of this case, the Heir to the Throne. 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. In the Commissioner's opinion such an interest is clearly distinct from the prurient public interest alluded to by the MOD.
86. Disclosure of this correspondence 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 it could add to the public interest in disclosing the information.
87. 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 enhance public confidence in respect of how the government engages with The Prince of Wales.
88. 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.
89. Linked to this argument, is the fact that disclosure of this correspondence could further public debate regarding the role of the Monarchy and particularly the Heir to the Throne. Similarly, disclosure of this correspondence could inform the broader debate surrounding constitutional reform.

Can disclosure of the correspondence with The Prince of Wales be justified on public interest grounds?

90. Before turning to the balance of the public interest the Commissioner wishes to highlight that the public interest test inherent within section 41 differs from the public interest test contained in the qualified exemptions contained within the Act; the default position for the public interest test in the qualified exemptions is that the information should be disclosed unless the public interest in withholding the information outweighs the public interest in disclosing the information. With regard to the public interest test inherent within section 41, this position is reversed; the default position being that information should not be disclosed unless the public

interest in disclosure outweighs the interest in upholding the duty of confidence and therefore withholding the information.

91. In the Commissioner's opinion the introduction of the concept of privacy and the impact of ECHR into the law of confidence has not affected this balancing exercise; Sedley L J expressed such a view in *LRT v Mayor of London*: 'the human rights highway leads to exactly the same outcome as the older road of equity and common law'.⁶
92. Therefore in conducting this balancing exercise as well as taking into account the protection afforded by Article 8(1), consideration must also be given to Article 10 ECHR which provides that:
- '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'
93. The Commissioner notes that recent European Court of Human Rights judgments have highlighted the relationship between Article 10 and access to public information. In particular, the Court has recognised that individuals involved in the legitimate process of gathering information on a matter of public importance can rely on Article 10(1) as a basis upon which to argue that public authorities interfered with this process by restricting access to information.⁷
94. Turning to the various factors identified by the MOD, the Commissioner does not entirely accept the argument that for there to be a successful public interest defence against a breach of confidence there would always have to be an exceptional public interest in disclosure. The Commissioner's reasoning is as follows: The Information Tribunal in *Derry City Council v Information Commissioner* in discussing the case of *LRT v The Mayor of London* noted that in the first instance the judge said that an exceptional case had to be shown to justify a disclosure which would otherwise breach a contractual obligation of confidence. When hearing the case, the Court of Appeal although not expressly overturning this view, did leave this question open and its final decision was that the information should be disclosed. The Tribunal in *Derry* interpreted this to mean that:
- No exceptional case has to be made to override the duty of confidence that would otherwise exist;

⁶ Quoted by the Information Tribunal in *Derry City Council v Information Commissioner*, (EA/2006/0014).

⁷ See *Kenedi v Hungary* 37374/05.

- All that was required is balancing of the public interest in putting the information into the public domain and the public interest in maintaining the confidence.
95. Consequently in cases where the information is of a commercial nature, the Commissioner's approach is to follow the lead of the Tribunal in that no exceptional case has to be made for disclosure, albeit the balancing exercise will still be of an inverse nature.
96. However, in cases where the information is of a private and personal nature, the Commissioner accepts that in light of the case law referenced by the MOD, disclosure of such information require a very strong set of public interest arguments. The difference in the Commissioner's approach to such cases can be explained by the weighty protection that Article 8 offers to private information; in other words the Commissioner accepts that there will always be an inherent and strong public interest in protecting an individual's privacy. The Commissioner's believes that a potential deviation to this approach maybe appropriate where the personal information relates to the individual's public and professional life, as opposed to their intimate personal or family life, and in such a scenario such a strong set of public interest arguments may not be needed because the interests of the individual may not be paramount.
97. In determining whether the correspondence which the MOD holds which has been exchanged directly with The Prince of Wales relates more to His Royal Highness' 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 information which is the focus of this case can be said to more private in nature than public and thus a very strong set of public interest arguments would be needed to cited in order for there to be a valid public interest defence.
98. Before turning to whether the arguments in this case can meet such a threshold, the Commissioner wishes to make a number of comments in relation to the weight that should be attributed to the additional arguments identified by the public authority in favour of non-disclosure.
99. As implied by the comments above, the Commissioner accepts the argument that there is weighty public interest in maintaining confidences. Furthermore, the Commissioner agrees that there is a significant public interest in the ensuring the convention that the Heir to the Throne can be instructed in the business of government is not undermined; it would clearly not be in the public interest if the Heir to Throne and future Monarch appeared to be politically partisan. The Commissioner of course also agrees that there is a clear and important distinction between disclosure of information which the public would be interested in and disclosure of information which is genuinely in the public interest.

100. However, given the number of public interest arguments in favour of disclosure that the Commissioner has identified, he is of the perhaps unsurprising opinion that the benefit of disclosing correspondence the MOD holds with The Prince of Wales should not be summarily dismissed in the fashion implied by the public authority. Rather the arguments identified by the Commissioner touch directly on many, if not all, of the central public interest arguments underpinning the Act, namely ensuring that public authorities are accountable for and transparent in their actions; furthering public debate; improving confidence in decisions taken by public authorities. Furthermore, the specific arguments relevant to this case in relation to The Prince of Wales' relationship with government Ministers deserves to be given particular weight.
101. Nevertheless, the Commissioner has to remember that disclosure of such information would require an exceptional set of public interest arguments and disclosure would have to be justified by the content of the withheld information itself not simply on the basis of generic or abstract public interest arguments.
102. The Commissioner has reviewed the content of the relevant correspondence carefully and he has reached the conclusion that despite the weight of the public interest arguments in favour of disclosure, the content does not present an exceptional reason or reasons for this correspondence to be disclosed. Consequently, the Commissioner has concluded that there would not be a public interest defence if the correspondence that falls within the scope of section 41 were disclosed.

Correspondence with representatives of The Prince of Wales and the MOD

103. The Commissioner recognises that the nature of the correspondence the MOD exchanged with The Prince of Wales clearly differs from the nature of correspondence exchanged with His Royal Highness' representatives in some key ways: correspondence in the first category is exchanged between the Heir to the Throne and government Ministers; correspondence falling within the second category cannot necessarily be said to have been exchanged at such a high level of government or with actual members of The Royal Family.
104. However in terms of the application of section 41(1)(b) the Commissioner has established that a significant number of documents that the MOD exchanged with representatives of The Prince of Wales include references, either directly or indirectly, to the views and opinions of His Royal Highness. Furthermore, the Commissioner understands that The Prince of Wales' Household is, in essence, taken to be an extension of His Royal Highness; when a member of the Household sends a letter to a government department it is understood that such a letter is essentially being sent on behalf of The Prince of Wales.
105. Therefore on the basis of these two factors, for such pieces of correspondence, even although they are not sent directly by or to The Prince of Wales, the Commissioner believes that it is correct to treat such information as personal and private in nature. That is to say, such correspondence is personal and private to

The Prince of Wales. Consequently for such information the, the Commissioner believes that the following test should again be considered:

- Whether information was imparted with an expectation that it would be kept confidential (be that an explicit or implicit expectation); and
 - Whether disclosure of the information would infringe the confider's right of privacy as protected by Article 8(1) ECHR.
106. The Commissioner accepts that information exchanged between representatives of The Prince of Wales and government departments is exchanged by both parties with an understanding that this information will be kept confidential. The Commissioner finds support for such a conclusion in the fact that The Prince of Wales and His Royal Highness' Household are said to be indistinguishable and as set out above it is established practice that correspondence between The Prince of Wales and government departments is not disclosed or commented on.
107. Given that this correspondence includes The Prince of Wales' views and opinions, the Commissioner believes that it is relevant to consider the His Royal Highness' right of privacy. For the reasons set out above the Commissioner believes that disclosure of correspondence containing such information would infringe His Royal Highness' right of privacy and thus would constitute an actionable breach of confidence. Similarly for the reasons set out above the Commissioner believes that there would not be a public interest defence if such information was disclosed.
108. However, the Commissioner has established that not all of the correspondence exchanged between the MOD and The Prince of Wales' representatives includes the views and opinions of His Royal Highness and thus not all of the information contained in such correspondence is of a strictly personal and private nature. For example, the MOD holds correspondence exchanged with representatives of The Prince of Wales that although discussing matters of substance are of an administrative nature. For such information the Commissioner believes that the test of confidence which should be applied is the first two limbs of the *Coco* test:
- Whether the information had the necessary quality of confidence; and
 - Whether the information was imparted in circumstances importing an obligation of confidence.
109. The Commissioner believes that information will have the necessary quality of confidence if it is not otherwise accessible and it is more than trivial. Information which is known only a limited number of individuals will not be regarded as being generally accessible though it will be if it has been disseminated to the general public. Information which is of importance to the confider should not be considered as trivial.
110. The Commissioner has reviewed the remaining correspondence in this case and accepts that some of this information has the quality of confidence; it is clearly correspondence which focuses on matters of substance, is not generally available and is of importance to the confider.

111. For the reasons set out above, the Commissioner is satisfied that some of the correspondence the MOD exchanged with the representatives of The Prince of Wales was provided in circumstances in which the confider expected it to be kept confidential.
112. For these reasons the Commissioner accepts that disclosure of some of the remaining correspondence between representatives of The Prince of Wales and the public authority would constitute an actionable breach of confidence.
113. However, before it can be concluded that such correspondence is exempt from disclosure by virtue of section 41, the Commissioner must again consider whether there is a public interest defence to disclosing this information. Given the different nature of this information to the correspondence of a more private and personal nature, the Commissioner believes that the balance of public interest is slightly different from that considered above.
114. The public interest arguments in favour of disclosing this information still focus on issues identified above which are central to the Act, namely accountability and transparency of public authorities, furthering public debate and improving confidence in public authorities. However, the emphasis on these arguments in this context is less on how the public authority interacted with The Prince of Wales and actions it may have taken following such correspondence, and more on how the public authority interacted with His Royal Highness' representatives and actions its may have taken following such correspondence.
115. Similarly, whilst the public interest arguments at the heart of maintaining the confidence remain relevant, e.g. the strong public interest in protecting confidences, there is less emphasis on the public interest in protecting The Prince of Wales' ability to correspond privately with Ministers. The focus is more on the public interest in protecting his representatives' ability to correspond confidentially with government departments. In the Commissioner's opinion it is in the public interest that members of the Heir to the Throne's Household can correspond confidentially with government departments in order to ensure the efficient and effective interaction between the government of the day and a key part of The Royal Household.
116. Nevertheless, the Commissioner has to remember that disclosure of such information would require a strong set of public interest arguments and disclosure would have to be justified by the content of the withheld information itself not simply on the basis of generic or abstract public interest arguments.
117. The Commissioner has reviewed the content of the relevant correspondence carefully and he has reached the conclusion that despite the weight of the public interest arguments in favour of disclosure, the content does not indicate a sufficiently strong reason for this correspondence to be disclosed. Consequently, the Commissioner has concluded that there would not be a public interest defence if the withheld correspondence was disclosed.

Internal documentation

118. As explained above the Commissioner accepts that part of the internal documentation held by the public authority meets the requirements of section 41(1)(a) because it sufficiently replicates the views of The Prince of Wales. The Commissioner has therefore also concluded, for the reasons given above, that part of such internal documentation also meets the requirements of section 41(1)(b) and that there is no sufficient public interest defence to justify disclosure of this information. It is therefore exempt under section 41(1) and has been correctly withheld on that basis.

Section 37(1)(a) – communications with the Royal Family and Royal Household

119. For the information which the Commissioner does not believe falls within the scope of section 41(1)(a), identified in the confidential annex, he has considered whether such information is exempt from disclosure by virtue of section 37(1)(a).
120. This section states that:
- '37 – (1) 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'.
121. In line with his approach to the term 'relates to' when it appears in other sections of the Act (for example section 35), the Commissioner interprets this term broadly and thus the exemption contained at section 37(1)(a) provides an exemption for information which 'relates to' communications with the Royal Family or with the Royal Household rather than simply communications with such parties.
122. Therefore, this exemption has the potential to cover draft letters, memorandums or references to the existence of meetings with the Royal Family or Royal Household irrespective of whether such communications have in fact been sent or received or indeed whether such meetings have in fact occurred.
123. However, information must still constitute, or relate to, a 'communication' to fall within the exemption. So, for example an internal note held by a government department that simply references the Royal Family or Royal Household will not necessarily fall within this definition. It must be evident that the information is intended for communication, or has been communicated, or that it references some other communication falling within the definition.
124. Furthermore, the Commissioner is aware that many members of the Royal Family act as patrons for a wide range of charities. If correspondence withheld by a public authority relates to those charities **and** is either from a member of the Royal Family or the Royal Household then it will fall within the scope of section 37(1)(a). However correspondence simply between one of the charities which enjoys the patronage of a member of the Royal Family and a public authority will not fall within the exemption, for example letters between Companies House and

the charity offices regarding the accounts because it does not relate to a communication with a member of the Royal Family or the Royal Household.

125. The Commissioner has reviewed the remaining withheld information and he is satisfied that it falls within the broad ambit of section 37(1)(a) and thus is exempt from disclosure.

Public interest test

126. Section 37 is a qualified exemption and is therefore subject to the public interest test set out in section 2(2)(b) of the Act, i.e. whether in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Under the public interest test under section 2 of the Act the presumption is in favour of disclosure so if the arguments on both sides are equally weighted the Act requires disclosure of the information.
127. The MOD has provided the Commissioner with detailed arguments to support its position that the public interest in relation section 37(1)(a) favours maintaining the exemption. The MOD noted how these arguments overlap and buttress the arguments in support of the application of section 41 of the Act. The Commissioner has set out below what these arguments are. Once again the Commissioner notes that the arguments advanced by the MOD focus solely on communications sent to or from The Prince of Wales rather than correspondence exchanged with His Royal Highness' representatives or internal documentation. The Commissioner has then gone on to comment on the public interest arguments in favour of disclosure before setting out his position on where the balance of the public interest lies firstly for correspondence exchanged with The Prince of Wales and then secondly for correspondence exchanged with representatives of His Royal Highness and finally for internal documentation held by the MOD.

Public interest arguments in favour of maintaining the exemption

128. The MOD argued that the prime reason why the exemption should be maintained is in order to ensure that the confidentiality essential to the two conventions discussed above is not undermined. The MOD explained that it was strongly in the public interest that these conventions were not undermined as to do so would result in The Prince of Wales, who in due course would become Monarch, losing his political neutrality. Preserving the political neutrality of the Royal Family was essential to ensuring the stability of the constitutional Monarchy (for the reasons set out in relation to section 41 above), an outcome which was clearly in the public interest.
129. Furthermore the MOD argued that disclosure of the information could lead to a chilling effect in respect of The Prince of Wales, and those he corresponds with, altering the manner in which they communicate, for example by comments no longer being recorded or the nature in the which the comments are recorded being of a less free and frank nature. Such an effect would not be in the public interest because it would result in The Prince of Wales being less prepared for the business of government when he is Monarch and furthermore might

undermine His Royal Highness' ability to carry out his role as a Privy Councillor, a Counsellor of State and any duties he may be called upon to undertake in line with the Regency Act 1937.

130. The MOD has also argued that disclosure of this information may also have a wider chilling effect because it could deter other private individuals from contacting the government if they felt their correspondence would be disclosed under the Act. The public authority has argued that it is in the public interest that anyone should feel free to correspond with members of the government on any subject matter and that such an input has been a valuable source of information about the public's view on many matters. Consequently, a valuable channel of communication of between government and governed could break down to great public detriment. Not only would the government lose access to otherwise unreachable ideas, citizens deprived of this long-established channel for expressing opinions to our leaders could come to feel alienated from government.
131. The MOD also argued that given the broad scope of section 37(1)(a), the public interest extended to protecting the privacy and the dignity of the Royal Family. It would not be in the public interest if disclosure of the withheld information infringed this privacy.

Public interest arguments in favour of disclosing the requested information

132. The Commissioner believes that the public interest arguments in favour of disclosing this information mirror those set out above under the consideration of section 41 and thus he has not repeated them here.

Balance of the public interest arguments for communications with The Prince of Wales

133. In the Commissioner's opinion given the broad reading of the term 'relates to' the subject matter of information which can fall within the scope of section 37(1)(a) can be very broad because communications, and information relating to such communications, could potentially cover a huge variety of different issues. Therefore establishing what the inherent public interest is in maintaining the exemption contained at section 37(1)(a) is more difficult than identifying the public interest inherent in a more narrowly defined exemption, for example section 42, which clearly provides a protection for legally privileged information.
134. The Commissioner believes that the following four public interest factors can be said to be inherent in the maintaining the exemption and relevant to the correspondence exchanged with The Prince of Wales:
- Protecting the ability of the Sovereign to exercise her right to consult, to encourage and to warn her Government and to preserve her position of political neutrality;
 - Protecting the ability of the Heir to the Throne to be instructed in the business of government in preparation for when he is King and in connection with existing constitutional duties, whilst preserving his own position of political neutrality and that of the Sovereign;

- Preserving the political neutrality of the Royal Family and particularly the Sovereign and the Heir to the Throne to ensure the stability of the constitutional Monarchy; and
 - Protecting the privacy and dignity of the Royal Family.
135. As noted above in his analysis of the application of section 41, the Commissioner believes that the scope of the constitutional convention in respect of the Heir to the Throne is relatively narrow. That is to say it will only cover correspondence in which The Prince of Wales is in fact being educated in the ways and workings of government; it cannot be interpreted so widely as to encompass **all** of The Prince of Wales' communications with the government, i.e. it does not cover correspondence in which His Royal Highness may be discussing his charitable work or indeed information of particularly personal nature (this is not to say of course that the withheld information in this case includes examples of either class of information).
136. However, where the information does fall within the Commissioner's definition of this convention, he accepts that there is a significant and weighty public interest in preserving the operation of this convention, i.e. it would not be in the public interest that the operation of the established confidential convention would be undermined. This is particularly so given that the convention is designed to protect communications at the heart of government, i.e. the Heir to the Throne and government Ministers. The significant weight which protecting the convention attracts can be seen correctly seen as akin to the strong weight applied to maintaining the exemption in contained at section 42 as it will always be strongly in the public interest to protect legal professional privilege.
137. The Commissioner also accepts that it is logical to argue that disclosure of the information covered by the convention could undermine The Prince of Wales' political neutrality for the reasons advanced by the public authority. The Commissioner believes that significant weight should be attributed to the argument that disclosure would undermine The Prince of Wales' political neutrality: it is clearly in the public interest that The Prince of Wales, either as Heir to the Throne or when Monarch is not perceived to be politically biased in order to protect his position as Sovereign in a constitutional democracy.
138. Vitally, the Commissioner believes that arguments concerning political neutrality are still relevant, and indeed attract similar weight, even when the information being withheld does not fall within the scope of the constitutional convention relating to the Heir to the Throne. In other words disclosure of correspondence not strictly on issues related to the business of government could still lead to The Prince of Wales being perceived as having particular political views or preferences and thus could undermine his political neutrality. As noted above, the Commissioner accepts that it is inherent in the exemption contained at section 37(1)(a) that it is in the public interest for the political neutrality of all members of the Royal Family to be preserved.
139. Turning to the chilling effect arguments, as the public authority correctly suggests such arguments are directly concerned with the loss of frankness and candour in

debate and advice which would flow from the disclosure of information. Such arguments can encompass a number of related scenarios:

- Disclosing information about a given policy or decision making process, whilst that particular process is ongoing, will be likely to affect the frankness and candour with which relevant parties will make future contributions to that policy/decision making;
- The idea that disclosing information about a given policy or decision making process, whilst that process is ongoing, will be likely to affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates and decision making processes; and
- Finally an even broader scenario where disclosing information relating to the formulation and development of a given policy or decision making process (even after the process is complete), will be likely to affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates and decision making processes.

140 In the Commissioner's opinion all three scenarios are potentially relevant here. Some of the withheld information can be seen to relate to discussions on issues where the policy debate or decision making can still be seen as 'live', e.g. where a government position has yet to be finalised and some of the information can be said to relate to decisions which have been taken.

141. With regard to attributing weight to the argument that disclosure of the withheld information would have a chilling effect on the way in which The Prince of Wales and/or government Ministers would correspond, the Commissioner believes that it is difficult to make an assessment of such an argument given the unique nature of this relationship and thus the lack of any clear precedents, e.g. previous disclosures under the Act of similar information.

142. However, the Commissioner is aware of the authorised biography of The Prince of Wales by Jonathan Dimbleby which was published in 1994.⁸ In his introduction to this publication, Dimbleby explains that The Prince of Wales provided him with access to His Royal Highness' archives at St James's Place and Windsor Castle. Dimbleby therefore had access to The Prince of Wales' journals, papers and correspondence between with Whitehall. In relation to the inclusion of such information in his book Dimbleby explains that:

'I have been persuaded that the verbatim publication of the material might have a deleterious effect either on the conduct of British diplomacy or on the confidential nature of communications between the monarchy and Whitehall or Westminster; in these cases I have either withheld information or paraphrased the relevant documents or correspondence. However, when it was obvious that only the culture of secrecy which pervades Whitehall was under threat and not the conduct of good governance, I have not complied with requests to delete pertinent material'.

⁸ J Dimbleby, *The Prince of Wales: A Biography*, (Bath: Chivers Press, 1994)

143. Therefore, it would clearly be incorrect to argue that details of Prince of Wales' communications with government have **never** been placed in the public domain. To take but two examples from *The Prince of Wales: A Biography*, at page 582 Dimbleby quotes from a letter sent by His Royal Highness in 1985 to the then Prime Minister Margaret Thatcher, in addition to quoting from a draft section of the letter which did not make the final version. And at page 809 Dimbleby notes that The Prince of Wales wrote to the then Secretary of State for Defence, Malcolm Rifkind, about the implications of cutting the Army's manpower and quotes from the this letter. Although the quote is not particularly lengthy in nature it clearly shows The Prince of Wales' strong views on this issue. The Commissioner has not been provided with any evidence by the public authority that the inclusion of details of The Prince of Wales' correspondence in this book has resulted in any sort of the chilling effect.
144. However, the Commissioner accepts that a direct parallel cannot be drawn between the disclosure of the withheld information which is the focus of this case and the previous disclosures such as the Dimbleby biography. To some extent, as Dimbleby himself acknowledges, his book was been 'self-censored': extracts have not been included that would undermine the confidential nature of communications between the monarchy. In contrast, disclosure of the withheld information in this case would be without the consent of The Prince of Wales and would result in complete copies, as opposed to extracts or paraphrased sections, of correspondence being revealed.
145. Furthermore the Commissioner believes that an inherent part of the convention is the ability of both the Heir to the Throne and government ministers to be free and frank when discussing matters of government business. This is to ensure that the Heir to the Throne is instructed in the business of government in the most effective and efficient way possible. In the Commissioner's opinion, disclosure of information falling within the scope of convention would lead The Prince of Wales, and possibly the government minister with whom he corresponds, to feel constrained or more reluctant to take part in the process of being educated about the business of government. Therefore, given the protection which the Commissioner believes should be provided to the convention itself, it follows that notable weight should be given to the argument that disclosure of information which falls within the scope of the convention would result in a chilling effect.
146. In reaching this conclusion the Commissioner wishes to note that he believes that in the context of section 37(1)(a) the protection afforded to communications **from** government ministers only extends to their contribution to educating the Heir to the Throne; it would be incorrect to argue that section 37(1)(a) provides a protection for government ministers to discuss more widely matters of policy formulation or development – protection for such information is offered by, and inherent in, the exemption contained at section 35(1)(a) of the Act not in section 37(1)(a).
147. With regard to attributing weight to the chilling effect arguments for correspondence which does not fall within the scope of the convention, the Commissioner does not believe that such arguments automatically attract weight in the way in which correspondence falling within the convention does. Rather,

- the assessment as to whether a chilling effect will occur will be based upon factors considered in other cases involving an assessment of the chilling effect, most notably the content of the information itself. This because in the Commissioner's opinion in order for a chilling effect argument to be convincing the information which is disclosed has to be more than anodyne in nature otherwise disclosure of such information is unlikely to dissuade individuals from making frank and candid comments in the future. In the circumstances of this case the Commissioner accepts that the correspondence which is not covered by the chilling effect is of a relatively frank and candid nature and thus some weight should be attributed to the argument that disclosure of this information would result in a chilling effect in the way in which The Prince of Wales drafts his correspondence.
148. Again, as with the concept of political neutrality, the Commissioner accepts that a chilling effect on the nature of correspondence falling within the convention could occur even if the withheld information does fall within the scope of the convention. That is to say, disclosure of information on topics not associated with the business of government, would still be likely to affect future correspondence not simply on similar topics but also on topics falling within the scope of the convention.
149. However, the Commissioner is not prepared to accept that disclosure of this information would have a chilling effect on the way in which other individuals contact the government. In the Commissioner's opinion it is not a logical to suggest that because some of The Prince Wales' correspondence with government is disclosed, private individuals would fear that their correspondence would also be disclosed. Clearly, if The Prince of Wales' correspondence was disclosed in response to a request submitted under the Act, despite the strong protection afforded to it by sections 41 and 37 (and by implication the effect of the constitutional convention and Article 8 ECHR) it would be obvious that disclosure would be necessary to satisfy a significant and distinct public interest. This interest would almost inevitably be related to the position that His Royal Highness holds rather than simply the content of the information itself. Consequently, the Commissioner believes that the public would be perfectly capable of distinguishing between the government disclosing specific pieces of correspondence with The Prince of Wales (and moreover only disclosing such information after a request under the Act and/or in response to a section 50 Notice) and the potential disclosure of information which they may send to the government in their role as private citizens. Without any evidence to the contrary, and bearing in mind the comments of the Tribunal referenced above, the Commissioner believes that such an argument does not attract any particular weight.
150. With regard to the final argument, i.e. the privacy considerations contained within section 37, the Commissioner believes that these should not be dismissed lightly. There is a clear public interest in protecting the dignity of the Royal Family so as to preserve their position and ability to fulfil their constitutional role as a unifying symbol for the nation. To the extent that disclosure of the withheld information would undermine His Royal Highness' dignity by invasion of his privacy, the Commissioner accepts that this adds further weight to maintaining the exemption.

151. The Commissioner believes that his position in relation to the weight that should be attributed to the public interest arguments in favour of disclosing this information are clearly set out in relation to the comments above in section 41.
152. Again, in reaching a conclusion about where the balance of the public interest lies the Commissioner has to focus on the specific content of the information. In this case for the information which falls within the scope of the convention, the Commissioner believes that the public interest in maintaining the exemption is very strong because of the weight that should be attributed to maintaining the convention – i.e. a confidential space in which the Heir to the Throne can communicate with Ministers - and the concepts which underpin it, i.e. political neutrality and confidentiality, along with the weight that should be given to the chilling effect arguments for such correspondence. Even when taken together the Commissioner does not feel that the public interest arguments in favour of disclosing the particular information which falls within the scope of this request overrides this weighty public interest in maintaining the exemption.
153. In relation to any of the information which may fall outside the Commissioner's definition of the convention, the Commissioner believes that the public interest is more finely balanced because the argument in favour of maintaining a constitutional convention attracts far less weight. (It should not be inferred that such information is indeed contained within the scope of this request.) Therefore, it would certainly be possible (and easier) to envisage a scenario where disclosure of the correspondence between The Prince of Wales and government Ministers would be in the public interest. However, as noted above just because information does not fall within the scope of the convention this does not mean that its disclosure would not undermine two key concepts inherent to it: political neutrality and the potential to have a chilling effect on future correspondence. Moreover, having once again considered the content of the withheld information in this case the Commissioner believes that the public interest favours maintaining the exemption.
154. The Commissioner therefore finds that in all the circumstances of the case, the balance of the public interest lies in favour of withholding the relevant part of the internal documentation identified in the confidential annex.

The requests for a list of approaches and number of approaches

155. In addition to asking for copies of correspondence and internal documentation the complainant also sought a list of approaches, along with the number of approaches, made by The Prince of Wales or other individuals representing His Royal Highness to the public authority. The complainant specified that such a list should include 'details of the nature of the approach and the issues involved'.
156. The MOD has argued that disclosure of such a list, and by implication the number of approaches, is exempt from disclosure on the basis of sections 37(1)(a), 40(2) and 41(1).

157. In relation to section 41, the MOD argued that disclosure of the details of the approaches made to the MOD clearly constituted information which was provided to it by a third party and thus met the requirements of section 41(1)(a). As to why disclosure of this would constitute an actionable breach, the MOD referred to the arguments set out above in relation to the application of section 41(1)(b) to copies of the letters sent by The Prince of Wales to the MOD.
158. In relation to the application of section 37(1)(a), the MOD explained that whilst it is publicly acknowledged that The Prince of Wales corresponds on occasion with government, it is not generally known when and with whom he corresponds. Disclosure of such information, i.e. by providing a list and/or schedule of the correspondence falling within the scope of this request would not be in the public interest because disclosure of the details of when and with whom His Royal Highness corresponds, even in the absence of disclosure of the subject matter of the correspondence, would lead to damaging speculation about the nature of that correspondence. Inferences would be drawn, whether warranted or not, from the knowledge that The Prince of Wales had written a certain number of times to a government department within a particular period, that he had written on particular topics or had expressed particular views. That in turn would inhibit His Royal Highness and Ministers from exchanging views on governmental matters which would inhibit the convention that the Heir to the Throne should be instructed in business of government. Again the MOD noted that the reasons for the application of section 41(1) overlap and support the application of section 37(1)(a).
159. The MOD argued that these public interest concerns should be given particular weight even without the need to demonstrate particular prejudice arising from these particular lists; section 37(1)(a) applied without proof of damage. To support this point the MOD suggested that there was a strong parallel to be drawn between this case and *HM Treasury v Information Commissioner and Evan Owen [2009] EWHC 1811*. This case, like the present case, concerned a narrow and specific exemption: in that case, the exemption related to the advice of Law Officers under section 35(1)(c). The MOD highlighted the fact that Blake J held that the general public interest considerations behind non-disclosure, which are reflected in section 35(1)(c), should be taken into account in the absence of proof of damage. This was why Parliament had enacted the specific exemption for Law Officers' advice under section 35(1)(c) without requiring proof of damage. The public authority argued that same considerations applied in the context of this case.
160. In addition to this point the public authority highlighted to the Commissioner a particular instance where a particular MOD had disclosed the number of times The Prince of Wales had contacted it and the harm this had caused to His Royal Highness' position, and in particular his political neutrality. (The Commissioner does not consider it appropriate to include details of this in the main body of the Notice).
161. Having considered the arguments advanced by the MOD very carefully the Commissioner has concluded that a list of approaches, along with the number of approaches made by The Prince of Wales and/or His Royal Highness'

representatives is exempt from disclosure on the basis of section 41(1). The Commissioner accepts that disclosure of this information would constitute an actionable breach of confidence broadly for the reasons the Commissioner has set out above with regard to the application of section 41(1) to the correspondence itself. Although the Commissioner acknowledges that disclosure simply of a list of approaches and/or details of the number of such approaches would result in less information being placed into the public domain, the Commissioner still believes that this would constitute an infringement into The Prince of Wales' right of privacy under Article 8 ECHR. For the reasons set out above the Commissioner does not believe that there is a sufficient public interest defence to warrant disclosure of this information.

162. The Commissioner is conscious of the fact that disclosure of the number of approaches in this case could be used, along with disclosure of similar information in the future, to build up a relatively complete picture of which departments The Prince of Wales corresponds most frequently with. Furthermore the nature of the requests in this case is relatively specific; they do not simply seek the overall number of approaches between The Prince of Wales and his Household and the public authority. Rather the complainant has specifically requested the number of approaches made by The Prince of Wales to the certain areas/individuals with the public authority and similarly the number of approaches by representatives of The Prince of Wales to the certain areas/individuals with the MOD.

Section 40(2) – Third Party Personal Data

163. In light of the above findings, the Commissioner has not gone on to consider the exemption at section 40(2).

Procedural Requirements

164. Under section 17(1)(b), a public authority intending to rely on an exemption(s) from the disclosure of information following a request(s) must do so within 20 working days.
165. In light of the MOD's late reliance on the exemptions at sections 40 and 41, the Commissioner finds the MOD in breach of section 17(1)(b).

The Decision

166. The Commissioner's decision is that the MOD dealt with the following elements of the request in accordance with the requirements of the Act:
167. The MOD correctly withheld the majority of the information within the scope of the requests on the basis of the exemptions at sections 41 of the Act and correctly withheld the balance on the basis of section 37(1)(a).

168. The MOD was then correct to conclude that, in all the circumstances of the case, the public interest in maintaining the exemption at section 37(1)(a) outweighed the public interest in disclosure.
169. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
170. The MOD breached section 17(1)(b) for its late reliance on the exemptions at sections 40 and 41 of the Act.

Steps Required

171. The Commissioner requires no steps to be taken.

Right of Appeal

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

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
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 2nd day of March 2010

Signed

**Graham Smith
Deputy Commissioner and Director of Freedom of Information**

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

Annex – text of request

The complainant submitted the following request to the public authority on 27 July 2006:

1....A list of all approaches made by HRH The Prince of Wales to any member of the MOD's ministerial team. This should include the date the Prince contacted the minister (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, by fax or by post.

2.....A list of all approaches made HRH the Prince of Wales to any person employed as a special adviser to a minister. This should include the date the Prince contacted the minister (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, by fax or by post.

3.....A list of all approaches made employees and or representatives of HRH the Prince of Wales to members of the ministerial team and or special advisers. This should include the date the representatives contacted the aforementioned individuals as well as details of the topics under discussion. These approaches could have taken place in any of the ways outlined above.

4....How many times has the Prince of Wales and or member of his team met with ministers or special advisers at the MOD? Could you please supply all minutes of these meetings as well as information concerning the date and location they took place? Could you also provide details of what was under discussion?

5.....please provide all internal documents held by the MOD which relate in any way whatsoever to approaches from the Prince of Wales and or his staff/representatives to members of the ministerial team and or special advisers.

Legal Annex

Freedom of Information Act 2000

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, 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 authority holds the information, or

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

Section 17(4) provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

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).”

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.”