

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 27 January 2010

Public Authority: Department for Health
Address: Richmond House
79 Whitehall
London
SW1A 2NS

Summary

The complainant sought correspondence exchanged between the public authority and The Prince of Wales concerning the regulation of homeopathic or herbal medicines. The public authority refused to confirm or deny whether it held any information citing section 37(2) of the Act. The complainant also sought correspondence exchanged between the public authority and His Royal Highness' Foundation for Integrated Health, again concerning the regulation of homeopathic or herbal medicines. The public authority informed the complainant that it did not hold any such correspondence. The complainant disputed the basis upon which the public authority refused both of his requests. The Commissioner has concluded that the public authority was entitled to refuse to confirm or deny whether it held information falling within the scope of the first request and further is satisfied that the public authority does not hold any information falling within the scope of the complainant's second request.

The Commissioner's Role

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

Background

2. The Prince's Foundation for Integrated Health (FIH) is a charity founded in 1993 by The Prince of Wales with the aim to promote the integrated healthcare for all. Integrated healthcare is defined as bringing together mainstream medical science

with the complementary alternatives such as homeopathy, acupuncture and herbal medicine.

The Request

3. On 25 September 2006 the complainant submitted the following request to the Department of Health ('DoH'):
 - '1. All correspondence between HRH The Prince of Wales, or anyone in his household or acting for him, and the Department of Health (including ministers), concerning the regulation of homeopathic or herbal medicines dated from 1st January 2003 to today's date.
 2. All correspondence between The Prince's Foundation for Integrated Health, and the Department of Health (including ministers), concerning the regulation of homeopathic or herbal medicines dated from 1st January 2003 to today's date.'
4. The DoH provided the complainant with a substantive response on 3 November 2006. In this response the DoH explained that it did hold some 'material falling within the description specified in your request' but it had determined that this material was exempt from disclosure on the basis of section 41 of the Act. The DoH also explained that it was relying on section 37(2) to refuse to confirm or deny whether it held 'any further information falling within the description specified in your request'.
5. The complainant contacted the DoH on 14 November 2006 and asked it to conduct an internal review of its handling of his request. The complainant specifically asked the DoH to consider the fact that The Prince of Wales had previously placed in the public domain his views on homeopathic or herbal medicines and continues to do so. The complainant also highlighted the fact that the DoH had failed to distinguish between the two parts of his request and suggested that the exemption contained at section 37 of the Act could not be relied upon to refuse to disclose information in relation his second request which sought correspondence not with The Prince of Wales or his Household but with one of his charities.
6. On 6 February 2007 the DoH informed the complainant of the outcome of the internal review: the DoH explained that it had incorrectly sought to apply section 41 of the Act to withhold a document which it had not determined was not relevant to the scope of the complainant's requests. However, it maintained its decision to refuse to confirm or deny whether it held any information on the basis of the section 37(2) of the Act. The DoH's internal review did not include any reference to the complainant's argument that it had failed to distinguish between the two different requests he had submitted.
7. Following the intervention of the Commissioner, details of which are set out in the 'Chronology' section below, the DoH contacted the complainant again on 12

December 2007. In this letter the DoH explained to the complainant that 'we had not at any time fully responded to your second question, regarding correspondence on the regulation of homeopathic or herbal medicines with the Prince's Foundation for Integrated Health'. This response went on to explain that 'the Department of Health has searched for information relevant to part 2 of your request, without locating anything'. The DoH explained that it was unlikely that it would hold correspondence on this subject as it is the Medicines and Healthcare Products Regulatory Agency (MHRA) which is responsible for all matters concerning regulation of medicines. The DoH therefore explained that it would only hold information whilst it was in transit to the MHRA; it did not retain any such correspondence for its permanent records.

The Investigation

Scope of the case

8. The complainant contacted the Commissioner on 14 February 2007 about the DoH's handling of his requests. Following the DoH's further response of 12 December 2007 the complainant contacted the Commissioner again in order to express dissatisfaction with the response he had received. At the time this Notice is being issued the points of complaint are as follows:
 - The DoH's failure to respond within 20 working days of the complainant's requests;
 - The DoH had incorrectly argued that the balance of the public interest favoured neither confirming nor denying whether it held information falling within the scope of his first request. Rather the public interest favoured confirming whether information was held, and if held, also disclosing that information; and
 - The complainant did not accept that the DoH did not hold any information falling within the scope of his second request.
9. The complainant provided with the Commissioner with detailed arguments to support his second and third points of complaint.

Chronology

10. The Commissioner contacted the DoH on 20 April 2007 in relation to this complaint and asked it confirm to him whether it held information falling within the scope of the complainant's requests, and if so to be provided with a description of this information. The Commissioner also asked the DoH to provide further submissions to support its reliance on section 37(2) of the Act.
11. The DoH responded on 9 August 2007 and provided the Commissioner with a response to the issues he had raised in his letter of 20 April 2007. The DoH also informed the Commissioner that in addition to section 37(2) it was relying on section 41(2) to refuse to confirm or deny whether it held any information. In providing this response, the DoH explained that it had established it had never

- fully responded to the second of the complainant's requests which sought correspondence with the FIH and it would be rectifying this situation and writing to the complainant separately in order to advise him of the outcome. Consequently, the DoH explained that the submissions contained in this letter to the Commissioner only related to the complainant's first request.
12. The Commissioner contacted the DoH again on 9 April 2008 in order to clarify a number of issues in relation to this request.
 13. The DoH provided the Commissioner with the clarification he was seeking on 30 May 2008.
 14. Meanwhile, in March 2008 representatives of the Royal Household, the Cabinet Office and the Commissioner's office met to discuss the issues raised by the various complaints the Commissioner had received involving requests for HRH The Prince of Wales' correspondence with government departments, including this present case.
 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 complaints.

Analysis

Substantive Procedural Matters

18. Section 1(1)(a) of the Act states that any person making a request for information is entitled to be informed in writing, subject to the application of a number of exemptions, by the public authority whether it holds information of the nature requested.
19. The complainant's second request sought correspondence exchanged between FIH and the DoH which referred to the regulation of homeopathic or herbal medicines for the dates 1st January 2003 to the 25 September 2006.
20. During the course of the Commissioner's investigation the DoH informed the complainant that it did not hold any information falling within the scope of this request.
21. The complainant has disputed this and believes that the DoH would hold information falling within the scope of the request for the reasons discussed below.

22. In cases such as this where there is some dispute as to whether information is held by a public authority, the Commissioner applies the civil standard of the balance of probabilities and in doing so will objectively consider the reasons offered by a public authority to explain why information is not held.
23. The complainant informed the Commissioner that the DoH had awarded the FIH a grant for £900,000 'specifically for developing regulation of complementary medicine' and therefore it was logical to assume that the DoH would hold information falling within his second request.
24. The DoH explained to the Commissioner that the purpose of the grant referred to by the complainant in support of his assertion that information must be held, was not in fact regulating homeopathic or herbal medicines but was the 'voluntary self-regulation of complementary health professionals'. Therefore in the DoH's opinion information about the grant does not fall within the scope of the complainant's second request.
25. The Commissioner understands that the FIH used this grant to fund its work with the main complementary healthcare professionals to establish an umbrella body, the Complementary and Natural Healthcare Council. The purpose of this new body was to set standards for registered practitioners in respect of complementary healthcare.
26. Having considered this issue carefully the Commissioner is prepared to accept the reasoning provided by the DoH that correspondence relating to the grant identified by the complaint falls outside the scope of the complainant's second request. This is because the Commissioner agrees that there is a distinction between information about the regulation of medicines – which is what the complainant requested information about – and information about the regulation of healthcare professionals who dispense such medicines, i.e. the information associated with the grant referenced by the complainant.
27. Furthermore, the DoH also explained to the Commissioner that the working relationship between it and the MHRA meant that it was unlikely that the DoH would hold information about the regulation of homeopathic and herbal medicines. The DoH explained that it was the MHRA, rather than the DoH, that was responsible for all matters concerning the regulation of medicines. Consequently, if correspondence was sent to the DoH from the FIH concerning the regulation of homeopathic or herbal medicines this would be forwarded to the MHRA and copies would not be kept for the DoH's permanent records.
28. The DoH explained to the Commissioner that in theory it would hold correspondence falling within the scope of the complainant's first request because information of this type, i.e. correspondence with The Prince of Wales or his Household, would be retained by the Private Offices as record of recent correspondence with members of the Royal Family rather than as part of departmental records on homeopathic and herbal medicine. This is not, of course, to confirm that such information is indeed held.

29. The Commissioner notes that the complainant has also submitted a request to the MHRA which sought correspondence between the FIH and the MHRA about the regulation of homeopathic and herbal medicines. In response to this request the MHRA provided the complainant with the correspondence it held which fell within the scope of this request (albeit with a number of redactions).
30. In light of this fact, and on the basis of reasoning advanced by the DoH, the Commissioner has concluded that on the balance of probabilities the DoH does not hold any information falling within the scope of the complainant's second request.

Exemptions

31. The DoH has relied upon the interaction of sections 37(1)(a) and 37(2) as basis upon which to refuse to confirm or deny whether it holds information falling within the scope of the complainant's first request.

32. Section 37 states that:

‘(1) Information is exempt if it relates to –

(a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household....

(2) 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)’.

33. The Commissioner accepts that the information requested, if held, would constitute information to which section 37(1)(a) would apply. Therefore the Commissioner is satisfied that the DoH are entitled to rely on section 37(2) to refuse to confirm or deny whether it holds information falling within the scope the complainant's first request.

Public interest test

34. However, section 37(2) is a qualified exemption and therefore the Commissioner must consider the public interest test set out at section 2(1)(b) which states that the exclusion from the duty to confirm or deny can only be maintained if the public interest in maintaining the exclusion outweighs the public interest in disclosing whether the public authority holds the information.
35. The DoH has provided the Commissioner with detailed arguments to support its position that the public interest in relation to section 37(2) favours maintaining the exclusion to confirm or deny. Furthermore, during the course of the Commissioner's investigation of this complaint he has exchanged correspondence with the Cabinet Office in relation to a number of complaints (including this one) he has received about information requests submitted to a range of central government public authorities for correspondence with The Prince of Wales. In some instances the Cabinet Office has provided the

Commissioner with a submission on the application of section 37 and has 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 DoH it may be the case that it was in fact provided by the Cabinet Office on its behalf.

36. The complainant has also provided the Commissioner with detailed arguments to support his view that the public interest favours confirming whether the DoH holds information falling within the scope of his first request.
37. The Commissioner has summarised these various submissions under two headings: arguments in favour of disclosing the information and arguments in favour of maintaining the exemption. The Commissioner has then gone on to set out his position on where the balance of the public interest lies in respect of this request.

Public interest arguments in favour of confirming whether correspondence is held

38. The complainant argued that The Prince of Wales has regularly placed in the public domain his views on herbal and homeopathic medicines, and continues to do so. The complainant suggested that since 1982 The Prince of Wales had given some 34 speeches and articles on healthcare topics, the vast majority promoting complementary and alternative medicine.
39. The complainant noted that The Prince of Wales' comments even extended to making recommendations for public health policy. The complainant quoted the following extract from The Prince of Wales' speech to the World Health Organisation on 23 May 2006 to support his point:

‘I can only urge all health ministers, politicians and Government representatives in this room today to abandon the conventional mindset that sees health solely the remit of a health department. In ancient China, the doctor was only paid when the patient was well. In modern health systems, perhaps your visible success should depend on health outcomes and the degree to which health has become the responsibility of every single department in your country's Government. Only through collaborative thinking can we paint a complete picture of world healing.’

40. The complainant also noted that The Prince of Wales had personally commissioned the ‘Smallwood Report’ which was published in 2005. The complainant argued that leading scientists had doubted the report's conclusion that greater use of alternative medicine by the NHS would lead to substantial cost savings.
41. As a result of this the complainant argued that The Prince of Wales has himself created a very high level of public interest in his views on these matters and as a consequence cannot reasonably expect his views to be kept secret within whatever context that they may have been expressed. Moreover, the complainant

argued that the public were entitled to know whether His Royal Highness had written to the government departments about alternative medicines so that some assessment could be made as to whether The Prince of Wales' views and opinions had been used to steer the direction of public health care.

42. To these submissions the Commissioner would add that there is a general and inherent public interest in ensuring that the government is accountable for, and transparent about, its decision making processes. This can extend to informing the public about what representations it has received from individuals on particular issues. Such openness can increase the trust and confidence that the public has in government.
43. Moreover, the Commissioner would agree that there is a specific public interest in disclosure of information that would increase the public's understanding of how the government engages 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 elements 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, including the topics on which the Prince of Wales may have corresponded.
44. Confirmation as to whether or not information is held could also, to some degree, further public debate regarding the role of the constitutional Monarchy and particularly the Heir to the Throne.

Public interest arguments in favour of neither confirming nor denying whether correspondence is held

45. The DoH has argued that a key reason for maintaining the exemption is to ensure that the confidentiality essential to two constitutional conventions is not undermined.
46. The first convention is that The Prince of Wales should be educated in, and about, the business of government in order to 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. The DoH argued that 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, a Counsellor of State and as next in line to the throne he also has a statutory duty under the Regency Act 1937 to act for The Queen during her absence or incapacitation. The DoH argued that the 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.

47. The DoH explained that this convention is inextricably tied to the role of the Sovereign in the British constitution and the separate constitutional right of the Sovereign by convention 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 DoH argued that if correspondence between The Prince of Wales and government Ministers were routinely disclosed, or even if it were confirmed that correspondence on particular topics had been exchanged, then His Royal Highness' political neutrality would be put at risk.
48. The DoH explained that it was strongly in the public interest that these conventions were not undermined as this 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, an outcome which was clearly in the public interest.
49. The DoH noted that whilst it is publicly known, and acknowledged by The Prince of Wales himself, that he corresponds on occasion with government, it is generally not known when and with whom he corresponds or indeed on what topics. The DoH argued that it was vital that The Prince of Wales knows that the choices he makes about what topics he may send correspondence on, and with whom, are protected, and that no undue inferences can be drawn from the absence or existence of any correspondence. Removal of this protection would constrain His Royal Highness from raising some matters for fear that his views, or even the knowledge that he had expressed his views to a member of the government, would ignite controversy. His Royal Highness would then be prevented from discharging His duties as Heir to the Throne – as described above – by the threat that publicity would undermine the perception of political neutrality which is a foundation of the constitution.
50. The DoH argued that given the broad scope of section 37, the public interest extended to protecting the privacy and the dignity of the Royal Family. It would not be in the public interest if confirmation as to the existence or otherwise of correspondence infringed this privacy.
51. The DoH emphasised the fact that a consistent approach had to be taken to neither confirming nor denying whether information was held. The DoH suggested that this point was well illustrated by the following theoretical example:

‘A department may hold information of greater or lesser sensitivity, either from a constitutional or privacy point of view. Equally, there may be no

information at all on a particular matter. Suppose a department chose to neither confirm nor deny only information of high sensitivity, and did not do so where less sensitive information was held, or where no information was held. It would soon be obvious, particularly in relation to carefully targeted requests (of substance or time), that information was held when a neither confirm nor deny response was received, because it was not used generally. In order for neither confirm nor deny to be effective it must be used whether information is held or not.'

Balance of public interest arguments

52. 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(2), when it is cited in conjunction with 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.
53. With regard to the weight that should be attributed to the public interest factors in this present case, the Commissioner believes that the following four public interest factors can be said to be inherent in the maintaining the exemption and relevant in this case:
- 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.
54. The Commissioner does not believe that any significant weight should be given to the argument that confirmation or denial would impact on The Prince of Wales' political neutrality. Such a confirmation or denial in this case would not reveal The Prince of Wales' views on the topic specified in the request; simply that The Prince of Wales had (or had not) exchanged correspondence with the DoH on this issue. Such a position is in contrast, for example, with a scenario where a public authority has confirmed that it holds correspondence with The Prince of Wales but argued that disclosure of that correspondence would undermine His Royal Highness' political neutrality. Clearly in such a scenario if correspondence was disclosed that actually revealed The Prince of Wales' views and opinions on particular issues it would be far easier to understand how such a disclosure could impact on His Royal Highness' position of political neutrality

55. Nevertheless, the Commissioner accepts that confirmation or denial as to whether information was held would to some extent undermine the convention of confidentiality by revealing the topics on which The Prince of Wales may have exchanged correspondence with government. In the Commissioner's opinion there is a significant public interest in protecting the convention that the Heir to the Throne can be instructed in the business of government.
56. Furthermore, the Commissioner accepts that confirmation or denial would to some extent undermine the privacy of The Prince of Wales by revealing the topics on which he may have exchanged correspondence and moreover within what timeframe. With regard to this argument, the Commissioner notes the unique position which The Prince of Wales occupies. There is clearly a 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. Consequently confirmation or denial as to whether information was held in this case can not simply be seen as potentially revealing details of official correspondence between the Heir to the Throne and government, but potentially revealing details of a private individual's correspondence with government.
57. With regard to attributing weight to the chilling effect argument advanced by the DoH – i.e. the suggestion that confirmation or denial as to whether information was held would restrain The Prince of Wales from corresponding with government in the future - 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 and direct precedents (e.g. a large government Whitehall department confirming whether it has exchanged correspondence with The Prince of Wales on a particular topic).
58. However, the Commissioner is aware of the authorised biography of The Prince of Wales by Jonathan Dimbleby which was published in 1994.¹ 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 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'.

¹ J Dimbleby, *The Prince of Wales: A Biography*, (Bath: Chivers Press, 1994)

59. 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. Secondly 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 DoH that the inclusion of details of The Prince of Wales' correspondence in this book has resulted in any sort of the chilling effect.
60. However, the Commissioner accepts that a direct parallel cannot be drawn between confirmation as to whether correspondence is held in this case and the previous disclosures such as the Dimbleby biography. To some extent, as Dimbleby himself acknowledges, his book was 'self-censored': he did not include extracts which would have undermined the confidential nature of communications between the Monarchy and government. In contrast, confirmation or denial as to whether information is held which falls within the scope of the complainant's first request would, as far as the Commissioner's understands, be without the consent of The Prince of Wales. (As noted in the Chronology above, in considering this and similar complaints, the Commissioner was in contact not only with the DoH but also with The Royal Household and it is the Commissioner's understanding that the Prince of Wales has not consented to confirming or denial whether correspondence in cases such as this is held).
61. 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.
62. However, in this case the issue is not of course whether correspondence should be disclosed but simply whether the DoH should confirm whether it holds correspondence on a particular topic. Therefore although the Commissioner believes that the chilling effect argument should be given some weight, it does not attract as much as it would if the point at issue was the actual disclosure of correspondence.

63. With regard to attributing weight to the public interest arguments in favour of confirming or denying whether information is held, the Commissioner does not believe that the arguments in relation to accountability, transparency and openness should be dismissed lightly. Rather, such arguments are central concepts underpinning the Act. Furthermore, such arguments when applied to this case deserve to be given particular weight. This is because confirmation or denial as to whether information is held could inform the public about a relationship between key parties within the British constitutional system; i.e. between the Heir to the Throne and Whitehall departments.
64. However, the Commissioner would disagree with the complainant's assertion that simply because The Prince of Wales has placed into the public domain his views and opinions on homeopathy and herbal medicine, this equates to him having no expectation of confidentiality or privacy in respect of this correspondence. The operation of the convention and established practice that communications between members of The Royal Family and government are not disclosed would, in the Commissioner's opinion, lead The Prince of Wales to have a reasonable and realistic expectation of confidentiality with regard to the correspondence requested. (This is not to say of course that such correspondence is in fact held by the DoH.) Such an argument also ignores the context in which correspondence may have been sent; although the public is aware of The Prince of Wales' views on these issues, it is not aware whether such views were expressed to the DoH in the time period covered by this request.
65. The Commissioner is conscious that the extent to which the public interest arguments set out above would be advanced simply by disclosing whether correspondence of the nature requested is held, as opposed to disclosure of correspondence itself, is limited. In the same way that confirmation or denial by the DoH in this case would be unlikely to have any material effect on The Prince of Wales' political neutrality, confirmation or denial would also be unlikely to reveal the extent to which The Prince of Wales may have influenced government policy on alternative medicines.
66. In summary, in respect of this particular request, the Commissioner believes that the public interest is finely balanced; the extent to which confirmation or denial would serve the public interest arguments in favour are limited because mere confirmation or denial would not significantly serve those arguments. Similarly, the extent to which the harmful effects, and thus the damage to the public interest, would occur simply by confirming or denying is also relatively limited. This is not to dismiss any of these arguments as unimportant.
67. However, the Commissioner believes that balance of the public interest is tipped in favour of maintaining the exclusion of the duty to confirm or deny by the principle outlined by the DoH, i.e. the consistent approach that has to be taken to confirming or denying not just in this case but in similar cases in the future. The Commissioner wishes to make it clear, however, that this conclusion should not be taken to imply that in all cases involving the application of section 37(2) the impact of this principle means that the exclusion of the duty to confirm or deny will always be upheld. Rather it is the impact of the principle, along with the particular circumstances of this case, which has led the Commissioner to conclude that the

public interest favours maintaining the exclusion of the duty to confirm or deny on this occasion.

68. Therefore, in considering the weight that should be given to the public interest arguments in favour of excluding the duty to confirm or deny under section 37(2), the Commissioner has to take into account the consequences of how confirmation or denial in this case would affect the way in which the DoH, and indeed other government departments, would handle similar requests in the future. That is to say, the consequences of the theoretical example cited by the DoH.
69. In the Commissioner's opinion the risk and associated harm of such a scenario occurring – i.e. a series of requests being used to create a matrix of whether a public authority holds certain types of information – increases when the requests that are submitted to a public authority are more specific. In this case the complainant has named the subject matter of the correspondence which he is seeking along with specifying a three year time period. The Commissioner accepts that if he concluded that the public interest favoured confirming or denying whether information was held in this case then, even with regard to the fact that the circumstances of each request have to be considered on their merits, a similar conclusion would be likely for a future request which sought similar information; for example, correspondence between The Prince of Wales on the same subject matter but for the period 2006 to 2009. Therefore over time, as the DoH suggests, it would be possible to establish further details about The Prince of Wales' correspondence with government which would of course lead to an increase in the prejudicial effects summarised above, i.e. harm to the convention, an impact on His Royal Highness' privacy and a chilling effect in relation to His Royal Highness' correspondence with government, which the Commissioner has established is not in the public interest test.
70. The Commissioner wishes to emphasise that he has reached this conclusion given the relatively specific nature of the requests in this case, by reference to a particular subject and time period. If a public authority received a differently worded less specific request, for example 'please provide any correspondence exchanged between the public authority and The Prince of Wales for the period 1995 to 2005', the Commissioner's conclusions as to the application of section 37(2) may well be different, but would in any event be decided on the particular facts of that case.

Procedural Requirements

71. Section 1(1) of the Act states that:

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

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.'

72. Section 10(1) of the Act requires that a public authority must comply with the requirements of section 1(1) promptly and no later than the twentieth day following the date of receipt.
73. Furthermore, section 17(1) of the Act requires a public authority to provide an applicant with refusal notice stating the basis upon which it has refused a request for information within the time for complying with section 1(1) of the Act.
74. In responding to the complainant's first request, although the DoH issued a refusal notice citing section 37(2) of the Act, it did not provide this notice until 3 November 2006 which in excess of 20 working days after the complainant submitted his requests. This constitutes a breach of 17(1) of the Act.
75. In responding to the complainant's second request the DoH, by its own admissions, did not provide a specific response to this request until 12 December 2007, well outside the 20 working days required by the Act. This represents a breach of section 1(1)(a) and section 10(1).

The Decision

76. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - The DoH was entitled to refuse to confirm or deny on the basis of section 37(2) whether it held any information falling within the scope of the complainant's first request.
 - The DoH does not hold any information which falls within the scope of the complainant's second request.
77. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - In handling the first request, the DoH breached section 17(1) and in handling the second request breached sections 1(1)(a) and 10(1).

Steps Required

78. The Commissioner requires no steps to be taken.

Right of Appeal

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

First-tier Tribunal (Information Rights)
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

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

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

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

Dated the 27th day of January 2010

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that -

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

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

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

Section 1(2) provides that -

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

Section 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Effect of Exemptions

Section 2(1) provides that –

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

(a) the provision confers absolute exemption, or

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

section 1(1)(a) does not apply.”

Section 2(2) provides that –

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

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 10(3) provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

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.”

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).”