

Freedom of Information Act 2000
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 9 November 2016

Public Authority: Cabinet Office
Address: Room 405
70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested correspondence between the Prince of Wales (the Prince) and Tony Blair. The Cabinet Office refused to confirm or deny whether relevant information relevant to the request was held under section 37(2) of the Freedom of Information Act 2000 (the Act) because if any information was held it would relate to relate to communications with the heir to the Throne as per section 37(1)(aa). It also refused to confirm or deny whether any personal data in relation to environmental information was held under regulation 13(5)(a) of the EIR (personal data exception).
2. The Commissioner considers that the Cabinet Office is entitled to neither confirm nor deny whether information is held under section 37(2). He also finds that the Cabinet Office breached section 17(1) of the Act as it did not issue its refusal notice to the complainant within 20 working days following receipt of the request.
3. The Commissioner also finds that some of the information, if held, would be environmental information. She finds that that the Cabinet Office has not applied regulation 13(5) under the EIR correctly. She also finds that the Cabinet Office breached regulation 14(2) because it did not issue its refusal to the complainant within 20 working days following receipt of the request.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- Confirm or deny whether environmental information is held in relation to the complainant's request under the EIR and if any information is held either disclose it or refuse to disclose using an exception.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 1 April 2015, the complainant wrote to the Cabinet Office and requested information in the following terms:
- "I am sending this request under the Environmental Information Regulations to ask for the following information:*
- 1. Copies of all communications between Tony Blair during his time as Prime Minister and the Prince of Wales which refer to genetic modification.*
 - 2. Copies of all communications between Tony Blair and the Prince of Wales during 2001 which refer to foot-and-mouth disease."*
7. The Cabinet Office responded on 14 July 2015. It refused to confirm or deny whether information was held as per section 37(2) of the Act by virtue of section 37(1)(aa).
8. Following an internal review the Cabinet Office wrote to the complainant on 18 August 2015. It upheld the decision taken in its refusal notice of 14 July 2015.

Scope of the case

9. The complainant contacted the Commissioner on 22 June 2015 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of the case to be whether the Cabinet Office is entitled to neither confirm nor deny whether relevant information is held. This will be considered under section 37(2) of the Act and under regulation 13(5) of the EIR for any information that, if held, is environmental. The Commissioner will also consider the length of time the Cabinet Office took to issue a refusal notice to the complainant.

Is the information environmental?

11. In order for any information to be relevant to the request it will need to relate to the subjects specified by the complainant in items 1 and 2 of his request – genetic modification or foot-and-mouth disease.
12. For item 1 of the request, the Commissioner considers that information within scope would likely relate to “genetically modified organisms” (GMOs), which is an element specifically stated within regulation 2(1)(a) of the EIR. However, in order for the information to be environmental as per the EIR it must be on the “state” of genetically modified organisms, and so there needs to be sufficient context about the information to show that it is relevant to the state of an environmental element. The request specifically asks for any information that “refers” to GMOs, so whilst the Commissioner considers that it is likely information held on GMOs would be environmental, it is not obvious that any information which only refers to GMOs would categorically be environmental. Therefore, the Commissioner considers that information potentially within the scope of the request could be caught under the provisions of both the Act and the EIR.
13. For item 2 of the request, the Commissioner considers that correspondence relating to the foot-and-mouth disease would likely relate to the disease itself, and its impact upon the farming industry. The complainant was very specific to mention that he wanted correspondence from 2001, in which there was an outbreak of the disease that had a monumental impact on farming within the United Kingdom, so it seems logical that discussions relating to farming were part of the complainant’s reason for submitting the request. For both the disease itself and the impact upon the farming industry, the Commissioner considers that this can be seen as environmental as per regulation 2(1)(f) of the EIR – which specify the “contamination of the food chain”. However, as for the reasons above, the request only asks for information that refers to foot-and-mouth disease. It is entirely possible that the disease was mentioned in reference to another matter, or put in passing, without it being the sole purpose of the communication. Therefore, the Commissioner considers that information potentially within the scope of the request could be caught under the provisions of both the Act and the EIR.

Reasons for decision

Section 17(1) of the Act

14. Section 1(1) of the Act 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."

15. Section 10(1) of the Act provides that 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.

16. Section 17(1) of the Act states (Commissioner's emphasis):

*(1) 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.

17. The effect of section 17(1) is that if a public authority wishes to refuse a request – even if it is taking further time to consider the balance of the public interest – then it must inform the requester of this within 20 working days.

18. The complainant's request was acknowledged by the Cabinet Office on 1 April 2015. The Cabinet Office refusal to the request came on 14 July 2015, some 71 working days after receipt of the request. As the Cabinet Office took longer than 20 working days to issue its refusal notice it breached section 17(1).

Section 37(2) of the Act

19. Section 37(2) states 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)."

20. Section 37(1)(aa) states that, "Information is exempt information if it relates to— communications with the heir to, or the person who is for the time being second in line of succession to, the Throne".
21. Section 37(1)(aa) is class-based and an absolute exemption. This means that if the information were held and it would fall within the class of information described in the exemption in question, it is exempt from disclosure. It is not subject to a balance of the public interest test.
22. The definition of "communications" is seen as wide-ranging by the Commissioner. It does not simply relate to written correspondence by the Prince of Wales, but it also includes discussions, whether made in person or by telephone. The exemption also goes beyond being only from the Prince himself; it includes his officials and staff that are communicating on his behalf.
23. In the Commissioner's view, all of the information that is not environmental caught by the complainant's request would be communications as per section 37(1)(aa). Both items of the request ask for communications between Tony Blair and the Prince of Wales, and so both as in the class covered by section 37(1)(aa).
24. As stated above, section 37(1)(aa) is an absolute exemption, so there is no requirement to consider the balance of the public interest. The Commissioner's decision is that the class of information asked for is communications that relate to the heir to the throne, so would be caught by section 37(1)(aa). As section 37(1)(aa) would apply to the relevant information, section 37(2) is engaged and the Cabinet Office is not required to confirm or deny whether it holds any non-environmental information that comes within the scope of the request.

Regulation 14(2) of the EIR

25. Regulation 14(1) and 14(2) of the EIR state:

"14 Refusal to disclose information

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

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

27. Regulation 14(1) provides that if a public authority wishes to refuse a request for environmental information it must provide a written notice to the requester to confirm this. Regulation 14(2) states that this response should be made within 20 working days after receipt of the request.

28. The complainant submitted his request on 1 April 2015 to the Cabinet Office. The Cabinet Office confirmed in its receipt of the request on the same day. The Cabinet Office refusal to the request came on 14 July 2015, some 70 working days after receipt of the request.
29. Due to the Cabinet Office's delay in responding to the request it breached regulation 14(2) of the EIR as it did not refusal the request within the afforded timeframe.

Regulation 13(5) of the EIR

30. Regulation 13(5) of the EIR states that:

"Personal data

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

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

31. Regulation 13(5) of the EIR further excludes a public authority from neither confirming nor denying whether it holds information if to do so would reveal personal data of an individual and contravene any of the data protection principles.
32. The Cabinet Office provided submissions on why confirming or denying whether relevant information is held would breach the first data protection principle. The first principle states that processing of personal data must be "fairly and lawful". It specifically argued that it would not be fair to disclose whether or not it held personal data for the Prince.
33. In order to reach his decision the Commissioner shall look at the following:
 - Would confirming or denying whether the information is held constitute personal data?
 - Would confirming or denying whether the requested information is held contravene any of the data protection principles?

Would confirming or denying whether the information is held constitute personal data?

34. Personal data is defined in the Data Protection Act 1998 as information which relates to a living individual who can be identified from that data, or from that data along with any other information in the possession or is likely to come into the possession of the data controller.
35. The request asks for correspondence between Tony Blair during his time as Prime Minister and the Prince. A response to this request would confirm whether or not the Prince had been in correspondence with the Prime Minister of the time in relation to certain matters. This information would relate to both the Prince and Tony Blair, so would constitute the Prince's personal data.
36. The Cabinet Office has a consistent approach when dealing with requests relating to correspondence involving the Prince under the EIR. Were it ever to deny information is held in response to a request then it would undermine the usage of regulation 13(5), as it would be shown only to be used when personal data was held. Therefore, in order to be consistent the Cabinet Office refuses requests of this nature under regulation 13(5) regardless of whether or not it holds relevant information.

Would confirming or denying whether the requested information is held contravene any of the data protection principles?

37. As previously stated, the Cabinet Office argued that confirming or denying whether relevant information was held would contravene the first data protection principle for the processing of the Prince's personal data. This principle states that personal data must be processed fairly and lawfully.
38. In order to assess whether confirming or denying whether the Prince's personal data is held would be unfair under the first data protection principle the Commissioner shall consider the following:
 - Consequences of disclosure
 - Reasonable expectations of data subjects
 - Legitimate interest in disclosure balanced against the privacy rights of the data subjects
39. Regarding consequences of disclosure, the Cabinet Office did not put forward any arguments to consider beyond that if information was held this would be revealed by a confirmation. The Commissioner's own view is that it is widely known that the Prince has written to ministers in the past. Whilst there has been public debate about disclosure of the fact

that correspondence had been sent to ministers, this has not threatened the Prince's constitutional position, nor significantly affected his interests. The Commissioner finds that there is not strong evidence on specific harm that would flow from confirmation or denial. However, the Commissioner accepts that confirmation denial could infringe the Prince's privacy if official confirmation provided that he had, or had not, corresponded with the Prime Minister on the particular topics, for the first time.

40. The Commissioner has considered whether there was a reasonable expectation of privacy and whether to confirm or deny if information was held was unfair. The Commissioner does not consider that this argument carries significant weight. The time period covered by the request could pre or post-date the Act. Whilst the EIR had not been brought into effect, section 39 made it clear that environmental information would be handled under a separate set of regulations. Therefore, there was already expectation that the public authority would have to comply with the already established legislation and expectation about possible confirmation or denial of environmental information would have existed from the time the legislation was passed. The Commissioner also notes that the Environmental Information Regulations 1992 were in force before the EIR. She also finds that the argument about reasonable expectations carries less weight in context of confirming or denying whether the Prince has communicated with the Prime Minister around general topics, compared to disclosure of any correspondence.
41. The Prince is a patron of other agricultural organisations, which means he may have sought to influence the Prime Minister in matters that would impact upon those organisations affairs. The Prince would be carrying out functions relating to his public role, so it would be reasonable to confirm or deny whether information of this nature is held; unlike information which would relate more closely to personal affairs between either party. Were the Prince to be seeking to be involved in the business of government on behalf of organisations with his patronage, then there is a reasonable argument that the public should know of this information's existence.
42. In the Commissioner's view, linked to the context in the paragraph above, the public profile both data subjects named in the correspondence means that there is a reasonable expectation in confirming whether relevant information is held. The request specifically asks for correspondence relating to when Tony Blair was Prime Minister, and the Prince at the time was the heir to the throne. These are some of the most senior roles within public life. Accordingly, there is a reasonable expectation that a public authority should confirm or deny whether it holds information where these two parties are in

communication with one another about a public policy issue. The Commissioner has also concluded that there is a strong public interest in understanding whether correspondence was sent to the Prime Minister on these issues.

43. In reaching his view on the public interest the Commissioner has drawn on the findings of the Upper Tribunal in the case *Evans v Information Commissioner* [2012] UKUT 313 (AAC). The Tribunal found that Mr Evans was entitled to disclosure of "advocacy correspondence", noting:

"it will generally be in the overall public interest for there to be transparency as to how and when Prince Charles seeks to influence government ... although there are cogent arguments for non-disclosure, the public interest benefits of disclosure of 'advocacy correspondence' falling within Mr Evans's requests will generally outweigh the public interest benefits of non-disclosure".

44. In balancing the Prince's rights of privacy against the legitimate interests in disclosure, the Commissioner has taken into account the apparent arguments for protection of personal data and the argument put forward by the Cabinet Office. Against this, he has weighed the strong arguments showing the reasonable expectations one can expect from information of this nature, as well as the strong public legitimate interest in disclosure. The Commissioner accepts that confirmation or denial could represent an intrusion into the Prince's privacy, but set in the context above it would not be a severe intrusion. She has concluded that disclosure would not be unfair.

45. The Commissioner has also found that disclosure would meet schedule 2 condition 6 of the DPA:

46. The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

47. In approaching condition 6(1) of schedule 2 to the DPA the Commissioner has followed the approach of the Upper Tribunal in *Goldsmith International Business School v The Information Commissioner and The Home Office* [2014] UKUT 0563 (AAC). The judgment set out three questions to be asked:

"(i) Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?

(ii) Is the processing involved necessary for the purposes of those interests?

(iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?"

48. The Commissioner also notes the strong legitimate public interest that would support confirming or denying whether the relevant information is held. Confirmation or denial would be necessary to meet these interests. In this instance the Commissioner's view is that this outweighs the Prince's right to privacy in revealing whether or not communications had been sent to Tony Blair on the subject matters relevant to the request. She has also concluded that confirmation would not be unwarranted on the basis of prejudice to the rights and freedoms or legitimate interests of the Prince.
49. The Commissioner has concluded that Article 13(5) of the EIR is not engaged as confirmation or denial would not breach the data protection principles.

Right of appeal

50. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

51. 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.
52. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Steve Wood
Deputy Commissioner
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