

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 2 December 2020

Public Authority: The National Archives
Address: Kew, Richmond
Surrey
TW9 4DU

Decision (including any steps ordered)

1. The complainant has requested information from The National Archives (TNA) held in two closed files. TNA withheld the requested information citing section 37(1)(a) which relates to communication with or on behalf of the sovereign for the content of both files. Additionally TNA cited sections 40(2) and section 41 for one of the files.
2. The Commissioner's decision is that TNA was correct in withholding the information on the basis of the exemption at section 37(1)(a). However, TNA breached section 10(1) of the FOIA by not responding within the statutory timeframe.
3. The Commissioner does not require any further steps to be taken.

Request and response

4. On 5 October 2019 the complainant made the following request for information -

"I would like to request access to the following closed documents via The Freedom of Information Act and the Environmental Information Regulations. I understand my request will take 20 working days to

process but I would be grateful if you could acknowledge receipt via [email address provided]

For ease of reference could you please provide copies of the closed documents as separate entities rather than add them to existing files. If you are minded to add the documents to existing files can you take steps to help me identify what is the 'new' material being added to the file.

In the case of each of the three documents please do redact any information that may be defined as Communications of The Sovereign except in those instances when the information is clearly 'environmental' or as implications for the environment as defined by The Environmental Information Regulations. As you know the Queen is not exempt from The Environmental Information Regulations. I would like to request copies of the following documents. PREM/15/1299/1 – Closed extracts dated 23 April and 9 May 1973. Prime Minister's Office: Correspondence and Papers 1970-1974. Australia. Visit of Gough Whitlam, Australian Prime Minister, to UK: record of meeting with Prime Minister. PREM 16/1507/1 - Closed Extract: Letter dated 1 June 1976. Prime Minister's Office: Correspondence and papers 1974-1979. Australia. Visit to UK of Gough Whitlam former Prime Minister of Australia – in June 1976.

PREM 16/6 - Australia. Constitutional Issues: Australian honours system; States' access to the Monarch, appeals to judicial committee of Privy Council, record of PM's meeting with George (sic) Whitlam 20 December 1974. I note that a decision has been made to release all documents at a later date. Given that the Papers are already more than 40 years old I see no reason for continued secrecy..."

5. Having received no response from TNA, the complainant sent an email chaser on 5 November 2019. TNA wrote back on the same date to say that it had no record of the request being made. TNA updated him on 3 December 2019 and explained that it was allowed extra time to consult with other government departments and that it would respond by 17 December 2019.
6. On 4 December 2019 TNA confirmed that the requested information did not contain any environmental information.
7. TNA provided an update to the complainant on 31 December 2019 saying that it was still unable to provide a decision due to consultation with several government departments.
8. On 14 January 2020, TNA provided a refusal notice in which it cited section 37(1)(a)(Communications with Her Majesty etc and honours) as

the reason for withholding the requested information. TNA also cited sections 40(2)(personal information) and section 41(information provided in confidence) solely in relation to PREM 15/1299/1.

9. Subsequently, the complainant made a request for an internal review on 15 January 2020 as he was not content that the information had been withheld from him. He also asked again whether there was any environmental information withheld.
10. TNA provided an internal review on 29 January 2020 in which it maintained its original position and reiterated that the requested information did not hold any environmental information.

Scope of the case

11. The complainant contacted the Commissioner on 8 February 2020 to complain about the way his request for information had been handled.
12. On 27 October 2020 the Commissioner wrote to the complainant to clarify that her investigation would be about the two files - PREM 15/1299/1 and PREM 16/1507/1 which were the subject of his complaint and not PREM 16/6 which also formed part of the original request but had not yet gone through an internal review at the time of his complaint to the Commissioner.
13. The Commissioner wrote again to the complainant on 24 November 2020, having considered the response from TNA. In her correspondence she stated that her initial view was that the information had been appropriately withheld. The complainant responded by saying that he wanted the Commissioner to issue a decision notice nonetheless.
14. The Commissioner considers that the scope of this case concerns TNA's application of section 37(1)(a) to the entirety of both files and that of sections 41 and 40(2) to PREM 15/1299/1. As the complainant stresses that there may be environmental information, she intends to look at whether any of the information could fall under the EIRs. She will also consider any procedural breaches that may have occurred.

Reasons for decision

Regulation 2(1) - Is the requested information environmental?

15. Information is "environmental" if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR.
16. The Commissioner has published guidance on regulation 2(1). The Commissioner's guidance states that the test that should be applied by public authorities is whether the information is on, or about, something falling within the definitions in regulations 2(1)(a) – (f), and not whether the information directly mentions the environment or any environmental matter.
17. Regulation 2(1) of the EIR defines environmental information as information on:

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

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

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

18. The complainant's arguments are understandably speculative as he is unaware of the specific contents of the closed files. He has suggested that the requested information might be environmental and that it should be released on that basis. He has already had released to him other papers which touch upon,

"Mr Whitlam's visit to the UK, [that] reveal that matters relating to the environment were at the forefront of Gough Whitlam's discussions with the UK government in the early and mid 1970s. Moreover, the documents show that Anglo-Australian discussions about changes to Australia's legal system and constitution as well as changes to Australia's relationship with the UK had the environment very much at the heart."

He suggests that *"...a debate about Australia's constitution and legal system is in fact a debate driven by environmental concerns."*

In short, the complainant suggests that the word “*environment*” might not be contained in the requested information but that,

“the Commissioner [might be] genuinely unaware of this environmental dimension to Anglo-Australian talks at the time or to the fact that matters relating to the environment and offshore resources were prioritised during Mr Whitlam’s visit to the UK.”

19. TNA does not accept that there is any environmental information in this information and has reiterated this view several times, having considered whether there was any environmental information separately from the complainant’s FOIA request. The TNA’s response to the Commissioner stated clearly again that there was no environmental information contained in the two requested files.
20. The Commissioner cannot comment on what is actually contained in the files. However, having seen the information she can confirm that the information in both closed files is not environmental within the definition of regulation 2. It is information which is too far removed from activities which would affect or be likely to affect the elements or factors and measures referred to in regulations 2(1)(a), 2(1)(b) or 2(1)(c).

Section 37 - Communications with Her Majesty, etc. and honours

21. The exemption at section 37(1)(a) FOIA (as amended by the Constitutional Reform and Governance Act 2010) states that:

“Information is exempt information if it relates to communications with the Sovereign.”

22. In effect, this meant that a public authority no longer had to apply the public interest test to information falling within these categories. It could apply the exemption without any further qualification.¹
23. The Commissioner interprets the phrase “*relating to*” broadly. Section 37(1)(a) also covers communications made or received by a person (or organisation) who was acting on behalf of the sovereign.

¹ https://ico.org.uk/media/for-organisations/documents/1194/communications_with_her_majesty_and_the_awarding_of_honours.pdf

24. The Commissioner has had sight of the withheld information and she is satisfied that it *relates to* communications with the Queen. This includes communications with the Queen's representatives. The information does not have to be sensitive.
25. TNA was entitled to withhold the information on the basis of the exemption at section 37(1)(a). The Commissioner notes that the complainant is not content with the fact that she has not provided him with TNA's grounds for non-disclosure but the fact is that if the requested information engages the exemption there do not need to be any grounds for non-disclosure or any consideration of whether it is in the public interest to release the information. The Commissioner accepts that the exemption is engaged. As section 37(1)(a) is absolute, there is no further consideration to be made.
26. In view of the fact that the requested information PREM 16/1507/1 and PREM 15/1299/1 is exempt under section 37(1)(a) the Commissioner has not gone on to consider either sections 41 or 40(2) which were also cited in relation to PREM 15/1299/1.

Section 10 – time for compliance

27. Section 10(1) of the FOIA provides that a public authority must comply with its obligations under section 1(1) within twenty working days of the request being received.
28. The complainant states that he made his request on 5 October 2019. TNA had no record of the request being made. However, it acknowledged the chaser email the complainant sent on 5 November 2020 and the request can be taken as made from that date. TNA extended the time needed to respond under the FOIA, though it did confirm that there was no environmental information contained in the requested information on 4 December 2019.
29. TNA did not send the complainant a refusal notice until 14 January 2020, breaching section 10(1) of the FOIA.

Right of appeal

30. 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 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

31. 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.
32. 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

Pamela Clements
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