

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

Date: 16 February 2021

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information about communications between the Prince of Wales and senior members of the Prison Service regarding Dartmoor Prison.
2. The Ministry of Justice (MoJ) refused to confirm or deny whether it held any information on the basis of section 37(2) by virtue of section 37(1)(aa) (communications with the heir to the Throne). To the extent that any of the requested information, if held, would be environmental information, the MoJ refused to confirm or deny whether it held such information on the basis of regulation 13(5)(a) (personal data) of the EIR.
3. The Commissioner's decision is that the MoJ was entitled to rely on section 37(2) and regulation 13(5)(a).
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 29 January 2020, the complainant wrote to the MoJ and requested information in the following terms:

"Dear FOI Team

I would like to request the following information under the Freedom of Information Act and the Environmental Information Regulations

...

Please note that I am only interested in information generated between 23 January 2019 and the present day.

Please note that the reference to written correspondence and communications in all the questions below should include traditional forms of correspondence such as letters and faxes, all emails irrespective of whether they were sent through private or official accounts and any messages sent through encrypted messaging services.

Please note that the reference to the Prince of Wales in the questions below should include the Prince himself, his Principal Private Secretary (ies) and any member of staff in his private office able to write and receive correspondence and communications on his behalf.

Please note that the reference to the Duke of Cornwall in the questions below should include the Duke himself, his principal private secretary (ies), and any member of staff in his private office able to write and receive correspondence and communications on his behalf.

Please note that the reference to the Chief Executive and Director General in the questions below should include anyone who occupies or has occupied those positions during the relevant period. It should also include staff in their private offices who are able to write and receive correspondence and communications on their behalf.

1...During the aforementioned period did the Prince of Wales write to or communicate in writing with either the Chief Executive of the HM Prison and Probation Service or the Director General of Prisons about Dartmoor Prison. This correspondence and communications will include but not be limited to matters relating to the staffing, management, funding and redevelopment of the prison as well as matters relating to the running of the prison and the future use of the prison. It will also include but not be limited to matters relating to the age of the facility and the conditions for prisoners inside the facility.

2...If the answer to question one is yes can you please provide copies of this correspondence and communication including any emails.

3...During the aforementioned period did either the Chief Executive of HM Prison and Probation Service and or the Director General Prisons write to the Prince of Wales about Dartmoor Prison. This correspondence and communication will include but not be limited to matters relating to the staffing, management, funding and redevelopment of the prison as well as matters relating to the running of the prison and its future use. It will also include but not be limited to matters relating to the age of the facility and the conditions for prisoners inside the facility.

4...If the answer to question three is yes can you please provide copies of this correspondence and communication including any emails.

5...During the aforementioned period did the Duke of Cornwall write to the either the Chief Executive of HM Prison and Probation Service and or the Director General of Prisons about Dartmoor Prison. This correspondence and communication will include but not be limited to matters relating to the staffing, management, funding and redevelopment of the prison as well as matters relating to the running of the prison and its future use. It will also include but not be limited to matters relating to the age of the facility and the conditions for prisoners inside the facility.

6...If the answer to question five is yes can you please provide copies of this correspondence and communications.

7...During the aforementioned period did the Chief Executive of HM Prison and Probation Service and or the Director General of Prisons write to the Duke of Cornwall about Dartmoor Prison. This correspondence and communication will include but not be limited to matters relating to the staffing, management, funding and redevelopment of the prison as well as matters relating to the running of the prison and its future use. It will also include but not be limited to matters relating to the age of the facility and the conditions for prisoners inside the facility.

8...If the answer to question seven is yes can you please provide copies of this correspondence and communication.

9...If information relevant to the request has been destroyed can you please provide the following information.

a...What documentation was destroyed? When was it destroyed and why?

b...In the case of written correspondence and communications which have been destroyed can you please provide details of the author, recipients and the dates generated/sent. In the case of

each destroyed piece of correspondence and communication can you please provide a brief outline of its contents.

c...In the case of all destroyed documentation which continues to be held in another form can you please provide copies of that destroyed documentation”.

6. The MoJ responded on 21 February 2020. It refused to confirm or deny that it held the requested information, citing section 37(2) (communications with Her Majesty etc) of the FOIA by virtue of 37(1)(aa).
7. Following an internal review, requested by the complainant on 27 February 2020, the MoJ wrote to him on 20 March 2020. It maintained its original position with respect to the FOIA. It also considered his request under the EIR, concluding that any information within the scope of the request would not constitute environmental information.

Scope of the case

8. The complainant contacted the Commissioner on 22 March 2020 to complain about the way his request for information had been handled under both the FOIA and the EIR.
9. He told the Commissioner:

“...my request concerned communications between the Prince of Wales (aka the Duke of Cornwall) and senior members of the Prison Service regarding Dartmoor Prison which is owned by the Prince’s Duchy of Cornwall estate”.
10. The Commissioner understands that Dartmoor Prison is operated by HM Prison and Probation Service, an executive agency sponsored by the MoJ.
11. The complainant was dissatisfied that the MoJ refused to provide information he considered it probably does hold.
12. The complainant asked the Commissioner to make a decision on disclosure, *“taking into account the presumption in favour of disclosure at the heart of both access regimes”.*
13. Having revisited its handling of the request during the course of her investigation, the MoJ confirmed its application of section 37(2) of the FOIA. Acknowledging that the request was made under the EIR as well as the FOIA, the MoJ confirmed its view that the information requested would not be environmental information and therefore the request is not

a valid request under the EIR. Furthermore, the MoJ told the Commissioner:

"Even if it were a valid request for environmental information then we believe that Regulation 13(5)(a) [(personal information)] of the EIR would apply".

14. In support of that view, the MoJ cited a case involving a request for information to the Cabinet Office which the Commissioner had recently considered¹.
15. The Commissioner accepts that a public authority has the right to claim an exception for the first time before the Commissioner or the Tribunal. The Commissioner does not have discretion as to whether or not to consider a late claim.
16. When considering a 'neither confirm nor deny' response, as in this case, the single issue the Commissioner must determine is whether the public authority was correct neither to confirm nor deny whether it holds the requested information.
17. The Commissioner acknowledges that the MoJ is seeking to rely on section 37(2) to neither confirm nor deny (NCND) whether it holds information falling within the scope of the request. She also accepts that, to the extent that any requested information, if held, would be environmental information, it is relying on regulation 13(5)(a) of the EIR to NCND whether any such information is held.
18. In light of the above, this notice considers whether the MoJ is entitled, on the basis of this exemption within FOIA and this exception within the EIR, to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.

Reasons for decision

19. The Commissioner has first considered the MoJ's application of section 37(2) to the requested information.
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¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617881/fs50895772.pdf>

Section 37 communications with Her Majesty etc. and honours

20. Section 37 of the FOIA is broad in its definition, encompassing information relating to:
 - communications with Her Majesty, other members of the Royal Family or the Royal Household; and
 - the awarding of honours and dignities by the Crown.
21. Section 37(2) provides an exclusion from the duty to confirm or deny where the information is exempt under section 37(1).
22. Section 37(2) of the FOIA 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).'
23. In the circumstances of this case the subsection within section 37(1) which has been cited by the MoJ is 37(1)(aa). This section states that information is exempt 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'*.
24. To engage section 37(2), the requested information, if held, would therefore have to fall within the scope of one of the exemptions contained within section 37(1).
25. As the complainant has requested information about communications between the Prince of Wales and senior members of the Prison Service, the Commissioner is satisfied that such information, if held, would clearly fall within the scope of the exemption contained at section 37(1)(aa) of the FOIA. Section 37(2) is therefore engaged.
26. Section 37(2), when engaged by virtue of section 37(1)(aa), is an absolute exemption and not subject to the public interest test.
27. The Commissioner is therefore satisfied that, under FOIA, the MoJ can rely on section 37(2) to refuse to confirm or deny whether it holds any information falling within the scope of the request.
28. The Commissioner has next considered whether information within the scope of the request, if held, constitutes environmental information.

Is the information environmental?

29. Regulation 2(1) of the EIR states:

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

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

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

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

(d) reports on the implementation of environmental legislation;

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

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

The complainant's view

30. The complainant believes that information relating to Dartmoor Prison is likely to fall under the EIR.

31. The complainant told the Commissioner:

"I think its highly likely that there could be information within the documents which will have implications for the environment as defined by the EIRs".

32. In that respect, he explained:

"... I note that the regulations cover information which has implications for 'the state of human health and safety, and conditions of human life.'

I maintain that information relevant to this request is likely to have implications for the state of human health and safety and the conditions of human life.

I also note that issues relating to things like prison expansion can have implications for the environment".

33. In subsequent correspondence with the Commissioner, he re-iterated his view that it might be pertinent that the EIR's cover matters relating to human health and safety.

The Commissioner's view

34. With respect to Regulation 2(1) of the EIR, in the Commissioner's view, the use of the word 'on' indicates a wide application and will extend to any information about, concerning, or relating to the various definitions of environmental information.
35. The requested information in this case relates to Dartmoor prison.
36. The Commissioner is satisfied that the complainant specifically stated that his request "*will include but not be limited to*" matters relating to the staffing, management, funding and redevelopment of the prison. She acknowledges that the wording of the request also covered "*matters relating to the running of the prison and the future use of the prison*" and "*matters relating to the age of the facility and the conditions for prisoners inside the facility*".
37. The Commissioner is mindful that the Court of Appeal has confirmed the appropriateness of a broad approach to defining environmental information². Given the wide scope of the multi-part request in this case, the Commissioner considers it has the potential to encompass information that, if held, meets the definition set out in regulation 2 of the EIR.
38. She has therefore considered the MoJ's application of Regulation 13(5) to the requested information.

² <https://ico.org.uk/for-organisations/regulation-2-1-what-is-environmental-information/>

Regulation 13(5)(a) personal data

39. Regulation 13(5)(a)³ of the EIR provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
40. Therefore, for the MoJ to be entitled to rely on regulation 13(5)(a) of the EIR to refuse to confirm or deny whether it holds any environmental information falling within the scope of the request the following two criteria must be met:
- confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

41. Section 3(2) of the Data Protection Act 2018 (DPA 2018) defines personal data as:-

"any information relating to an identified or identifiable living individual."

42. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
43. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
44. In correspondence with the Commissioner, the MoJ said:

"To reveal whether information is held would reveal The Prince of Wales' personal data given it would reveal whether he had entered into with, or received correspondence from, HM Prison and Probation Service senior officials".

45. Taking account of the wording of the request, the Commissioner is satisfied that confirming whether or not environmental information is

³ As amended by Schedule 19 Paragraph 307(6) of Data Protection Act 2018.

held would reveal whether or not the Prince of Wales had been in correspondence with the Chief Executive of HM Prison and Probation Service and or the Director General Prisons, on matters relating to Dartmoor Prison, within the timeframe specified in the request.

46. The Commissioner considers that either outcome would result in the disclosure of the Prince of Wales' personal data because it would reveal something of consequence about him.

Would confirming whether or not the requested information is held contravene one of the data protection principles?

47. Article 5(1)(a) GDPR states that:-

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

48. In the case of a EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair, and be transparent.

Lawful processing: Article 6(1)(f) GDPR

49. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
50. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"⁴.

⁴ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

51. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under the EIR it is necessary to consider the following three-part test:-

(i) **Legitimate interest test:** whether a legitimate interest is being pursued in the request for information;

(ii) **Necessity test:** whether confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;

(iii) **Balancing test:** whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

52. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) Legitimate interest test

53. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test

54. The MoJ accepted that there is legitimate public interest in correspondence between senior members of the Royal Family and Public Authorities.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

55. The Commissioner also acknowledges that there is a legitimate public interest in transparency.

(ii) Is confirming whether or not the requested information is held necessary?

56. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under the EIR as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.

57. In the circumstances of this case the Commissioner cannot envisage an alternative measure by which the legitimate interests identified above could be met. She therefore accepts that the necessary interest test is met.

(iii) Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

58. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to an EIR request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.

59. The MoJ argued that it is "a long-standing principle" that communications between senior members of the Royal Family and Public Authorities are confidential and private. It told the Commissioner:

"Indeed, we suggest the very existence of Section 37(1)(aa) of the FOIA acknowledges this..."

60. Recognising that there is no equivalent exception in the EIR analogous to section 37 of the FOIA, the MoJ nevertheless argued strongly that the EIR should not be allowed to bypass the protections established by section 37 of the FOIA.

61. The Commissioner accepts that it is a long standing principle that communications between the heir to the throne and public authorities are confidential and private. This includes correspondence between the

Prince of Wales in his role as Duchy of Cornwall and HM Prison and Probation Service senior officials.

62. Accordingly, the Commissioner accepts that the Prince of Wales would have a very clear, and indeed reasonable, expectation that details of any such correspondence would not be disclosed.
63. In reaching this decision, the Commissioner has taken into account that, if held, the information in question relates to the 12 month period prior to the date of the request. She considers that the newness of any such correspondence would add to the expectation that no details would be disclosed by way of confirmation or denial.
64. As noted above, the Commissioner accepts that there is a legitimate interest in allowing the public to know of correspondence involving the Prince of Wales and senior HM Prison and Probation officials, particularly given the subject matter of the request in this case.
65. However, given the expectation of the Prince of Wales that his correspondence with such officials is confidential, the fact that the information sought is very recent, and taking into account the consequences of disclosure, the Commissioner has concluded that the interests and rights of the Prince of Wales override the legitimate interests in confirming or denying whether information is held.
66. The Commissioner has therefore decided that the MoJ was entitled to refuse to confirm whether or not it held any environmental information falling within the scope of the request on the basis of regulation 13(5)(a) of the EIR.

Other matters

67. The Commissioner accepts that the internal review process affords public authorities the opportunity to reconsider the handling of requests and to address any outstanding issues. However, given that the complainant clearly stated that his request was made under the EIR as well as the FOIA, the Commissioner is concerned to note that the MoJ's initial response did not address the question of whether any information within the scope of the request comprised environmental information.
68. The Commissioner expects a public authority, such as the MoJ, that is subject to more than one piece of legislation providing the right to access information, to consider the nature of the requested information from the outset to ensure that it handles a request under the correct access regime(s).

Right of appeal

69. 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

70. 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.

71. 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

**Gerrard Tracey
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