

Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

Decision Notice

Date: 15 December 2009

Public Authority: Department for Culture, Media and Sport
Address: 2 -4 Cockspur Street
London
SW1Y 5DH

Summary

The complainant requested copies of correspondence exchanged between The Prince of Wales and government Ministers at the public authority over an eight month period. The complainant also requested a list and schedule of this correspondence. The public authority initially relied on the interaction of sections 37(1)(a) and 37(2) to refuse to confirm or deny whether it held any correspondence falling within the scope of the requests. During the course of the Commissioner's investigation the public authority confirmed to the complainant that it held correspondence falling within the scope of his requests but it considered this information to be exempt from disclosure on the basis of sections 37(1)(a), 40(2) and 41(1). The public authority also stated that although it did not believe any of the information to be environmental information, if it was it would be exempt on the basis of regulations 12(5)(d), 12(5)(f) and 13(1). The public authority also confirmed that it believed that a list and/or schedule of correspondence sent by The Prince of Wales would be exempt from disclosure on the basis of sections 37(1)(a), 40(2) and 41(1) of the Act and that a list and/or schedule of information sent to The Prince of Wales would be exempt on the basis of sections 37(1)(a) and 40(2) of the Act.

The Commissioner has concluded that all of the correspondence is environmental information and thus should be considered under the EIR rather than the Act. However the Commissioner has concluded that the correspondence is exempt on the basis of regulation 12(5)(f) of the EIR. The Commissioner has also concluded that a list and/or schedule of correspondence sent by The Prince of Wales are exempt on the basis of 12(5)(f) or the exemptions within the Act cited by the public authority.

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.
2. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

3. The complainant submitted an email to the DCMS on 8 April 2005. This email contained a number of requests which focused on correspondence which the DCMS may have exchanged with The Prince of Wales. The full text of this email is included in an annex which is appended to this Notice.
4. After some delay, the DCMS issued a refusal notice on 10 November 2005 in which it refused to confirm or deny whether it held any information falling within the scope of the complainant's requests on the basis of section 37(2).
5. On 3 January 2006 the complainant asked the DCMS to conduct an internal review of this decision.
6. The DCMS informed the complainant of the outcome of the review on 15 March 2006. The review upheld the decision set out in the refusal notice.
7. Following the intervention of the Commissioner (details of which are contained below) the DCMS contacted the complainant again in March 2009. In this communication the DCMS confirmed that it had re-considered the balance of the public interest test and it believed that the public interest now favoured confirming that it did hold information falling within the scope of the requests. However, the DCMS explained that it believed that all of this information was exempt from disclosure on the basis of section 37(1)(a) and some of the information was also exempt from disclosure on the basis of sections 41(1) and 40(2). The DCMS also confirmed that it did not hold a list or schedule of correspondence falling within the scope of the requests and although it agreed that it could create one, it believed the contents would also be exempt from disclosure.

The Investigation

Scope of the case

8. The complainant contacted the Commissioner on 24 March 2006 and asked him to consider the DCMS' refusal to confirm or deny whether it held information falling within the scope of his requests.
9. Following discussions between the DCMS and the Commissioner, in March 2009 the DCMS confirmed to the complainant that it held information falling within the scope his requests. Following this confirmation, the complainant asked the Commissioner to consider the DCMS' decision:
 - To withhold information the correspondence falling within the scope of his requests on the basis of section 37(1)(a), 40(2) and 41(1); and
 - Not to provide a list and/or schedule of the correspondence which was held.

Chronology

10. Although the complainant originally contacted the Commissioner in March 2006, due to a backlog of complaints received about public authorities' compliance with the Act, the Commissioner was unable to begin his investigation of this case immediately. Therefore it was not until 13 February 2007 that the Commissioner contacted the DCMS in relation to this complaint.
11. The Commissioner also contacted the Cabinet Office in order to discuss the issues relating to this case as a number of other government departments had received similar requests seeking details of correspondence with The Prince of Wales and the Cabinet Office was involved in co-ordinating the various public authorities' responses. (The Commissioner subsequently received a number of complaints about the responses provided by these public authorities).
12. The DCMS provided the Commissioner with a substantive response to his letter of 13 February 2007 on 8 August 2007.
13. 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 H.R.H The Prince of Wales' correspondence with government departments.
14. 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, in particular the refusal to confirm or deny whether information falling within the scope of the requests was in fact held.
15. The Commissioner received a response from the Royal Household in November 2008.

16. In December 2008 representatives of the Royal Household, the Cabinet Office and the Commissioner's office met again in order to further discuss the issues raised by these complainants.
17. On 27 January 2009 the Commissioner contacted the DCMS to explain that following discussions with the Cabinet Office and the Royal Household, it was his understanding that the DCMS was no longer refusing to confirm or deny whether it held information falling within the scope of these requests. The Commissioner therefore asked the DCMS to contact the complainant and confirm to him that it did in fact hold information which fell within the scope of his requests. The Commissioner also asked the DCMS to provide his office with copies of the information which fell within the scope of these requests.
18. As noted above, in March 2009 the DCMS contacted the complainant and confirmed that it held information but considered it to be exempt from disclosure on the basis of the exemptions contained at sections 37(1)(a), 40(2) and 41(1). The DCMS also confirmed that its position was that it did not hold a list or schedule of correspondence falling within the scope of the requests.
19. Also in March 2009 the DCMS provided the Commissioner with copies of the information which it believed fell within the scope of these requests.
20. The Commissioner contacted the DCMS again on 23 July 2009 and asked it to clarify its position with regard to the application of the various exemptions. The Commissioner also noted that his initial view was that some of the withheld information may constitute environmental information as defined by the EIR. He therefore asked the DCMS to provide details of which exceptions within the EIR it would seek to rely on should the Commissioner conclude that any of the information was environmental information.
21. The Commissioner received a response to this letter from the Cabinet Office on 7 October 2009 and from the DCMS on 8 October 2009. The DCMS confirmed that it did not believe that any of the withheld information fell within the scope of the EIR but if it did it would be exempt from disclosure on the basis of the exceptions contained at regulations 12(5)(d), 12(5)(f) and 13(1).

Findings of fact

22. As the information in the Chronology explains the Commissioner exchanged communications about this complaint both with the public authority to which the request was submitted and also with the Cabinet Office. In some instances the Cabinet Office has provided the Commissioner with a submission on the application of a particular exemption and asked the Commissioner to consider these submissions when reaching his decision in all cases involving requests for correspondence with The Prince of Wales. The Commissioner has agreed to do so. Therefore although for consistency and ease of reference the remainder of this Notice suggests that information or a particular submission has been provided by the DCMS it maybe the case that it was in fact provided by the Cabinet Office on its behalf.

23. At the time that this Notice is being issued the DCMS position is that **all** of the correspondence falling within the scope of the requests is exempt from disclosure on the basis the exemptions contained at sections 37(1)(a), 40(2) and 41(1) of the Act.
24. The DCMS has also confirmed that although it believed that the withheld information did not constitute 'environmental information' it believed that it would be exempt from disclosure under the EIR by virtue of regulations 12(5)(d), 12(5)(f) and 13(1).
25. The DCMS has also confirmed that it believed that a list and/or schedule of correspondence sent by The Prince of Wales would be exempt from disclosure on the basis of sections 37(1)(a), 40(2) and 41(1) of the Act and that a list and/or schedule of information sent to The Prince of Wales would be exempt on the basis of sections 37(1)(a) and 40(2) of the Act.

Analysis

Is any of the requested information 'environmental'?

26. Regulation 2(1) of the EIR explains that defines 'environmental information' as any information in any 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)'

27. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor etc in question. In other words, information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.

28. The Commissioner also finds support for this approach in two decisions issued by the Information Tribunal. The first being *The Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth* (EA/2007/0072). In this case the Tribunal found:

'that the Decision Notice [in which the Commissioner has concluded that none of the requested information was environmental information] fails to recognise that information on 'energy policy' in respect of 'supply, demand and pricing' will often fall within the definition of 'environmental information' under Regulation 2(1) EIR. In relation to the Disputed Information we find that where there is information relating to energy policy then that information is covered by the definition of environmental information under EIR. Also we find that meetings held to consider 'climate change' are also covered by the definition.' (Tribunal at paragraph 27).

29. In reaching this conclusion the Tribunal placed weight on two arguments advanced by Friends of the Earth (FoE), the first being that information on energy policy, including the supply, demand and pricing issues, will often affect or be likely to affect the environment and the second that term 'environmental information' should be interpreted broadly:

'23. Mr Michaels on behalf of FOE contends that policies (sub-para (c)) on 'energy supply, demand and pricing' often will (and are often expressly designed to) affect factors (sub-para (b)) such as energy, waste and emissions which themselves affect, or are likely to affect, elements of the environment (sub-para (a)) including, in particular and directly, the air and atmosphere and indirectly (in respect of climate change) the other elements.

24. He provides by way of simple and practical example, national policy on supply, demand and pricing of different energy sources (e.g., nuclear, renewable, coal, gas) has potentially major climate change implications and is at the heart of the debate on climate change. Similarly, national policy on land use planning or nuclear power has significant effect on the elements of the environment or on factors (e.g. radiation or waste) affecting those elements.

25. Mr Michaels further argues that the term 'environmental information' is required to be construed 'very broadly' so as to give effect to the purpose of the Directive. Recognition of the breadth of meaning to be applied has been recognised by the European Court of Justice, by the High Court and by this Tribunal in *Kirkaldie v Information Commissioner & Thanet District Council* EA/2006/001. The breadth is also recognised in the DEFRA guidance 'What is covered by the regulations'. It does not appear, Mr Michaels argues, that the Commissioner has adopted such an approach.'

30. Moreover in reaching this conclusion the Tribunal appeared to reject BERR's arguments that there must be a sufficiently close connection between the information and a probable impact on the environment before it can be said that the information is 'environmental information'.
31. The second Tribunal decision is *Ofcom v Information Commissioner and T-Mobile* (EA/2006/0078) which involved a request for the location, ownership and technical attributes of mobile phone cellular base stations. Ofcom had argued that the names of Mobile Network Operators were not environmental information as they did not constitute information 'about either the state of the elements of the environment....or the factors.....that may affect those elements.'
32. The Tribunal disagreed, stating at para 31 that:

'The name of a person or organisation responsible for an installation that emits electromagnetic waves falls comfortably within the meaning of the words "any information...on....radiation". In our view it would create unacceptable artificiality to interpret those words as referring to the nature and effect of radiation, but not to its producer. Such an interpretation would also be inconsistent with the purpose of the Directive, as expressed in the first recital, to achieve "... a greater awareness of environmental matters, a free exchange of views [and] more effective participation by the public in environmental decision making...". It is difficult to see how, in particular, the public might participate if information on those creating emissions does not fall within the environmental information regime.'
33. The Commissioner has reviewed the withheld information and has concluded that all of the information falling within the scope of the requests constitutes environmental information because it falls within the scope of one of the regulations contained within 2(1) of the EIR. Therefore this information must be dealt with under the EIR rather than under the Act.
34. However, the Commissioner is not able to explain which sections of the withheld information he considers to be environmental, and why, in the body of this Notice without potentially revealing the content of this information. Therefore the Commissioner has included in the confidential annex which will be provided to the DCMS but not the complainant, an explanation of which parts of the withheld information he has concluded is environmental information and why.

35. In reaching this conclusion the Commissioner has taken into account the following arguments advanced by the DCMS to supports its position that none of the withheld information constitutes environmental information:
36. Firstly, the DCMS argued that environmental information for the purposes of the EIR comprises information on the elements, factors and measures etc set out in regulation 2(1). It does not extend to, for example, expressions of public opinion, questions or information which records aspirations covering the subject matter under discussion.
37. Secondly, the DCMS noted that the European Court of Justice made it clear in the *Glawischnig* case that the intention of the previous Directive on environmental information was not to give a general and unlimited right of access to all information held which has a connection, however minimal, with one of the specified environmental factors.¹ The DCMS argued that the judgment remained accurate in relation to the current Directive.
38. In relation to the first point advanced by the DCMS, in the Commissioner's opinion the key to determining whether information is environmental information for the purposes of the EIR is whether that information can be said to be 'information... on' one of the elements, factors etc listed in 2(1) – remembering of course the broad interpretation of this phrase. In other words, it is the content of information that determines whether it is environmental information and not the format in which that information is recorded or expressed. For example the Commissioner accepts that a comment in which a particular individual stated 'that climate change was irreversible' will not constitute environmental information because it cannot be sufficiently linked back to the definition in regulation 2(1). However, a comment attributed to an individual which read 'that climate change was irreversible but I believe that policy X can slow down the effects of change' could be environmental information if policy X could be linked to the definition in regulation 2(1).
39. In relation to the second point advanced by the DCMS, the Commissioner notes that as the *Glawischnig* case related to the previous Directive in 1990 this decision is not binding in relation to the current Directive. Moreover as the judgement actually notes at paragraph 5 the current Directive 'contains a definition of environmental information which is wider and more detailed' than in the previous Directive. Therefore the Commissioner does not believe that it is necessarily useful to rely on the *Glawischnig* case to interpret how the current Directive and thus the EIR should be interpreted.

¹ *Glawischnig v Bundesminister fur sozaille Sicheheit and Generationen* [C- 316/01]

The request for the correspondence

Regulation 12(5)(f) – interests of the person who provided the information

40. The DCMS has argued that if the Commissioner finds that any of the withheld information constitutes 'environmental' information as defined by the EIR, it would seek to rely on the exceptions contained at regulations 12(5)(d), 12(5)(f) and 13(1).

41. As the Commissioner has concluded that all of the information falling within the scope of this request is environmental information, he has considered the application of these exceptions, starting with 12(5)(f).

42. Regulation 12(5)(f) states:

'a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(f) the interests of the person who provided the information where that person –

- (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
- (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
- (iii) has not consented to its disclosure;

43. The Commissioner is conscious that the threshold to engage an exception under regulation 12(5) of the EIR is a high one compared to the threshold needed to engage a prejudiced based exemption under the Act:

- Under regulation 12(5) for information to be exempt it is not enough that disclosure of information will have an effect, that effect must be 'adverse'.
- Refusal to disclose information is only permitted to the extent of that adverse effect – i.e. if an adverse effect would not result from disclosure of part of a particular document or piece of information, then that information should be disclosed.
- It is necessary for the public authority to show that disclosure 'would' have an adverse effect, not that it may or simply could have an effect. With regard to the interpretation of the phrase 'would' the Commissioner has been influenced by the Tribunal's comments in the case *Hogan v Oxford City Council & Information Commissioner* (EA/2005/0026 & 0030) in which the Tribunal suggested that although it was not necessary for the public authority to prove that prejudice would

occur beyond any doubt whatsoever, prejudice must be at least more probable than not.²

44. Furthermore, the wording of the exception at regulation 12(5)(f) makes it clear that the information has to have been provided to the public authority by another person and the adverse effect has to be on that person who provided the information rather than the public authority that holds the information.
45. The Commissioner accepts that the correspondence in this case which the DCMS received from The Prince of Wales clearly constitutes information 'provided' to it be a third party and thus such information falls within the scope of the exception at regulation 12(5)(f).
46. With regard to the correspondence that the DCMS sent to The Prince of Wales the Commissioner has taken into account the arguments advanced by the DCMS in respect of section 41(1)(a) of the Act. This sub-section requires that for information to be exempt from disclosure on the basis of section 41 it must have been 'obtained from another person'. The DCMS argued that this sub-section should be interpreted broadly to include information about a person, as well as information actually provided by a person.
47. In relation to this argument the Commissioner recognises that deciding whether information has been 'obtained from any other person' requires an assessment of the content of information, not simply of the mechanism by which it was imparted and recorded. However, the Commissioner does not agree with the DCMS' assertion that simply because information it holds is about an identifiable individual it constitutes information obtained from that person. Rather it will depend upon the content of the information which was communicated.
48. In the Commissioner's opinion there has to be a significant degree of similarity to the information which the DCMS is sending to The Prince of Wales to the information which His Royal Highness originally provided to the DCMS for it to meet the requirements of section 41(1)(a). In the Commissioner's opinion it is not sufficient that the information is simply on the same topic; the correspondence being sent to The Prince of Wales has to reflect the actual views or opinions His Royal Highness may have raised on a particular topic.
49. The Commissioner believes that a similar approach should be taken in respect of whether correspondence sent to The Prince of Wales can be said to be information originally 'provided' by His Royal Highness.
50. Having looked at the content of the correspondence falling within the scope of this case that the DCMS sent to The Prince of Wales, the Commissioner accepts that it reflects the views of The Prince of Wales sufficiently closely that it falls within the scope of regulation 12(5)(f).

² These guiding principles in relation the engagement of exceptions contained at regulation 12(5) were set out in Tribunal case *Archer v Information Commissioner & Salisbury District Council* (EA/2006/0037)

51. Before considering the nature of the adverse effect, the Commissioner has considered whether the three limbs of 12(5)(f) are met. With regard to the first limb, the Commissioner accepts that The Prince of Wales was not under any legal obligation to supply the information; although it is an established tradition, and one protected by the convention which is discussed below, that the Heir to the Throne will communicate with government Ministers, he is under no legally binding obligation to do so. The Commissioner believes that the second limb will be met where there is no specific statutory power to disclose the information in question. It is clear that there is no such power in this case and thus the second limb is met. Finally with regard to the third limb the Commissioner understands that The Prince of Wales has not consented to disclosure of the withheld information.
52. The Commissioner has summarised below the nature of the adverse effects which the DCMS has argued would occur if the withheld information was disclosed:
53. Firstly, if the information was disclosed this would adversely affect The Prince of Wales because it could appear to undermine his political neutrality. The DCMS argued that this potential harm to The Prince of Wales' political neutrality was directly linked to the constitutional convention 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 DCMS 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 DCMS argued that convention that The Prince of Wales will be informed about the business of government in order to prepare for being Sovereign can only be maintained if both His Royal Highness, and government Ministers who advise and inform him about the business of government, can be assured that their communications with each other remain confidential.
54. The DCMS explained that this convention is inextricably tied to the role of the Sovereign in the British constitution and the separate constitutional convention which the Sovereign has: namely to counsel, encourage and warn the government and thus to have opinions on government policy and to express those opinions to her Ministers. However, whatever personal opinions the Sovereign may hold she is bound to accept and act on the advice of her Ministers and is obliged to treat her communications with them as absolutely confidential. Such confidentiality is necessary in order to ensure that the Sovereign's political neutrality is not compromised in case Her Majesty has to exercise her executive powers, e.g. initiating discussions with political parties in the scenario of a hung Parliament in order to ensure that a government can be formed. Consequently, The Prince of Wales must not be in a position where his position of political neutrality is compromised (or appear to be compromised) because it cannot be restored on accession to the throne. The DCMS argued that if correspondence

between The Prince of Wales and government Ministers were routinely disclosed His Royal Highness' political neutrality would be put at risk.

55. Secondly the DCMS argued that disclosure of the correspondence would have a chilling effect on the way in which The Prince of Wales corresponds with government Ministers, for example by The Prince of Wales no longer recording particular comments or the nature in which His Royal Highness' views and opinions are recorded being less free and frank nature. The DCMS argued that such a chilling effect would directly impinge upon the established convention that The Prince of Wales is able to confidentially correspond with government Ministers.
56. Thirdly, the DCMS explained that disclosure of the correspondence would impinge upon The Prince of Wales' privacy. In respect of the protection which should be afforded to The Prince of Wales' privacy in this case the DCMS noted the effect of Article 8 of the European Convention on Human Rights.
57. Article 8 provides that:
- '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society for the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'
58. The DCMS highlighted the fact that the concept of 'private life' within Article 8(1) is a broad one, based upon the need to protect a person's autonomy and relationships with others from outside interference. The DCMS argued that the right is not confined to activities which are personal in the sense of being intimate or domestic but can be extended to business or professional activities. To support this broad interpretation the DCMS quoted the European Court of Human Rights case of *Niemietz v Germany* and also noted that this judgment confirmed that Article 8(1) was intended to protect correspondence, (i.e. the type of information which is the focus of this case):

'[29]The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which an individual may choose to live his personal life as he chooses at to exclude entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.

There appears, furthermore, to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if

not the greatest, opportunity of developing relationships with the outside world...'³

59. And:

'[32] In this connection, it is sufficient to note that the provision does not use, as it does for the word "life", any adjective to qualify the word "correspondence". And, indeed, the Court has already held that, in the context of correspondence in the form of telephone calls, no such qualification is to be made...in a number of cases relating to correspondence with a lawyer...the Court did not even advert to the possibility that Article 8 might be inapplicable on the ground that the correspondence was of a professional nature'.

60. The Commissioner accepts that there is a causal link between disclosure of the correspondence in this case and the adverse effects described above:

61. Disclosure of information which revealed The Prince of Wales' views on particular issues of public policy could clearly have the potential to result in His Royal Highness' political neutrality being compromised.

62. In relation to the DCMS's argument disclosure would have a chilling effect on the way in which The Prince of Wales communicates with government Ministers, the Commissioner believes that it is more difficult to make an assessment of such an argument given the unique nature of this relationship and thus the lack of any clear precedents, e.g. previous disclosures under the Act of similar information.

63. However, the Commissioner is aware of the authorised biography of The Prince of Wales by Jonathan Dimbleby which was published in 1994.⁴ In his introduction to this publication, Dimbleby explains that The Prince of Wales provided him with access to His Royal Highness' archives at St James's Place and Windsor Castle. Dimbleby therefore had access to The Prince of Wales' journals, papers and correspondence between with Whitehall. In relation to the inclusion of such information in his book Dimbleby explains that:

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

64. 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

³ *Niemietz v Germany* (1993) 16 EHRR 97

⁴ J Dimbleby, *The Prince of Wales: A Biography*, (Bath: Chivers Press, 1994)

Dimbleby quotes from a letter sent by His Royal Highness in 1985 to the then Prime Minister Margaret Thatcher, in addition to quoting from a draft section of the letter which did not make the final version. And at page 809 Dimbleby notes that The Prince of Wales wrote to the then Secretary of State for Defence, Malcolm Rifkind, about the implications of cutting the Army's manpower and quotes from the this letter. Although the quote is not particularly lengthy in nature it clearly shows The Prince of Wales' strong views on this issue. The Commissioner has not been provided with any evidence by the DCMS that the inclusion of details of The Prince of Wales' correspondence in this book has resulted in any sort of the chilling effect.

65. However, the Commissioner accepts that a direct parallel cannot be drawn between the disclosure of the withheld information which is the focus of this case and the previous disclosures such as the Dimbleby biography. To some extent, as Dimbleby himself acknowledges, his book was been 'self-censored': extracts have not been included that would undermine the confidential nature of communications between the monarchy. In contrast, disclosure of the withheld information in this case would be without the consent of The Prince of Wales and would result in complete copies, as opposed to extracts or paraphrased sections, of correspondence being revealed.
66. 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 could lead The Prince of Wales to feel constrained or more reluctant to take part in the process of being educated about the business of government.
67. In reaching this conclusion the Commissioner wishes to clarify his position in relation to the scope of the constitutional convention provided to the Heir to the Throne. In the Commissioner's opinion given that the purpose of this convention is to allow the Heir to the Throne to be educated in the ways and workings of government, the only information which will attract the protective confidentiality of this convention is information which relates to The Prince of Wales being educated in the ways and workings of government. In the Commissioner's opinion this convention cannot be interpreted so widely as to encompass **all** of The Prince of Wales' communications with the government, for example it does not cover correspondence in which His Royal Highness maybe discussing his charitable work or indeed information of a particularly personal nature. (This is not to say of course that the withheld information in this case includes examples of either class of information.)
68. With regard to the relevance of the chilling effect arguments for correspondence which does not fall within the scope of the convention, the Commissioner does not believe that such arguments automatically attract weight in the way in which correspondence falling within the convention does. Rather, the assessment as to whether a chilling effect will occur will be based upon factors considered in other cases involving an assessment of the chilling effect, most notably the content of

the information itself. This is because, in the Commissioner's opinion, in order for a chilling effect argument to be convincing the information which is disclosed has to be more than anodyne in nature otherwise disclosure of such information is unlikely to dissuade individuals from making frank and candid comments in the future. In the circumstances of this case the Commissioner accepts that the correspondence which is not covered by the convention is of a relatively frank and candid nature and thus some weight should be attributed to the argument that disclosure of this information would result in a chilling effect in the way in which The Prince of Wales drafts his correspondence.

69. Finally with regard the third effect, the Commissioner agrees with the DCMS that in respect of Article 8(1) the term 'private' should be interpreted broadly to ensure that a person's relationships with others are free from interference. The Commissioner also accepts that matters of a business and professional nature are covered by the protection afforded by Article 8(1). Moreover, the Commissioner recognises the unique position which The Prince of Wales occupies: there is clearly significant overlap between the His Royal Highness' 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. Therefore in the Commissioner's opinion The Prince of Wales' public and private lives can be said to be inextricably linked. Consequently the Commissioner accepts that disclosure of information in this case, even if it focuses on some aspects of The Prince of Wales' public role could still be said to have an impact on his privacy and dignity.
70. In relation to the likelihood of such effects actually occurring, the Commissioner believes that the higher threshold of 'would occur' is met. This is because there a number of ways in which the adverse effect could manifest itself: it could be to his privacy, dignity, political neutrality and/or the practical way in which he actually corresponds with government Ministers. Furthermore, it is clear that The Prince of Wales communicates with Ministers across government, rather than simply to one or two departments, thus the likelihood of the adverse effects occurring is increased.
71. Vitally, the Commissioner believes that arguments concerning political neutrality are still relevant, and indeed attract similar weight, even when the information being withheld does not fall within the scope of the constitutional convention relating to the Heir to the Throne. In other words disclosure of correspondence not strictly on issues related to the business of government could still lead to The Prince of Wales being perceived as having particular political views or preferences and thus could undermine his political neutrality. Similarly the Commissioner accepts that a chilling effect on the nature of correspondence falling within the convention could occur even if the withheld information does fall within the scope of the convention. That is too say, disclosure of information on topics not associated with the business of government, would still be likely to affect future correspondence not simply on similar topics but also on topics falling within the scope of the convention.
72. The Commissioner therefore accepts that regulation 12(5)(f) is engaged. However all exceptions contained within the EIR are qualified and therefore the

Commissioner must consider the public interest test set out at regulation 12(1)(b) which states that information will only be exempt if the public interest in maintaining the exception outweighs the public interest in disclosing the information. Regulation 12(2) states explicitly that a public authority must apply a presumption in favour of disclosure.

Public interest test

Public interest arguments in favour of disclosing the information

73. There is a public interest in disclosure of information to ensure that the government is accountable for, and transparent in its decision making processes.
74. Moreover, there is a specific public interest in disclosure of information that would increase the public's understanding of how the government interacts with the Royal Family and the Royal Household and, in particular in the circumstances of this case, the Heir to the Throne. This is because the Monarchy has a central role in the British constitution and the public is entitled to know how the various mechanisms of the constitution operate. This includes, in the Commissioner's opinion, how the Heir to the Throne is educated in the ways of government in preparation for his role as Sovereign. In the Commissioner's opinion such an interest is clearly distinct from the prurient public interest alluded to by the DCMS.
75. Disclosure of the information may allow the public to understand the influence (if any) exerted by The Prince of Wales on matters of public policy. If the withheld information demonstrated that the DCMS or government in general had placed undue weight on the preferences of The Prince of Wales then it could add to the public interest in disclosing the information.
76. Conversely, if the withheld information actually revealed that The Prince of Wales did not have undue influence on the direction of public policy, then there would be a public interest in disclosing the information in order to reassure the public that no inappropriate weight had been placed on the views and preferences of The Heir to Throne. In essence disclosure could enhance public confidence in respect of how the government deals with The Prince of Wales.
77. These two arguments could be seen as particularly relevant in light of media stories which focus on The Prince of Wales' alleged inappropriate interference in matters of government and political lobbying.
78. Linked to this argument, is the fact that disclosure of the withheld information could further the public debate regarding the constitutional role of the Monarchy and particularly the Heir to the Throne. Similarly, disclosure of the business of government information could inform the broader debate surrounding constitutional reform.

Public interest arguments in favour of maintaining the exception

79. The public interest arguments in favour of maintaining the exception inevitably focus on the need to ensure that the adverse effects described above do not occur:
80. It is clearly in the public interest to preserve the political neutrality of the Royal Family as this essential to ensuring the stability of the constitutional monarchy.
81. It would not be in the public interest for The Prince of Wales to alter the way in which he corresponds with the government Ministers. Such a chilling effect would result in The Prince of Wales being less prepared for the business of government when he is Monarch and furthermore may undermine His Royal Highness' ability to carry out his role as a Privy Councillor, a Counsellor of State and any duties he may be called upon to undertake in line with the Regency Act 1937.
82. There is a clear public interest in protecting the privacy, and by implication, the dignity of the Royal Family so as to preserve their position and ability to fulfil their constitutional role as a unifying symbol for the nation.

Balance of public interest arguments

83. The Commissioner believes that significant weight should be attributed to the argument that disclosure would undermine The Prince of Wales' political neutrality: it is clearly in the public interest that The Prince of Wales, either as Heir to the Throne or when Monarch is not perceived to be politically biased in order to protect his position as Sovereign in a constitutional democracy. Vitally, as noted the Commissioner believes that arguments concerning political neutrality are still relevant, and indeed attract similar weight, even when the information being withheld does not fall within the scope of the Heir to the Throne's convention.
84. Furthermore the Commissioner agrees that it is clearly in the public interest that the Heir to the Throne and government Ministers can 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. Again as noted above the Commissioner accepts that the chilling effect arguments are still relevant even when the correspondence itself may not fall within his interpretation of the convention and some weight should be given to them.
85. There is a clear public interest in protecting the dignity of the Royal Family so as to preserve their position and ability to fulfil their constitutional role as a unifying symbol for the nation. To the extent that disclosure of the withheld information would undermine His Royal Highness' dignity by invasion of his privacy, the Commissioner accepts that this adds further weight to maintaining the exemption.
86. However, given the number of public interest arguments in favour of disclosure that the Commissioner has identified, he is of the opinion that the benefit of disclosing this information should not be dismissed lightly. Rather the arguments identified by the Commissioner touch directly on many, if not all, of the central

public interest arguments underpinning the Act, namely ensuring that public authorities are accountable for and transparent about their actions; furthering public debate; improving confidence in decisions taken by public authorities. Furthermore, the specific arguments relevant to this case in relation to The Prince of Wales relationship with government Ministers deserves to be given particular weight.

87. In reaching a conclusion about where the balance of the public interest lies the Commissioner has to focus on the specific content of the information. In the Commissioner's opinion although the public interest arguments in favour of disclosing the information are compelling, he believes that disclosure of the particular correspondence falling within the scope of this request would not necessarily fulfil these public interest arguments. In contrast, as the Commissioner has explained above he believes that disclosure of this correspondence would result in the prejudicial effects identified by the DCMS and moreover there are weighty public interest arguments in such effects not occurring. Therefore the Commissioner believes that in all the circumstances of this case the public interest in maintaining the exception outweighs the public interest in disclosing the information.

The requests for the lists and schedules

88. In addition to asking for copies of correspondence exchanged between The Prince of Wales and Ministers at the DCMS, the complainant also requested a list of this correspondence and furthermore a schedule of such correspondence. The complainant's request specified that the list should include the recipient of the correspondence, the sender of the correspondence and the date of the correspondence. The complainant's request also specified that the schedule should include a brief description of each relevant document including the nature of the document, the date of the document, and whether the document is being released or not.
89. The DCMS has argued that a list/schedule of documents which The Prince of Wales sent to the DCMS is exempt from disclosure on the basis of section 37(1)(a), 40(2) and 41(1) and that a list/schedule of documents which the DCMS sent to The Prince of Wales is exempt from disclosure on basis of sections 37(1)(a) and 40(2).
90. As the Commissioner has decided that all of the correspondence in this case should be dealt with under the EIR he has not had to address in detail the DCMS' reliance on sections 37(1)(a), 40(2) and 41(1) of the Act. However, the Commissioner has also recently issued a decision notice involving a request to another government department for correspondence with The Prince of Wales. This decision notice does include a detailed analysis of the application of sections 37(1)(a), 40(2) and 41(1) of the Act. Therefore rather than repeat this detailed analysis in this present notice the Commissioner has simply attached this related notice which sets out his position on the exemptions contained within the Act which have been cited by the DCMS in this present case. The analysis which follows below sets out the Commissioner's position in relation to whether these

sections of the Act can be relied upon to withhold the information which would fulfil the complainant's requests for lists and schedules.

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

95. Having considered the arguments advanced by the DCMS very carefully the Commissioner has concluded that the list and schedule information in relation to correspondence sent by The Prince of Wales is exempt from disclosure on the basis of section 41(1). The Commissioner accepts that disclosure of this information would constitute an actionable breach of confidence broadly for the reasons the Commissioner has set out above with regard to the application of section 41(1) to the correspondence itself. Although the Commissioner acknowledges that disclosure simply of a list and/or schedule of information would result in less information being placed into the public domain, the Commissioner still believes that this would constitute an infringement of The Prince of Wales' right of privacy under Article 8 ECHR. For the reasons set out above and in the attached decision notice the Commissioner does not believe that there is a sufficient public interest defence to warrant disclosure of this information.
96. In relation to the application of section 37(1)(a) to the lists and schedules detailing the correspondence sent to The Prince of Wales, the Commissioner also accepts that balance of the public interest favours non-disclosure of such details. In reaching this conclusion the Commissioner again broadly adopts his logic set out in the attached notice with regard to why the public interest favours maintaining section 37(1)(a) in relation to the correspondence itself. Furthermore, the Commissioner placed some weight on the example provided to him by the DCMS where disclosure of some information arguably lead to a negative impact on The Prince of Wales' position of political neutrality. In reaching this conclusion the Commissioner has also placed particular weight on the fact that the time period specified by the complainant in this request is a narrow one, eight months, and the request seeks details of correspondence between The Prince of Wales and Ministers – as opposed to a broader request seeking for example correspondence between any individuals acting on behalf of His Royal Highness and any individual at the DCMS.
97. The Commissioner notes that with regard to the part of the schedule requested by the complainant which would include a brief description of each subject matter of each document, if the documents contained environmental information, as some of the correspondence in this case does, any description of the environmental information contained within the documents would in itself constitute environmental information. However, the Commissioner believes that those the parts of such a schedule would be exempt from disclosure on the basis of regulation 12(5)(f) for the reasons set out above.

Procedural Requirements

98. The Commissioner has concluded that the DCMS committed a number of procedural breaches when handling these requests.

Late response to requests and refusal notice issues

99. Both the Act and the EIR require a public authority to respond to an information request within 20 working days following its receipt. In this case the complainant

submitted his requests to the DCMS on 8 April 2005 and the DCMS issued a refusal notice on 10 November 2005.

100. With regard to the information falling within the scope of the Act (i.e. parts of the lists and schedule), the Commissioner finds that the DCMS breached section 17(1) by failing to issue its refusal notice within 20 working days.
101. With regard to the information falling within the scope of the EIR, the Commissioner finds that the DCMS breached regulation 5(2) by failing to respond to the request within 20 working days. Furthermore, the Commissioner finds that the DCMS breached regulation 14(1) in failing to provide a refusal notice citing the exceptions contained within the EIR which it later relied upon (albeit that the DCMS maintains that the information is not environmental). The DCMS also breached regulation 14(2) and 14(3) which require that such a notice is provided within 20 working days following the request and states the exceptions that are being relied upon.

Delays in conducting an internal review

102. Regulation 11(4) of the EIR requires that a public authority to inform an applicant of the outcome of its internal review 40 working days after the date of receiving a request for such a review.
103. In this case the complainant requested an internal review on 3 January 2006 and the DCMS issued the outcome of the internal review on 15 March 2006. Therefore the Commissioner has concluded that the DCMS breached regulation 11(4).

The Decision

104. The Commissioner has decided that the following elements of the requests were not dealt with in accordance with the Act:
 - The request for the correspondence should have been dealt with under the EIR rather than under the Act.
 - The DCMS breached section 17(1) of the Act and regulations 5(2), 14(1), 14(2) and 14(3) of the EIR by failing to issue adequate and timely refusal notices.
 - The DCMS also breached regulation 11(4) by failing to conduct an internal review within 40 working days.
105. However, the Commissioner has also concluded that:
 - The correspondence falling within the scope of the requests is exempt from disclosure on the basis of regulation 12(5)(f) and in all the

circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.

- The list and schedule information in relation to correspondence sent by The Prince of Wales is exempt from disclosure on the basis of section 41(1) of the Act. To the extent that any parts of the schedule contain environmental information, this information is exempt from disclosure on the basis of regulation 12(5)(f) and the public interest in maintaining the exception outweighs the public interest in disclosure.
- The list and schedule information in relation to correspondence sent to The Prince of Wales is exempt from disclosure on the basis of section 37(1)(a) of the Act and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure. To the extent that any parts of the schedule contain environmental information, this information is exempt from disclosure on the basis of regulation 12(5)(f) and the public interest in maintaining the exception outweighs the public interest in disclosure.

Steps Required

106. The Commissioner requires no steps to be taken.

Right of Appeal

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

Information Tribunal
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 15th day of December 2009

Signed

**Graham Smith
Deputy Commissioner**

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

Annex – text of request

The complainant submitted the following request to DCMS on 8 April 2005:

'Under the Act I would like to request a list of any and all correspondence which has been sent by Prince Charles to each minister in the Department for Culture, Media and Sport between September 1 2004 and April 1 2005. I assume that this would cover letters, emails, faxes, and any other forms of correspondence.

Under the act [sic], I would also like to request a list of any and all correspondence which has been sent by each minister in the Department for Culture, Media and Sport to Prince Charles between September 1 2004 and 1 April 2005. I assume that this would cover letters, emails, faxes and other forms of correspondence.

For each piece of correspondence, I would be grateful if you could list the recipient of the correspondence, the sender of the correspondence and the date of the correspondence.

Under the act [sic], I would also like to request complete copies of each piece of correspondence listed above between ministers in the Department for Culture, Media and Sport and Prince Charles between September 1 2004 and April 1 2005. This request covers correspondence which has been both received and sent by ministers in the Department for Culture, Media and Sport to and from Prince Charles. I assume that this would cover letters, emails faxes, and any other forms of correspondence.

I would also like to ask the Department for Culture, Media and Sport on answering the above request, to comply with a further request under the Freedom of Information act. This request is to provide a schedule of the documents which are relevant to the above request. I believe that there should be a brief description of each relevant documents including the nature of the document, the date of the document, and whether the documents is being released or not. I believe that providing such a schedule would clarify what documents are being released and what is being withheld. This is a specific request for information to which I believe I am entitled under the Freedom of Information act, and would also represent best practice in open government'.

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).”

Personal information.

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Information provided in confidence.

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Section 41(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

Environmental Information Regulations 2004

Regulation 5 - Duty to make available environmental information on request

Regulation 5(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 11 - Representation and reconsideration

Regulation 11(1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

Regulation 11(2) Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

Regulation 11(3) The public authority shall on receipt of the representations and free of charge –

- (a) consider them and any supporting evidence produced by the applicant; and
- (b) decide if it has complied with the requirement.

Regulation 11(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(1)

Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(2)

A public authority shall apply a presumption in favour of disclosure.

Regulation 12(3)

To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

Regulation 12(5)

For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

Regulation 12(9)

To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

Regulation 13 - Personal data

Regulation 13(1)

To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

Regulation 13(2) The first condition is –

- (a) in a case where the information falls within any paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –
 - (i) any of the data protection principles; or
 - (ii) section 10 of the Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(a) (which relates to manual data held by public authorities) were disregarded.

Regulation 14 - Refusal to disclose information

Regulation 14(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.

Regulation 14(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.

Data Protection Act 1998

Part I

- 1) In this Act, unless the context otherwise requires—

“personal data” means data which relate to a living individual who can be identified—

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

Schedule 1

The first principle states that:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Schedule 2

Conditions relevant for purposes of the first principle: processing of any personal data

1. The data subject has given his consent to the processing.
2. The processing is necessary— (a) for the performance of a contract to which the data subject is a party, or (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
4. The processing is necessary in order to protect the vital interests of the data subject.
5. The processing is necessary—
 - (a) for the administration of justice
 - (b) for the exercise of any functions conferred on any person by or under any enactment
 - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department
 - (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
6. — (1) 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.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.