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

Decision Notice

Date: 10 June 2010

Public Authority: Food Standards Agency
Address: Aviation House
125 Kingsway
London
WC2B 6NH

Summary

The complainant requested various pieces of information relating to communications between HRH The Prince of Wales and the public authority. The public authority withheld the disputed information on the basis of the exemptions at sections 35(1)(a) (formulation or development of government policy), 36(2)(b) (free and frank provision of advice) 37(1)(a) (communications with the Royal Household), 40(2) (personal data), and 41 (information provided in confidence). To the extent that any of the information constituted environmental information, the public authority additionally relied on regulations 12(5)(f) (adversely affect the interests of person who provided information) and 13 (personal data). The Commissioner decided that all of the information which does not constitute environmental information was correctly withheld either on the basis of sections 41 or 37(1)(a). The environmental information was also correctly withheld either on the basis of regulations 12(5)(f) or 13. He did not therefore need to consider the applicability or otherwise of the exemptions at sections 35(1)(a) and 36(2)(b). The Commissioner however found the public authority in breach of sections 17(1), 17(1)(b) of the Act, and regulations 14(2) and 14(3) of the EIR.

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 Food Standards Agency (FSA) on 22 February 2006. This email contained a number of requests which focused on correspondence which the FSA may have exchanged with HRH The Prince of Wales and representatives of His Royal Highness. The full text of this email is included in an annex which is appended to this Notice.

4. After some delay, the FSA issued a refusal notice on 22 May 2006 in which it confirmed that it held information relevant to the requests but refused to disclose the information held on the basis of the exemption at section 37(1)(a).

5. On 23 May 2006 the complainant asked the FSA to conduct an internal review of this decision.

6. The FSA informed the complainant of the outcome of the review on 19 July 2006. The review upheld the public authority's original decision to withhold the information held on the basis of section 37(1)(a).

The Investigation

Scope of the case

7. The complainant contacted the Commissioner on 25 July 2006 and asked him to consider the FSA's refusal to provide him with the information that he had requested.

8. In its letter to the Commissioner of 17 May 2010, the FSA informed the Commissioner that it was now prepared to release

some information which the Commissioner considers falls within the scope of items 6 and 7 of the requests.

9. The exact detail of this information, as set out in the FSA's letter of 17 May 2010, is included in the confidential annex attached to this notice which will be sent to the FSA only. This is so there can be no doubt as to the information which the Commissioner now expects the FSA to disclose the complainant.

10. In respect of each aspect of the information the FSA is now prepared to disclose to the complainant, the Commissioner understands that the FSA is withdrawing its reliance on the exemptions at 35(1)(a), 36(2)(b), 37(1)(a), and 41 subject to any redactions to be made on the basis of the personal data exemption at section 40(2).

11. The Commissioner has therefore restricted his decision in this notice to the information which the FSA continues to withhold.

Chronology

12. Although the complainant originally contacted the Commissioner in July 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 19 February 2007 that the Commissioner contacted the FSA in relation to this complaint.

13. 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 his Household 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).

14. On 21 September 2007 the FSA provided the Commissioner with a response to his letter of 19 February 2007. In this letter the FSA provided the Commissioner with a list of the information which it considered to fall within the complainant's requests. The FSA also explained that it believed that some of this information was exempt on the basis of section 41(1) of the Act because The Prince of Wales had written in the expectation that his correspondence will be treated in confidence by the government. The FSA also provided further submissions to support its application of section 37(1)(a) of the Act. The FSA also noted

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that the complainant had requested lists of approaches made to it and it believed that the fulfilment of these requests would involve creation of new information, something which it was not required to do as part of the Act.

15. 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 The Prince of Wales' correspondence with government departments.

16. 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.

17. The Commissioner received a response from the Royal Household in November 2008.

18. 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.

19. On 26 March 2009 the Commissioner contacted the FSA and asked to be provided with copies of the information falling within the scope of the complainant's requests.

20. On April 2009 the FSA supplied the Commissioner with the information withheld from the complainant.

21. The Commissioner contacted the FSA again on 07 September 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 FSA 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.

22. In response to a number of letters sent on other cases involving correspondence with The Prince of Wales the Commissioner received a response a letter from the Cabinet Office on 7 October 2009. In this letter the Cabinet Office provided further arguments to support the application of section 41(1) of the Act to withhold information exchanged between the public authorities and The Prince of Wales.

23. The Commissioner received a response to this letter from the Cabinet Office on 7 October 2009 and from the FSA on 17 May 2010. The FSA 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 'equivalent exceptions to those under FOIA.'

Findings of fact

24. As 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 FSA it maybe the case that it was in fact provided by the Cabinet Office on its behalf.

25. However, as noted above, the FSA informed the Commissioner that it would be disclosing some of the information it had originally considered exempt.

26. At the time that this Notice is being issued the FSA's position is that the information in document 1 of the revised schedule is exempt on the basis of the exemptions at sections 37(1)(a) and 35(1)(a). The remainder 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.

27. The FSA also confirmed on 17 May 2010 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.

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Analysis

Substantive Procedural Matters – what has the complainant actually asked for?

28. Before setting out his findings in relation to whether the information requested by the complainant should be disclosed, the Commissioner has clarified the nature of the information which he considers to fall within the scope of the complainant's requests.

29. In the Commissioner's opinion, he believes that the requests submitted by the complainant can be separated into three separate types:

- The requests numbered 1 - 2 seek **lists of approaches** made by The Prince of Wales or his representatives to the FSA
- The requests numbered 3, 4, and 5 seek the **number of times** The Prince of Wales or his representatives contacted the FSA; and
- The requests numbered 6 and 7 seek various internal documents and pieces of correspondence.

30. The Commissioner notes that in early responses to the complainant and submissions to him, the FSA suggested that it did not hold a list of any such approaches (or indeed a record of the number of approaches) and that to provide such information would involve the creation of new information and under the Act it was not required to create new information

31. The Commissioner's position is that where a request is made for a schedule or list of documents, even if no schedule has been compiled, if the information which would be in the schedule is held, the request can and should be complied with unless the contents of the schedule, once compiled, would also be exempt. (The Commissioner originally outlined this view in decision notice FS50070854 involving a request to the Foreign and Commonwealth Office). Therefore in the circumstances of this case the Commissioner believes that as the FSA holds letters and emails from The Prince of Wales, and his representatives, it is in a position to provide the complainant with a list of these approaches and confirm the number of such approaches, subject of course to the application of any exemptions.

32. As noted, the complainant's latter requests seek correspondence held by the FSA. The Commissioner notes that the complainant

has phrased his request in a particular way, namely 'Please provide all correspondence between the FSA and any outside organisation or individual...**which relate** [emphasis added] to approaches from the HRH The Prince of Wales or representatives acting on his behalf'.

33. The Commissioner notes that in some of the submissions he received from the FSA it indicated that it did not believe that correspondence sent to it by The Prince of Wales actually fell within the scope of any of the complainant's requests.

34. The Commissioner wishes to clarify that in his opinion such a request, by seeking information which 'relates to correspondence' with the Prince of Wales or those who represent him does not exclude the actual correspondence itself. In other words these requests include correspondence between the FSA and The Prince of Wales and those who represent Him, as well as any information which relates to such correspondence. This is because, in the Commissioner's opinion it is clear that any request which seeks information which relates to particular correspondence also covers the named correspondence itself.

35. The Commissioner has initially considered whether the information falling within the scope of the latter class of the complainant's requests – i.e. that which seeks internal documentation, correspondence and information relating to that correspondence – is exempt from disclosure on the basis of the exemptions cited by the FSA. He has then gone on to consider whether the information that would fulfil the complainant's first two classes of requests is exempt from disclosure.

36. However, before considering the applications of the exemptions the Commissioner has considered whether any of the requested correspondence and internal documentation is in fact environmental information as defined by the EIR.

Is any of the requested information 'environmental'?

37. Regulation 2(1) of the EIR 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)'

38. 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, from which the EIR are derived. 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.

39. The Commissioner 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

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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).

40. 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.'

41. 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 said that the information is 'environmental information'.

42. 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.'

43. 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 affect 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.'

44. The Commissioner has reviewed the withheld information and has concluded that some of the information constitutes environmental information because it falls within the definition in regulation 2(1) of the EIR. Therefore this information must be dealt with under the EIR rather than under the Act. The information that does not fall within the definition in regulation 2(1), must be considered under the Act.

45. 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 FSA but not the complainant, an explanation of which parts of the withheld information he has concluded is environmental information and why.

46. In reaching this conclusion the Commissioner has taken into account the following arguments advanced by the FSA to supports its position that none of the withheld information constitutes environmental information:

47. Firstly, the FSA 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.

48. Secondly, the FSA 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 FSA argued that the judgment remained accurate in relation to the current Directive.

49. In relation to the first point advanced by the FSA, 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 or a measure affecting those elements 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 definition in regulation in 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).

50. In relation to the second point advanced by the FSA, 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 judgment 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

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

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.

Exemptions and exceptions

51. Given that the Commissioner has found that some of the withheld information is environmental information and some is not, the Commissioner must consider both the exceptions provided by the EIR and the exemptions provided by the Act.

52. The Commissioner has considered the non-environmental information first, albeit that there is inevitably some cross over between the reasoning as to why the exemptions in the Act and the exceptions in the EIR may apply to the withheld information.

The request for the correspondence, information relating to the correspondence and internal documentation

53. In this case the Commissioner has established that the FSA holds:

- Correspondence exchanged with The Prince of Wales;
- Correspondence exchanged with representatives of The Prince of Wales; and
- Internal documentation relating to approaches from either The Prince of Wales or his representatives.

Section 41 – information provided in confidence

54. The Commissioner has been provided with detailed submissions to support the FSA's position that correspondence exchanged with The Prince of Wales is exempt from disclosure on the basis of section 41 of the Act.

55. This section states that:

'41-(1) 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.'

56. Therefore for this exemption to be engaged two criteria have to be met, the public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.

Section 41(1)(a)

57. The FSA has argued that correspondence sent by The Prince of Wales to it meets the first limb of section 41 because it is clearly information it received from another person. On this basis the Commissioner accepts that such correspondence, along with correspondence received by the FSA from representatives of The Prince of Wales, meets the requirements of section 41(1)(a).

58. However, the FSA has also argued that the requirement of section 41(1)(a) that information be 'obtained from another person' is sufficiently broad to include information about a person, as well as information actually provided by a person. To support this approach the FSA made the point that the modern law of breach of confidence (which is discussed in detail below) covers information not only obtained from a person, but also information about a person, for example a photograph.[2] On this basis the FSA has argued that correspondence to The Prince of Wales from the FSA also falls within the scope of section 41(1)(a) because the content of the correspondence clearly indicates what matters His Royal Highness has raised with Ministers.

59. 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.[3] However, the Commissioner does not agree with the FSA's assertion that simply because information it holds is about an identifiable individual it constitutes information obtained from that person. In the Commissioner's view such an interpretation of section 41(1)(a) is too broad for two reasons.

60. Firstly, although the Commissioner accepts – for the reasons set out below – that the modern law of breach of confidence needs to be taken into account when considering whether disclosure of information would constitute an actionable breach and thus engage section 41(1)(b), he does not believe that the case law

[2] The FSA referenced the case of *Campbell v MGN Ltd [2004] 2 AC 457* in which a claim was brought by Ms Campbell under the tort of breach of confidence in respect of details of drug addiction treatment and covertly taken photographs.

[3] The Tribunal confirmed that such an approach was correct in *DBERR v Information Commissioner and FoE* (EA/2007/0072) – see para 78.

referenced by the FSA is directly relevant to the engagement of section 41(1)(a). This is because the way in which section 41is drafted means that information is not exempt simply if its disclosure would constitute an actionable breach of confidence as in common law. Rather the inclusion of section 41(1)(a) means that the public authority also has to have received that information from a third party. In effect section 41 creates an additional requirement for withholding information which is confidential under the common law and it would be inappropriate simply to apply the common law test to lower the threshold of engaging section 41.

61. Secondly, the Commissioner believes that the approach suggested by the FSA effectively represents an attempt to broaden out the basis upon which section 41 is engaged to also ensure that it offers protection to an individual's privacy regardless of whether a public authority had 'obtained' information about that individual from a third party. However, in the Commissioner's view such an interpretation of section 41 is not necessary; whilst this exemption may not always protect an individual's privacy in the way in which the FSA is arguing that it should, the Act clearly offers weighty protection to an individual's privacy in the form of the exemption contained at section 40.

62. Therefore although the Commissioner accepts that it is possible for correspondence which was created by the FSA and sent **to** The Prince of Wales and his representatives to still meet the requirements of section 41(1)(a), whether it does in any particular case will depend upon the content of the information which was communicated. By the same logic the Commissioner accepts that it is possible for internal documentation created by the FSA to meet the requirements of section 41(1)(a) if it closely replicates the content of information originally provided to the FSA

63. In the Commissioner's opinion there has to be a significant degree of similarity between the information which the FSA is sending to The Prince of Wales or his representatives and the information which His Royal Highness or those who represent him originally provided to the FSA. 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 or his representatives has to reflect the actual views or opinions His Royal Highness, or those who represent him, may have raised on a particular topic. Again the same is true of any internal documentation held by the FSA.

64. Having considered the content of the correspondence falling within the scope of this case that the public authority sent to The Prince of Wales, the Commissioner accepts that in the context in which they written, some of the correspondence reflects the views of The Prince of Wales and as such meets the requirements of section 41(1)(a).

65. In relation to the internal documentation, the Commissioner finds that none of the information which falls within the scope of the request reflects the views of The Prince of Wales or those of his representatives and therefore does not meet the requirements of section 41(1)(a).

66. The Commissioner has set out in the confidential annex which particular pieces of correspondence or parts of correspondence do not in his opinion meet the requirements of section 41(1)(a). The Commissioner next considered whether the disclosure of the correspondence which was obtained from His Royal Highness or his representatives would have constituted an actionable breach of confidence.

Section 41(1)(b)

The FSA's position on an actionable breach of confidence

67. The FSA has provided the Commissioner with detailed submissions to support its position that the disclosure of the correspondence between it and The Prince of Wales would constitute an actionable breach and thus meet the requirements of section 41(1)(b). The Commissioner has summarised these submissions below and has then gone on to explain his view as to whether they apply to the information which has been withheld in this case.

68. In most cases involving the application of section 41 which the Commissioner has previously considered, the requested information has been of a commercial nature rather than the more personal information which is the focus of this case. The approach usually adopted by the Commissioner in assessing whether disclosure commercial information would constitute an actionable breach is to follow the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415 (the *Coco* test).

69. This judgment suggested that the following three limbed test should be considered in order to determine whether information was confidential:

- Whether the information had the necessary quality of confidence;
- Whether the information was imparted in circumstances importing an obligation of confidence; and
- Whether an unauthorised use of the information would result in detriment to the confider.

70. In submissions to the Commissioner the FSA explained why the *Coco* test no longer represented the law in respect of information such as The Prince of Wales correspondence which fell within the scope of this case. These submissions are summarised below.

71. The FSA noted that the *Coco* test involved a claim in relation to commercially confidential information whereas the information which was the focus of this case, The Prince of Wales' correspondence, was essentially personal information. The FSA explained that more recent cases than *Coco v Clark* had considered the law of confidence and/or misuse of personal or private information in the context of Article 8 of the European Convention of Human Rights (ECHR). Such cases included *Campbell v MGN* and *HRH The Prince of Wales v Associated Newspapers Ltd*.[4] The FSA argued that it was the approach to the law of confidence set out in these cases, rather than in *Coco*, that should be considered in the circumstances of this case.

72. In support of this approach the FSA referenced the only High Court case to date to deal with the application of section 41 of the Act. This case involved a request submitted to the Home Office by the British Union for Abolition of Vivisection (BUAV) for applications for licences to conduct animal experimentation.

73. The FSA highlighted the fact that in his judgment in this case Eady J confirmed that the *Coco* test was not the only test of confidence that existed and that recognition had to be given to how misuse of private information may give rise to an actionable breach of confidence and furthermore any assessment of confidence had to take into account the impact of the Human Rights Act.[5]

74. In light of this, the FSA explained that the test of confidence not only included the traditional breach as described in *Coco v Clark*

[4] Full citation: *HRH The Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 (Ch), [2006] EWCA Civ 1776 [2008] Ch 57.
[5] *The Home Office v British Union for the Abolition of Vivisection and Information Commissioner* [2008] EWCH 892 (QB) 25 April 2008.

but also claims to prevent the misuse of information entitled to protection under Article 8 ECHR.

75. 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.'

76. The FSA 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 FSA 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 FSA 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…'

77. The FSA noted that it was not necessary for any particular detriment to be demonstrated in order for a duty of confidence to be actionable. The FSA explained that this position was supported by the judge in *Coco v Clark* who questioned whether

in fact detriment would always be a necessary ingredient of an actionable breach (para 421) and furthermore by the fact that in order for Article 8(1) to be engaged it was not necessary to demonstrate any detriment.

78. The FSA explained that in its view the withheld information in this case was confidential information within the sense of the traditional *Coco* test (albeit that for the reasons set out above it believed that this was incorrect test to apply) and also constituted confidential information because it attracted the protection of Article 8(1).

79. With regard to why the information met the three limbs of the *Coco* test the FSA emphasised the significance of 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. 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, as a Counsellor of State and as next in line to the throne, whereby he also has a statutory duty under the Regency Act 1937 to act for The Queen during her absence or incapacitation. The FSA argued that the convention that The Prince of Wales will be informed about the business of government in order to prepare for being Sovereign can only be maintained if both His Royal Highness and government Ministers who advise and inform him about the business of government can be assured that their communications with each other remain confidential.

80. The FSA explained that this convention is inextricably tied to the role of the Sovereign in the British constitution and the separate constitutional right of the Sovereign by convention to counsel, encourage and warn the Government and thus to have opinions on government policy and to express those opinions to her Ministers. However, whatever personal opinions the Sovereign may hold she is bound to accept and act on the advice of her Ministers and is obliged to treat her communications with them as absolutely confidential. Such confidentiality is necessary in order to ensure that the Sovereign's political neutrality is not compromised in case Her Majesty has to exercise her executive powers, e.g. initiating discussions with political parties in the scenario of a hung Parliament in order to ensure that a

government can be formed. Consequently, The Prince of Wales must not be in a position where his position of political neutrality is compromised (or appear to be compromised) because it cannot be restored on accession to the throne. The FSA argued that if correspondence between The Prince of Wales and government Ministers was routinely disclosed His Royal Highness' political neutrality would be put at risk.

81. In light of the constitutional convention relating to the Heir to Throne, the FSA argued that it was clear that correspondence exchanged between the Prince of Wales and government departments had the quality of confidence. The content of such information was clearly not of a trivial nature but rather focused on the business of government. The information was clearly imparted in circumstances which had given rise to the obligation of confidence. All parties understood, because of the operation of the convention, the need to keep such communications private. Finally, the FSA argued that even if detriment needed to be identified, the harm which would occur to the operation of the convention, and the potential undermining of The Prince of Wales' political neutrality following disclosure of the information would constitute sufficient detriment to meet the third limb of the *Coco* test.

82. In relation to why the correspondence exchanged between the Prince of Wales and government departments constituted confidential information under the modern law of confidence, the FSA explained that it was clear that such correspondence engaged Article 8(1) where the topic of the correspondence was of a particularly private nature of topic, but also, in light of the quoted case law above, where the correspondence reflects The Prince of Wales' opinions on matters of government business. Therefore disclosure of the correspondence would lead to a clear infringement of The Prince of Wales' right of privacy and thus constitute a breach of confidence.

83. Although section 41 is an absolute exemption and thus not subject to the public interest test under section 2, the common law concept of confidence suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence.

84. The FSA argued that in the circumstances of this case there was no effective public interest defence. In support of this position the FSA made the following arguments.

85. Firstly, there is an inherent public interest in the preservation of confidences and their protection by law, which in itself is a weighty factor in favour of maintaining confidentiality.

86. Secondly, in the circumstances of this case there was a specific public interest in maintaining the confidentiality of The Prince of Wales' correspondence with government in order to preserve the conventions discussed above, and specifically his political neutrality. It was strongly in the public interest to ensure the preservation of conventions in order to ensure the constitution was not undermined.

87. Thirdly, it is not simply a question of whether the information is a matter of public interest, but rather whether in all of the circumstances of the case, it is in the public interest that the duty of confidence should be breached. The FSA highlighted the Court of Appeal in *Associated Newspapers Ltd v HRH The Prince of Wales* to illustrate this point:

'[68] But a significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence that are created between individuals. It is not enough to justify publication that the information in question is a matter of public interest. To take an extreme example, the content of a budget speech is a matter of great public interest. But if a disloyal typist were to sell as copy to a newspaper in advance of the delivery of the speech in Parliament, there can surely be no doubt that the newspaper would be in breach of duty if it purchased and published the speech.'

88. Fourthly, to justify disclosure of confidential information on the grounds of public interest, it is not sufficient that the information is simply interesting to the public. Rather, the public interest in overriding confidentiality must be one of very considerable significance, whether that be related to, for example, the proper conduct of public affairs, public health, prevention of crime etc. Disclosure must in fact be 'necessary' in order to override obligations of confidentiality with the test of necessity reflecting both the traditional test of confidence and the test for justification with Article 8 rights under the ECHR. The FSA referenced the Court of Appeal in *McKennitt v Ash* which involved a confidence being overridden on the basis of allegations of misconduct:

'I would nevertheless accept that Mr Browne is broadly correct when he submits that for a claimant's conduct to "trigger the

public interest defence" a very high degree of misbehaviour must be demonstrated'.

89. The FSA argued that it was clear from the content of the correspondence – both that sent to and received by The Prince of Wales – no such level of significance was present to meet this high threshold.

90. Fifthly, it was important not to confuse the public interest with information which the public may be interested in. To illustrate this point the FSA referenced Blackburne J in his judgment at first instance in *HRH The Prince of Wales v Associated Newspapers*:

'[118]…it is important not to overlook the fact that what may be in the public interest to know and thus for the media to publicise in exercise of their freedom of speech is not to be confused with what is interesting to the public and therefore in a newspaper's commercial interest to publish. This is particularly so in the case of someone like the claimant whose every thought and action is, in some quarters at least, a matter of endless fascination.'

91. And noted that this point was subsequently accepted by the Court of Appeal at [70]:

'As heir to the throne, Prince Charles is an important public figure. In respect of such persons the public takes an interest in information about them that is relatively trivial. For this reason public disclosure of such information can be particularly intrusive. The judge rightly had regard to this factor…'

92. Finally, the FSA suggested that whatever public interest which may exist in disclosure of correspondence between the Prince of Wales and government departments could be best described as a public interest in knowing what matters of public importance The Prince of Wales raises with Ministers, and how the they respond to him, in light of the access his constitutional position affords him. However, the FSA suggested that disclosure of some of the correspondence would not serve this public interest at all because it related to purely administrative issues or focused solely on purely private matters.

The Commissioner's position on an actionable breach of confidence

93. At this stage the Commissioner wishes to highlight the fact that the FSA's submissions on the application of section 41 focus on solely correspondence exchanged between The Prince of Wales

and government departments, in particular Ministers within those departments. Although the Commissioner agrees that information of this description falls within the scope of the complainant's requests – for the reasons set out above at the beginning of the Analysis section – he believes that the FSA holds other types of information which also falls within the scope of the complainant's requests, namely correspondence with representatives of The Prince of Wales. Consequently the Commissioner has begun by considering the application of the section 41 submissions in relation only to correspondence exchanged between The Prince of Wales and government departments before moving on to consider how these arguments apply to the remainder of the information which falls within the scope of these requests.

Correspondence between The Prince of Wales and government departments

94. The Commissioner agrees with the FSA that a strict and rigid following of the *Coco* test is not an appropriate approach to the test of confidence for the correspondence exchanged between The Prince of Wales and government departments. The Commissioner's reasoning for this mirrors the arguments highlighted by the FSA namely the recent case law which has been referenced, most notably *BUAV*, and also the impact of the ECHR. Therefore when considering whether personal and private information is confidential the Commissioner agrees that consideration of Article 8 ECHR as well a consideration of Article 10 ECHR (the right to freedom of expression) in the context of the public interest defence is necessary.

95. However, the Commissioner does not believe that some of the concepts raised in *Coco v Clark* should be abandoned completely as they can still be useful in determining whether information of a personal and private nature is confidential. Indeed as Eady J noted in his conclusion at [35] whether information was imparted in circumstances where there was an expectation of confidence can be relevant to determining whether there would be an actionable breach if information of a private and personal nature was disclosed.

96. Therefore for information which is of personal and private nature, such as correspondence between The Prince of Wales and government departments, rather than use the three limbed test employed by *Coco v Clark*, the Commissioner will consider:

- Whether information was imparted with an expectation that it would be kept confidential (be that an explicit or implicit expectation); and
- Whether disclosure of the information would infringe the confider's right of privacy as protected by Article 8(1) ECHR.

97. In relation to the first criteria the Commissioner accepts that the constitutional convention which provides that the Heir to the Throne should be educated in the ways and workings of government means that both The Prince of Wales, and those he corresponded with, will have had an explicit (and weighty) expectation that such communications would be confidential.

98. In reaching this conclusion the Commissioner wishes to clarify his position with regard to the scope of the constitutional convention relating 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.)

99. Nevertheless, the Commissioner accepts that for communications between the parties that do not fall within his interpretation of the convention, there is still a weighty expectation that such correspondence will be kept confidential. The Commissioner finds support for such a conclusion given the established practice that communications between The Prince of Wales and government Ministers have not been disclosed or commented on by either party, regardless of the content of the correspondence. Moreover, it is the Commissioner's understanding that the FSA's position is that all correspondence the Prince of Wales exchanges with government Ministers falls within the scope of the convention and thus the individuals involved in exchanging this correspondence will have had a weighty and explicit expectation that such information will not be disclosed.

100. In relation to the second criteria, the Commissioner agrees with the FSA 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). Furthermore, in the quoted case reference to 'correspondence' confirms that Article 8(1) can apply to information contained within the format which is the focus of this request.

101. In light of this broad reading of Article 8(1) the Commissioner accepts that disclosure of correspondence exchanged between The Prince of Wales and government departments would place in the public domain details of His Royal Highness' views and opinions on a number of issues and such an action would amount to an invasion of his privacy. Thus the Commissioner accepts that disclosure of this information would constitute an infringement of Article 8(1) and would constitute an actionable breach of confidence.

102. For these reasons the Commissioner accepts that disclosure of such correspondence would constitute an actionable breach of confidence.

103. However, before it can be concluded that such correspondence is exempt from disclosure by virtue of section 41, the Commissioner has to consider whether there is a public interest defence to disclosing the information, which includes an assessment of the weight that should be attributed to Article 10 ECHR.

104. As explained above the FSA identified only a very general and limited public interest in disclosure of The Prince of Wales' correspondence. In the Commissioner's opinion there are a number of further public interest arguments in favour of disclosing such correspondence than have been identified by the FSA and he has set out below what he believes these interests are. The Commissioner has then gone on to consider whether such arguments provide a sufficient public interest defence.

Additional arguments in favour of disclosing correspondence with The Prince of Wales

105. There is a public interest in disclosure of information to ensure that the government is accountable for, and transparent in, its decision making processes.

106. Moreover, there is a specific public interest in disclosure of information that would increase the public's understanding of

how the government engages with the Royal Family and the Royal Household, and in particular in the circumstances of this case, the Heir to the Throne. This is because the Monarchy has a central role in the British constitution and the public is entitled to know how the various 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 FSA.

107. Disclosure of this correspondence 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 FSA 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.

108. 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 engages with The Prince of Wales.

109. 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.

110. Linked to this argument is the fact that disclosure of this correspondence could further public debate regarding the role of the Monarchy and particularly the Heir to the Throne. Similarly, disclosure of this correspondence could inform the broader debate surrounding constitutional reform.

Can disclosure of the correspondence with The Prince of Wales be justified on public interest grounds?

111. Before turning to the balance of the public interest the Commissioner wishes to highlight that the public interest test inherent within section 41 differs from the public interest test contained in the qualified exemptions in the Act; the default position for the public interest test in the qualified exemptions is that the information should be disclosed unless the public

interest in withholding the information outweighs the public interest in disclosing the information. With regard to the public interest test inherent within section 41, this position is reversed; the default position being that information should not be disclosed unless the public interest in disclosure outweighs the interest in upholding the duty of confidence and therefore withholding the information.

112. In the Commissioner's opinion, the introduction of the concept of privacy and the impact of ECHR into the law of confidence has not affected this balancing exercise; Sedley LJ expressed such a view in *LRT v Mayor of London*: 'the human rights highway leads to exactly to exactly the same outcome as the older road of equity and common law'.[6]

113. Therefore in conducting this balancing exercise as well as taking into account the protection afforded by Article 8(1), consideration must also be given to Article 10 ECHR which provides that:

'1.Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…
2.The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

114. The Commissioner notes that recent European Court of Human Rights judgments have highlighted the relationship between Article 10 and access to public information. In particular, the Court has recognised that individuals involved in the legitimate process of gathering information on a matter of public importance can rely on Article 10(1) as a basis upon which to argue that public authorities interfered with this process by restricting access to information.[7]

115. Turning to the various factors identified by the FSA the Commissioner does not entirely accept the argument that for there to be a successful public interest defence against a breach

[6] Quoted by the Information Tribunal in Derry City Council v Information Commissioner, (EA/2006/0014).
[7] See Kenedi v Hungary 37374/05.

of confidence there would always have to be an exceptional public interest in disclosure. The Commissioner's reasoning is as follows: The Information Tribunal in *Derry City Council v Information* Commissioner in discussing the case of *LRT v The Mayor of London* noted that in the first instance the judge said that an exceptional case had to be shown to justify a disclosure which would otherwise breach a contractual obligation of confidence. When hearing the case, the Court of Appeal although not expressly overturning this view, did leave this question open and its final decision was that the information should be disclosed. The Tribunal in *Derry* interpreted this to mean that:

- No exceptional case has to be made to override the duty of confidence that would otherwise exist;
- All that was required is balancing of the public interest in putting the information into the public domain and the public interest in maintaining the confidence.

116. Consequently in cases where the information is of a commercial nature, the Commissioner's approach is to follow the lead of the Tribunal in that no exceptional case has to be made for disclosure, albeit the balancing exercise will still be of an inverse nature.

117. However, in cases where the information is of a private and personal nature, the Commissioner accepts that in light of the case law referenced by the FSA, disclosure of such information requires a very strong set of public interest arguments. The difference in the Commissioner's approach to such cases can be explained by the weighty protection that Article 8 offers to private information; in other words the Commissioner accepts that there will always be an inherent and strong public interest in protecting an individual's privacy. The Commissioner's believes that a potential deviation from this approach may be appropriate where the personal information relates to the individual's public and professional life, as opposed to their intimate personal or family life, and in such a scenario such a strong set of public interest arguments may not be needed because the interests of the individual may not be paramount.

118. In determining whether the correspondence which the FSA holds which has been exchanged directly with The Prince of Wales, relates more to His Royal Highness' professional or public life, rather than his private life, the Commissioner faces a particularly difficult dilemma given the unique position which His Royal Highness occupies. There is clearly significant overlap between the Prince of Wales' public role as Heir to the Throne and a senior

member of the Royal Family and his private life; he only occupies such positions because of the family into which he was born. In the Commissioner's opinion The Prince of Wales' public and private lives can be said to be inextricably linked. Therefore for the purposes of this case, and the consideration of Article 8, the Commissioner believes that he has to adopt the position that the information which is the focus of this case can be said to more private in nature than public and thus a very strong set of public interest arguments would need to cited in order for there to be a valid public interest defence.

119. Before turning to whether the arguments in this case can meet such a threshold, the Commissioner wishes to make a number of comments in relation to the weight that should be attributed to the additional arguments identified by the FSA in favour of non-disclosure.

120. As implied by the comments above, the Commissioner accepts the argument that there is weighty public interest in maintaining confidences. Furthermore, the Commissioner agrees that there is a significant public interest in ensuring the convention that the Heir to the Throne can be instructed in the business of government is not undermined; it would clearly not be in the public interest if the Heir to Throne and future Monarch appeared to be politically partisan. The Commissioner of course also agrees that there is a clear and important distinction between disclosure of information which the public would be interested in and disclosure of information which is genuinely in the public interest.

121. However, given the number of public interest arguments in favour of disclosure that the Commissioner has identified, he is of the perhaps unsurprising opinion that the benefit of disclosing correspondence the FSA holds with The Prince of Wales should not be summarily dismissed in the fashion implied by the FSA. 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 in 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.

122. Nevertheless, the Commissioner has to remember that disclosure of such information would require an exceptional set of public interest arguments and disclosure would have to be justified by

the content of the withheld information itself not simply on the basis of generic or abstract public interest arguments.

123. The Commissioner has reviewed the content of the relevant correspondence carefully and he has reached the conclusion that despite the weight of the public interest arguments in favour of disclosure, the content does not present an exceptional reason or reasons for this correspondence to be disclosed. Consequently, the Commissioner has concluded that there would not be a public interest defence if the correspondence that falls within the scope of section 41 were disclosed.

Correspondence with representatives of The Prince of Wales and the FSA

124. The Commissioner recognises that the nature of the correspondence the FSA exchanged with The Prince of Wales clearly differs from the nature of correspondence exchanged with His Royal Highness' representatives in some key ways: correspondence in the first category is exchanged between the Heir to the Throne and government Ministers or in the FSA's case, the Chair; correspondence falling within the second category cannot necessarily be said to have been exchanged at such at high level or with actual members of The Royal Family.

125. However in terms of the application of section 41(1)(b) the Commissioner has established that a significant number of documents that the FSA exchanged with representatives of The Prince of Wales include references, either directly or indirectly, to the views and opinions of His Royal Highness. Furthermore, the Commissioner understands that The Prince of Wales' Household is, in essence, taken to be an extension of His Royal Highness; when a member of the Household sends a letter to a government department it is understood that such a letter is essentially being sent on behalf of The Prince of Wales.

126. Therefore on the basis of these two factors, for such pieces of correspondence, even although they are not sent directly by or to The Prince of Wales, the Commissioner believes that it is correct to treat such information as personal and private in nature. That is to say, such correspondence is personal and private to The Prince of Wales. Consequently for such information the Commissioner believes that the following test should again be considered:

- Whether information was imparted with an expectation that it would be kept confidential (be that an explicit or implicit expectation); and
- Whether disclosure of the information would infringe the confider's right of privacy as protected by Article 8(1) ECHR.

127. The Commissioner accepts that information exchanged between representatives of The Prince of Wales and government departments is exchanged by both parties with an understanding that this information will be kept confidential. The Commissioner finds support for such a conclusion in the fact that The Prince of Wales and His Royal Highness' Household are said to be indistinguishable and as set out above it is established practice that correspondence between The Prince of Wales and government departments is not disclosed or commented on.

128. Given that this correspondence includes The Prince of Wales' views and opinions, the Commissioner believes that it is relevant to consider the His Royal Highness' right of privacy. For the reasons set out above the Commissioner believes that disclosure of correspondence containing such information would infringe His Royal Highness' right of privacy and thus would constitute an actionable breach of confidence. Similarly for the reasons set out above the Commissioner believes that there would not be a public interest defence if such information was disclosed.

129. However, the Commissioner has established that not all of the correspondence exchanged between the FSA and The Prince of Wales' representatives include the views and opinions of His Royal Highness and thus not all of the information contained in such correspondence is of a strictly personal and private nature. For example, the FSA holds correspondence exchanged with representatives of The Prince of Wales which is of an administrative nature even though the matters are of substance. For such information the Commissioner believes that the test of confidence which should be applied is the first two limbs of the *Coco* test:

- Whether the information had the necessary quality of confidence; and
- Whether the information was imparted in circumstances importing an obligation of confidence.

130. The Commissioner believes that information will have the necessary quality of confidence if it is not otherwise accessible and it is more than trivial. Information which is known only to a limited number of individuals will not be regarded as being

generally accessible though it will be if it has been disseminated to the general public. Information which is of importance to the confider should not be considered as trivial.

131. The Commissioner has reviewed the remaining correspondence in this case and accepts that all of this information has the quality of confidence; it is clearly correspondence which focuses on matters of substance, is not generally available and is of importance to the confider.

132. For the reasons set out above, the Commissioner is satisfied that the correspondence the FSA exchanged with the representatives of The Prince of Wales was provided in circumstances in which the confider expected it to be kept confidential.

133. For these reasons the Commissioner accepts that disclosure of the remaining correspondence between representatives of The Prince of Wales and the FSA would constitute an actionable breach of confidence.

134. However, before it can be concluded that such correspondence is exempt from disclosure by virtue of section 41, the Commissioner must again consider whether there is a public interest defence to disclosing this information. Given the different nature of this information to the correspondence of a more private and personal nature, the Commissioner believes that the balance of public interest is slightly different from that considered above.

135. The public interest arguments in favour of disclosing this information still focus on issues identified above which are central to the Act, namely accountability and transparency of public authorities, furthering public debate and improving confidence in public authorities. However, the emphasis on these arguments in this context is less on how the FSA engaged with The Prince of Wales and actions it may have taken following such correspondence, and more on how the FSA engaged with His Royal Highness' representatives and actions its may have taken following such correspondence.

136. Similarly, whilst the public interest arguments at the heart of maintaining the confidence remain relevant, e.g. the strong public interest in protecting confidences, there is less emphasis on the public interest in protecting The Prince of Wales' ability to correspond with senior government officials. The focus is more on the public interest in protecting his representatives' ability to correspond confidentially with government departments. In the

Commissioner's opinion it is in the public interest that members of the Heir to the Throne's Household can correspond confidentially with government departments in order to ensure the efficient and effective interaction between the government of the day and a key part of The Royal Household.

137. Nevertheless, the Commissioner has to remember that disclosure of such information would require a strong set of public interest arguments and disclosure would have to be justified by the content of the withheld information itself not simply on the basis of generic or abstract public interest arguments.

138. The Commissioner has reviewed the content of the relevant correspondence carefully and he has reached the conclusion that despite the weight of the public interest arguments in favour of disclosure, the content does not present a sufficiently strong reason or reasons for this correspondence to be disclosed. Consequently, the Commissioner has concluded that there would not be a public interest defence if the correspondence that falls within the scope of section 41 was disclosed.

Section 37(1)(a) – communications with the Royal Family and Royal Household

139. For the information which the Commissioner does not believe falls within the scope of section 41(1)(a), he has considered whether such information is exempt from disclosure by virtue of section 37(1)(a).

140. This section states that:

'37 – (1) 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'.

141. In line with his approach to the term 'relates to' when it appears in other sections of the Act (for example section 35), the Commissioner interprets this term broadly and thus the exemption contained at section 37(1)(a) provides an exemption for information which 'relates to' communications with the Royal Family or with the Royal Household rather than simply communications with such parties.

142. Therefore, this exemption has the potential to cover draft letters, memorandums or references to the existence of meetings with the Royal Family or Royal Household irrespective of whether such

communications have in fact been sent or received or indeed whether such meetings have in fact occurred.

143. However, information must still constitute, or relate to, a 'communication' to fall within the exemption. So, for example an internal note held by a government department that simply references the Royal Family or Royal Household will not necessarily fall within this definition. It must be evident that the information is intended for communication, or has been communicated, or that it references some other communication falling within the definition.

144. Furthermore, the Commissioner is aware that many members of the Royal Family act as patrons for a wide range of charities. If correspondence withheld by a public authority relates to those charities **and** is either from a member of the Royal Family or the Royal Household then it will fall within the scope of section 37(1)(a). However correspondence simply between one of the charities which enjoys the patronage of a member of the Royal Family and a public authority will not fall within the exemption, for example letters between Companies House and the charity offices regarding the accounts because it does not relate to a communication with a member of the Royal Family or the Royal Household.

145. The Commissioner has reviewed the remaining withheld information and he is satisfied that it falls within the broad ambit of section 37(1)(a) and thus is exempt from disclosure.

Public interest test

146. Section 37 is a qualified exemption and is therefore subject to the public interest test set out in section 2(2)(b) of the Act, i.e. whether in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Under the public interest test under section 2 of the Act the presumption is in favour of disclosure so if the arguments on both sides are equally weighted the Act requires disclosure of the information.

147. The FSA has provided the Commissioner with detailed arguments to support its position that the public interest in relation section 37(1)(a) favours maintaining the exemption. The FSA noted how these arguments overlap and buttress the arguments in support of the application of section 41 of the Act. The Commissioner has set out below what these arguments are. Once again the Commissioner notes that the arguments advanced by the FSA

focus solely on communications sent to or from The Prince of Wales rather than correspondence exchanged with His Royal Highness' representatives or internal documentation. The Commissioner has gone on to comment on the public interest arguments in favour of disclosure before setting out his position on where the balance of the public interest lies firstly for correspondence exchanged with The Prince of Wales, then secondly for correspondence exchanged with representatives of His Royal Highness and finally for internal documentation held by the FSA.

Public interest arguments in favour of maintaining the exemption

148. The FSA argued that the prime reason why the exemption should be maintained is in order to ensure that the confidentiality essential to the two conventions discussed above is not undermined. The FSA explained that it was strongly in the public interest that these conventions were not undermined as to do so would result in The Prince of Wales, who in due course would become Monarch, losing his political neutrality. Preserving the political neutrality of the Royal Family was essential to ensuring the stability of the constitutional Monarchy (for the reasons set out in relation to section 41 above), an outcome which was clearly in the public interest.

149. Furthermore the FSA argued that disclosure of the information could lead to a chilling effect in respect of The Prince of Wales, and those he corresponds with, altering the manner in which they communicate, for example by comments no longer being recorded or the nature in the which the comments are recorded being of a less free and frank nature. Such an effect would not be in the public interest because it would result in The Prince of Wales being less prepared for the business of government when he is Monarch and furthermore might undermine His Royal Highness' ability to carry out his role as a Privy Councillor, or as a Counsellor of State and any duties he may be called upon to undertake in line with the Regency Act 1937.

150. The FSA has argued that disclosure of this information may also have a wider chilling effect because it could deter other private individuals from contacting the government if they felt their correspondence would be disclosed under the Act. The FSA has argued that it is in the public interest that anyone should feel free to correspond with members of the government on any subject matter and that such an input has been a valuable source of information about the public's view on many matters. Consequently, a valuable channel of communication of between government and governed could break down to great public

detriment. Not only would the government lose access to otherwise unreachable ideas, citizens deprived of this long-established channel for expressing opinions to our leaders could come to feel alienated from government.

151. The FSA also argued that given the broad scope of section 37(1)(a), the public interest extended to protecting the privacy and the dignity of the Royal Family. It would not be in the public interest if disclosure of the withheld information infringed this privacy.

Public interest arguments in favour of disclosing the requested information

152. The Commissioner believes that the public interest arguments in favour of disclosing this information mirror those set out above under the consideration of section 41 and thus he has not repeated them here.

Balance of the public interest arguments for communications with The Prince of Wales

153. In the Commissioner's opinion given the broad reading of the term 'relates to' the subject matter of information which can fall within the scope of section 37(1)(a) can be very broad because communications, and information relating to such communications, could potentially cover a huge variety of different issues. Therefore establishing what the inherent public interest is in maintaining the exemption contained at section 37(1)(a) is more difficult than identifying the public interest inherent in a more narrowly defined exemption, for example section 42, which clearly provides a protection for legally privileged information.

154. The Commissioner believes that the following four public interest factors can be said to be inherent in maintaining the exemption and relevant to the correspondence exchanged with The Prince of Wales:

- Protecting the ability of the Sovereign to exercise her right to consult, to encourage and to warn her Government and to preserve her position of political neutrality;
- Protecting the ability of the Heir to the Throne to be instructed in the business of government in preparation for when he is King and in connection with existing constitutional duties, whilst preserving his own position of political neutrality and that of the Sovereign;

- Preserving the political neutrality of the Royal Family and particularly the Sovereign and the Heir to the Throne to ensure the stability of the constitutional Monarchy; and
- Protecting the privacy and dignity of the Royal Family.

155. As noted above in his analysis of the application of section 41, the Commissioner believes that the scope of the constitutional convention in respect of the Heir to the Throne is relatively narrow. That is to say it will only cover correspondence in which The Prince of Wales is in fact being educated in the ways and workings of government; it cannot be interpreted so widely as to encompass **all** of The Prince of Wales' communications with the government, i.e. it does not cover correspondence in which His Royal Highness maybe discussing his charitable work or indeed information of particularly personal nature (this is not to say of course that the withheld information in this case includes examples of either class of information).

156. However, where the information does fall within the Commissioner's definition of this convention, he accepts that there is a significant and weighty public interest in preserving the operation of this convention, i.e. it would not be in the public interest that the operation of the established confidential convention would be undermined. This is particularly so given that the convention is designed to protect communications at the heart of government, i.e. the Heir to the Throne and government Ministers. The significant weight which protecting the convention attracts can be seen correctly seen as akin to the strong weight applied to maintaining the exemption in contained at section 42 as it will always be strongly in the public interest to protect legal professional privilege.

157. The Commissioner also accepts that it is logical to argue that disclosure of the information covered by the convention could undermine The Prince of Wales' political neutrality for the reasons advanced by the FSA. 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.

158. 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. As noted above, the Commissioner accepts that it is inherent in the exemption contained at section 37(1)(a) that it is in the public interest for the political neutrality of all members of the Royal Family to be preserved.

159. Turning to the chilling effect arguments, as the FSA correctly suggests, such arguments are directly concerned with the loss of frankness and candour in debate and advice which would flow from the disclosure of information. Such arguments can encompass a number of related scenarios:

- Disclosing information about a given policy or decision making process, whilst that particular process is ongoing, will be likely to affect the frankness and candour with which relevant parties will make future contributions to that policy/decision making;
- The idea that disclosing information about a given policy or decision making process, whilst that process is ongoing, will be likely to affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates and decision making processes; and
- Finally an even broader scenario where disclosing information relating to the formulation and development of a given policy or decision making process (even after the process is complete), will be likely to affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates and decision making processes.

160. In the Commissioner's opinion all three scenarios are potentially relevant here. Some of the withheld information can be seen to relate to discussions on issues where the policy debate or decision making can still be seen as 'live', e.g. where a government position has yet to finalised and some of the information can be said to relate to decisions which have been taken.

161. With regard to attributing weight to the argument that disclosure of the withheld information would have a chilling effect on the way in which The Prince of Wales and/or government Ministers would correspond, the Commissioner believes that it is difficult to make an assessment of such an argument given the unique nature of this relationship and thus the lack of any clear

precedents, e.g. previous disclosures under the Act of similar information.

162. However, the Commissioner is aware of the authorised biography of The Prince of Wales by Jonathan Dimbleby which was published in 1994.[8] 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'.

163. Therefore, it would clearly be incorrect to argue that details of Prince of Wales' communications with government have **never** been placed in the public domain. To take but two examples from *The Prince of Wales: A Biography,* at page 582 Dimbleby quotes from a letter sent by His Royal Highness in 1985 to the then Prime Minister Margaret Thatcher, in addition to quoting from a draft section of the letter which did not make the final version. 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 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 FSA that the inclusion of details of The Prince of Wales' correspondence in this book has resulted in any sort of the chilling effect.

164. 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

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

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.

165. Furthermore the Commissioner believes that an inherent part of the convention is the ability of both the Heir to the Throne and government ministers to be free and frank when discussing matters of government business. This is to ensure that the Heir to the Throne is instructed in the business of government in the most effective and efficient way possible. In the Commissioner's opinion, disclosure of information falling within the scope of convention would lead The Prince of Wales, and possibly the government minister with whom he corresponds, to feel constrained or more reluctant to take part in the process of being educated about the business of government. Therefore, given the protection which the Commissioner believes should be provided to the convention itself, it follows that notable weight should be given to the argument that disclosure of information which falls within the scope of the convention would result in a chilling effect.

166. With regard to attributing weight to 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 chilling effect 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.

167. Again, as with the concept of political neutrality, 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 to 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.

168. However, the Commissioner is not prepared to accept that disclosure of this information would have a chilling effect on the way in which other individuals contact the government. In the Commissioner's opinion it is not logical to suggest that because some of The Prince of Wales' correspondence with government is disclosed, private individuals would fear that their correspondence would also be disclosed. Clearly, if The Prince of Wales' correspondence were disclosed in response to a request submitted under the Act, despite the strong protection afforded to it by sections 41 and 37 (and by implication the effect of the constitutional convention and Article 8 ECHR) it would be obvious that disclosure would be necessary to satisfy a significant and distinct public interest. This interest would almost inevitably be related to the position that His Royal Highness holds rather than simply the content of the information itself. Consequently, the Commissioner believes that the public would be perfectly capable of distinguishing between the government disclosing specific pieces of correspondence with The Prince of Wales (and moreover only disclosing such information after a request under the Act and/or in response to a section 50 Notice) and the potential disclosure of information which they may send to the government in their role as private citizens. Without any evidence to the contrary, and bearing in mind the comments of the Tribunal referenced above, the Commissioner believes that such an argument does not attract any particular weight.

169. With regard to the final argument, i.e. the privacy considerations contained within section 37, the Commissioner believes that these should not be dismissed lightly. 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.

170. The Commissioner believes that his position in relation to the weight that should be attributed to the public interest arguments in favour of disclosing this information are clearly set out in relation to the comments above in section 41.

171. Again, 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 this case for the information which falls within the scope of the convention, the Commissioner believes that the public interest in maintaining the exemption is very strong because of the weight that should be attributed to maintaining the convention – i.e. a confidential space in which the Heir to the Throne can communicate with Ministers - and the concepts which underpin it, i.e. political neutrality and confidentiality, along with the weight that should be given to the chilling effect arguments for such correspondence. Even when taken together the Commissioner does not feel that the public interest arguments in favour of disclosing the particular information which falls within the scope of this request overrides this weighty public interest in maintaining the exemption.

172. In relation to any of the information which may fall outside the Commissioner's definition of the convention, the Commissioner believes that the public interest is more finely balanced because the argument in favour of maintaining a constitutional convention attracts far less weight. (It should not be inferred that such information is indeed contained within the scope of this request.) Therefore, it would certainly be possible (and easier) to envisage a scenario where disclosure of the correspondence between The Prince of Wales and government Ministers would be in the public interest. However, as noted above, just because information does not fall within the scope of the convention this does not mean that its disclosure would not undermine two key concepts inherent in it. political neutrality and the potential to have a chilling effect on future correspondence. Moreover, having once again considered the content of the withheld information in this case the Commissioner believes that the public interest favours maintaining the exemption.

Balance of public interest arguments for correspondence with representatives of The Prince of Wales and the FSA

173. Given the different nature of this correspondence to the correspondence exchanged with The Prince of Wales the Commissioner believes that the weight that should be attributed to the various public interest arguments differs slightly.

174. In the Commissioner's opinion disclosure of this correspondence would be unlikely to have any particular chilling effect on the way in which The Prince of Wales exchanges correspondence with public authorities in the future. Similarly the Commissioner does not believe that disclosure of this correspondence would directly

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affect the confidentiality of correspondence which the Heir to the Throne exchanges with Ministers which would within the scope of the convention.

175. However, the Commissioner believes that the arguments surrounding political neutrality and the privacy and dignity of The Royal Family are still relevant. This is because, as discussed above, the correspondence held by the FSA which has been exchanged with the representatives of The Prince of Wales includes references to His Royal Highness' views and opinions; in many cases the correspondence sent by representatives were clearly sent on behalf of The Prince of Wales.

176. Furthermore, the Commissioner believes that the public interest arguments identified above in favour of disclosure, whilst being central to any public interest balance, should only attract weight to the extent that disclosure of the withheld information itself would serve those interests. Having considered the content of the remaining withheld information the Commissioner does not believe that its disclosure would significantly meet the public interest arguments identified above and in any case not sufficiently so to outweigh the public interest in maintaining the exemption given the weight that should attributed to political neutrality and privacy and dignity of the Heir to The Throne.

Balance of public interest arguments for internal documentation

177. The Commissioner believes that the internal documentation requested by the complainant falls within the scope of the exemption contained at section 37(1)(a) because it relates to either communications between the FSA and The Prince of Wales and/or communications between the FSA and representatives of His Royal Highness. Therefore as this internal documentation reflects the content of the correspondence itself the Commissioner believes that the balance of the public interest favours maintaining the exemption contained at section 37(1)(a) for the reasons set out above.

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

178. The FSA 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 equivalent exceptions in the EIR. The Commissioner considers the equivalent exceptions in this case to be regulations 12(5)(f) and 13(1).

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

180. 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;'

181. 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.[9]

[9] 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)

182. Furthermore, the wording of the exception at regulation 12(5)(f) makes it clear that the adverse effect has to be to the person who provided the information rather than the public authority that holds the information.

183. As with section 41, correspondence sent to the public authority clearly falls within the scope of regulation 12(5)(f) because it was information 'provided' to it by a third party, i.e. The Prince of Wales or his representatives. Again, as with section 41, the Commissioner also accepts that correspondence which the public authority sends to The Prince of Wales or his representatives and information within internal documentation can potentially fall within the scope of the exception at regulation 12(5)(f) if it sufficiently closely replicates the content of the information originally provided to it by His Royal Highness.

184. The Commissioner has carefully considered the environmental information which falls within the scope of this request and he is satisfied that it is contained within communications sent to the FSA by The Prince of Wales or his representatives and/or is contained within correspondence sent by the FSA to The Prince of Wales or his representatives is sufficiently focused on information originally provided to the FSA. The same logic also applies to internal communications which the Commissioner considers to be environmental in that the Commissioner has found some of the information to be sufficiently focused on the information originally provided by The Prince of Wales or his representatives to the FSA.

185. 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 neither The Prince of Wales nor his representatives were under any legal obligation to supply the information; although it is an established tradition, and one protected by the convention discussed above, that the Heir to The Throne will communicate with government officials, 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 neither The Prince of Wales nor his representatives have consented to disclosure of the withheld information.

186. The nature of the adverse effect which the FSA has argued would occur if The Prince of Wales' correspondence was disclosed

effectively mirrors that discussed above in relation to the application of sections 41 and 37. In essence, if the information were disclosed this would adversely harm The Prince of Wales because not only would it undermine his political neutrality but it would also have a chilling effect on the way in which he corresponds with government Ministers and thus impinge upon the established convention that he is able to confidentially correspond with government Ministers. Moreover, disclosure would impinge upon The Prince of Wales' privacy. For the reasons set about above the Commissioner accepts that disclosure of the correspondence with The Prince of Wales could potentially have these effects. As discussed above in relation to section 41, the correspondence exchanged by the FSA with representatives of The Prince of Wales also includes the views and opinions of His Royal Highness and this would also apply to internal documentation which include the views and opinions of The Prince of Wales.

187. Therefore the Commissioner accepts that if the relevant information in the correspondence with representatives of The Prince of Wales and the internal documents was disclosed, this could also potentially affect the Prince of Wales in the way that disclosure of his own correspondence would.

189. In relation to the likelihood of such effects 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 or other senior figures in government. Furthermore, it is clear that The Prince of Wales communicates with Ministers and others across government, rather than simply with one or two departments, thus the likelihood of the adverse effect occurring is increased.

190. The Commissioner therefore accepts that regulation 12(5)(f) is engaged for both correspondence exchanged with The Prince of Wales and for correspondence exchanged with representatives of His Royal Highness and the relevant information in the internal documents which sufficiently reflect his views. 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). This test is effectively the same as the test set out in section 2 of the Act and states that may only be withheld 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.

191. In the Commissioner's opinion, in this case the public interest arguments in favour of maintaining regulation 12(5)(f) are very similar to the public interest arguments in favour of maintaining section 37(1)(a). The public interest arguments in favour of disclosing the information are also very similar. Therefore the Commissioner does not indeed to set out in full his public interest considerations in respect of 12(5)(f). Rather he is satisfied that, for the reasons set out above, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exception contained at regulation 12(5)(f).

192. However, not all the information in the internal documents sufficiently reflects the views and opinions of The Prince of Wales. The information which does not reflect his views and opinions or the contents of his correspondence would not therefore have been provided by another person as is required by the exception. This information cannot therefore be exempt on the basis of regulation 12(5)(f).

Regulation 13(1)

193. The Commissioner has therefore considered whether the environmental information in the internal documents which did not engage sections 37(1)(a), 41, and regulation 12(5)(f) is exempt by virtue of regulation 13(1). This states that:

'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.'

194. The elements of regulation 13 relevant to this request are as follows:

'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'

195. Section 1(1) of the Data Protection Act 1998 (DPA) defines personal data as:

‘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 intention of the data controller or any other person in respect of the individual.’

196. The FSA has argued that the withheld information constitutes The Prince of Wales’ personal data because it is information which ‘relates to’ His Royal Highness.

197. The Commissioner has reviewed the remaining withheld information and accepts that it falls within the definition of personal data as defined by the DPA.

198. In light of the context in which the information was produced as well as the nature of the complainant’s request, the Commissioner is satisfied that the information relates to The Prince of Wales and therefore constitutes the personal data of His Royal Highness.

199. The FSA has also argued that disclosure of this information would breach the first data protection principle which states that:

1. Personal data must be processed fairly and lawfully; and
2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

200. The FSA has argued that disclosure would breach the first data protection principle for reasons which overlap and buttress the reasoning why the withheld information is exempt from disclosure on the basis of section 37(1)(a). Disclosure would be unfair because it would harm The Prince of Wales’ ability to carry out his public duties and detract from His Royal Highness’ political neutrality and the appearance of such neutrality.

201. In assessing whether disclosure of personal data would be unfair the Commissioner takes into account a range of factors including:

- The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
    - whether information of the nature requested is already in the public domain;
    - if so the source of such a disclosure; and
    - even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
  - what the public authority may have told them about what would happen to their personal data;
  - their general expectations of privacy, including the effect of Article 8 ECHR;
  - the nature or content of the information itself;
  - the circumstances in which the personal data was obtained;
  - particular circumstances of the case, e.g. established custom or practice within the public authority; and
  - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.

202. With regard to the reasonable expectations of The Prince of Wales, as discussed above in relation to section 41(1)(b), the Commissioner accepts that the correspondence which is the focus of this case was clearly exchanged on the basis that all parties believed that it should be kept private. Both the operation of the convention to educate the Heir to the Throne and the general way in which correspondence between the Royal Family and government has been historically handled give rise to this expectation. Given the respect and recognition that the Commissioner has accepted should be attributed to this constitutional convention, he believes that the expectations of the Prince of Wales when shaped by the convention are ones that are objectively reasonable. That is to say, the FSA has not created an unrealistic or unreasonable expectation under which The Prince of Wales may assume his personal data will not be disclosed.

203. With regard to the consequences of disclosure, the Commissioner accepts that disclosure of the correspondence has the potential to harm The Prince of Wales in a more than one way. It could impact on The Prince of Wales's political neutrality and thus his ability to carry out his public duties both as Heir to the Throne

and when he becomes Monarch. Furthermore, it could harm The Prince of Wales' privacy and dignity as protected by Article 8 ECHR.

204. Consequently, in light of the weighty expectations and the likely impact on The Prince of Wales if the correspondence was disclosed, the Commissioner accepts that such a disclosure would be unfair and therefore the Commissioner is satisfied that the FSA can rely on regulation 13(1) to withhold the remainder of the information contained in the internal documents.

The requests for a list of approaches and number of approaches (Parts 1 – 5 of the request)

205. In addition to asking for copies of correspondence and internal documentation the complainant also sought a list of approaches, along with the number of approaches, made by The Prince of Wales or other individuals representing His Royal Highness to the FSA. The complainant specified that such a list should include 'details of the nature of the approach and the issues involved'.

206. The FSA has argued that disclosure of such a list, and by implication the number of approaches, is exempt from disclosure on the basis of sections 37(1)(a), 40(2) and 41(1).

207. In relation to section 41, the FSA argued that disclosure of the details of the approaches made to FSA 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 FSA referred to the arguments set out above in relation to the application of section 41(1)(b) to copies of the letters sent by The Prince of Wales to the FSA.

208. In relation to the application of section 37(1)(a), the FSA 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 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. Again the FSA noted that the reasons for the application of section 41(1) overlapped and supported the application of section 37(1)(a).

209. The FSA 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 FSA 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.* This 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 FSA 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 FSA argued that same considerations applied in the context of this case.

210. In addition to this point the FSA 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 position, and in particular his political neutrality. (The Commissioner does not consider it appropriate to include details of this in the main body of the Notice).

211. Having considered the arguments advanced by the FSA very carefully the Commissioner has concluded that a list of approaches, along with the number of approaches made by The Prince of Wales and/or His Royal Highness' representatives 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 of approaches and/or details of the number of such approaches would result in less information being placed into the

public domain, the Commissioner still believes that this would constitute an infringement into The Prince of Wales' right of privacy under Article 8 ECHR. For the reasons set out above the Commissioner does not believe that there is a sufficient public interest defence to warrant disclosure of this information.

212. The Commissioner is conscious of the fact that disclosure of the number of approaches in this case could be used, along with disclosure of similar information in the future, to build up a relatively complete picture of which departments The Prince of Wales corresponds with most frequently. Furthermore the nature of the requests in this case are relatively specific; they do not simply seek the overall number of approaches between The Prince of Wales and his Household and the FSA. Rather the complainant has specifically requested the number of approaches made by The Prince of Wales to the certain areas/individuals with the FSA and similarly the number of approaches by representatives of The Prince of Wales to the certain areas/individuals with the FSA.

213. The Commissioner notes that with regard to the part of the schedule requested by the complainant which would include a brief description 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 the parts of such a schedule would be exempt from disclosure either on the basis of regulation 12(5)(f) or regulation 13(1) for the reasons set out above.

In light of the Commissioner's findings and decision above, he has not gone to consider the applicability or otherwise of the exemptions at sections 40(2), 35(1)(a), and 36(2)(b).

Procedural Requirements

214. Under section 17(1) a public authority is required to issue a refusal notice to an applicant within 20 working days.

215. The Commissioner therefore finds the FSA in breach of section 17(1) for issuing its refusal notice of 22 May 2006 outside of the statutory permitted 20 working days.

216. Section 17(1)(b) also requires a public authority to specify the exemption(s) it is relying on to withhold information in the refusal notice.

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217. The Commissioner therefore finds the public authority in breach of section 17(1)(b) for the late reliance on the exemption at section 41 of the Act.

218. Regulation 14(2) requires a public authority to issue a refusal notice within 20 working days.

219. The Commissioner finds the public authority in breach of regulation 14(2) for its late reliance on exceptions.

220. Under regulation 14(3), a public authority is required to issue a refusal notice which specifies amongst other things the exceptions relied on to withhold information.

221. The Commissioner also finds the public authority in breach of regulation 14(3) for failing to specify the exceptions it had relied on in withholding the disputed information.

The Decision

222. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act and the EIR:

223. The public authority correctly withheld all of the disputed information within the scope of the Act on the basis of the exemptions at sections 41 and 37(1)(a).

224. The public authority correctly withheld all of the disputed information within the scope of the EIR on the basis of the exceptions at regulations 12(5)(f) and 13

225. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act and the EIR :

226. The public authority breached sections 17(1) and 17(1)(b).

227. The public authority breached regulations 14(2) and 14(3).

Steps Required

228. The Commissioner requires no steps to be taken.

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Right of Appeal

229. 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:

Information Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
Arnhem House
31, Waterloo Way
LEICESTER
LE1 8DJ

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 sent.

Dated the 10th day of June 2010

Signed ………………………………………………….

Graham Smith
Deputy Commissioner

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

ico. Information Commissioner's Office

Annex – text of request

The complainant submitted the following request to the FSA on 22 February 2006:

1.....A list of all approaches made by HRH the Prince of Wales to the FSA. This should include the date the Prince contacted the agency (for whatever reason) as well as the nature of the matter under discussion. These approaches could have been made by the Prince in person, by email, by telephone or by post.

2....A list of approaches made by the representative or employees of HRH the Prince of Wales to the FSA. This should include the date the representatives/employees contacted the agency as well as details about the nature of the approach and the issues involved. These approaches could have been made in person, by email, by telephone or by post.

3......How many times has HRH the Prince of Wales contacted anyone in the employ of the FSA. Please provide details of these approaches, the dates they occurred and the issues concerned.

4....How many times have employees or representative acting on behalf of HRH the Prince of Wales contacted anyone in the employ of the FSA. Please provide details of these approaches, the dates they happened and the issues concerned

5.....How many times has HRH the Prince of Wales met with a senior member of staff from the FSA? Could you please provide details of these meetings, including the dates they took place, the venue they were held and the nature of the topics under discussion.

6....Please provide all internal documents held by the FSA which relate in any way whatsoever to approaches from the Prince of Wales and or employees or representatives acting on his behalf. These documents should include, among other things, all departmental minutes, memos, emails, telephone transcripts, letters and reports which touch upon this matter.

7.....Please provide all correspondence between the FSA and any outside organisation or individual which relates to approaches from HRH the Prince of Wales and or employees/representatives acting on his behalf.

Legal Annex

Freedom of Information Act 2000

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."

Section 17(2) states –

"Where–

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
(i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant t the request, or
(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of

section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, 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 authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Section 17(4) provides that -

"A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

Section 17(6) provides that –

"Subsection (5) does not apply where –

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request."

Section 17(7) provides that –

"A notice under section (1), (3) or (5) must –

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50."

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

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)."

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Environmental Information Regulations 2004

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

"the Act" means the Freedom of Information Act 2000(c);

"applicant", in relation to a request for environmental information, means the person who made the request;

"appropriate record authority", in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

"the Commissioner" means the Information Commissioner;

"the Directive" means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

"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 elements of the environment referred to in (b) and (c);

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(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(a) it does not hold that information when an applicant's request is received;

(b) the request for information is manifestly unreasonable;

(c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;

(d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or

(e) the request involves the disclosure of internal communications.

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 (6) For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

Regulation 12(7) For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

Regulation 12(8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

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 12(10) For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

Regulation 12(11) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.

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 –

(b) 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

(c) 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 13(3) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of the Act and, in all circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

Regulation 13(4) In determining whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

Regulation 13(5) For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that –

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

(b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of the Act.

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.

Regulation 14(3) The refusal shall specify the reasons not to disclose the information requested, including –

(a) any exception relied on under regulations 12(4), 12(5) or 13; and

(b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b)or, where these apply, regulations 13(2)(a)(ii) or 13(3).

Regulation 14(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

Regulation 14(5) The refusal shall inform the applicant –

(a) that he may make representations to the public authority under regulation 11; and

(b) of the enforcement and appeal provisions of the Act applied by regulation 18.