

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

### Decision Notice

**Date: 31 March 2010**

**Public Authority:** Commission for Architecture and the Built Environment  
**Address:** 1 Kemble Street  
London  
WC2B 4AN

### Summary

---

The complainant asked for information relating to contact between the public authority and The Prince of Wales and His Royal Highness' representatives. The public authority refused to disclose the information requested by the complainant citing sections 37(1)(a), 40(2) and 41(1) of the Act.

The Commissioner has considered this case and has concluded that the complainant's request clearly includes copies of correspondence between the public authority and The Prince of Wales and his representatives – a point which was in dispute. However, in his request for an internal review the complainant clarified that he was not seeking the actual correspondence between the public authority and The Prince of Wales. Therefore the Commissioner has not considered whether copies of this correspondence should be disclosed.

During the course of the Commissioner's investigation, the public authority informed him that it was willing to disclose to the complainant some of the information it had withheld. The Commissioner therefore requires this information to be disclosed to the complainant. The Commissioner has concluded that the remaining information is exempt from disclosure on the basis of section 41(1) of the Act. Where such information constitutes environmental information as defined by the Environmental Information Regulations, the Commissioner is satisfied that such information is exempt from disclosure on the basis of the exception contained at regulation 12(5)(f).

## 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 Commission for Architecture and the Built Environment ('CABE') on 22 February 2006. This email contained a number of requests which focused on correspondence which CABE 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. CABE contacted the complainant on 22 March 2006 and explained that it believed that the exemption set out in section 37 of the Act may apply to the request. However, CABE explained that this was a qualified exemption and it needed to extend the time it required to consider the public interest test.
5. CABE contacted the complainant again on 21 April 2006 and explained that it neither confirms nor denies that it holds information relevant to the request by virtue of section 37(2) of the Act. It further explained that the balance of the public interest favours the maintenance of the exemption and set out the factors it had considered in reaching this decision.
6. On 21 April 2006 the complainant asked for an internal review of this decision to be conducted. In his request for an internal review, the complainant stated: "I would ask you to note that my request does not ask for the Prince's correspondence with CABE. Rather it seeks basic information about the nature and number of contacts between the Prince and CABE".

7. CABE informed the complainant of the outcome of the review on 10 August 2006. The review upheld the decision not to confirm or deny whether any information was held.
8. Following the intervention of the Commissioner (details of which are given below) CABE contacted the complainant again on 6 March 2009. In this communication CABE confirmed that it had re-considered the balance of the public interest test and it believed that the public interest now favoured confirming that it did hold information falling within the scope of the requests. However, CABE explained that it believed that all of this information was exempt from disclosure on the basis of section 37(1)(a) and some of the information was also exempt from disclosure on the basis of section 41(1). CABE also confirmed that it did not hold a list or schedule of correspondence falling within the scope of the requests and although it agreed that it could create one, it believed the contents would also be exempt from disclosure.

## **The Investigation**

---

### **Scope of the case**

9. The complainant contacted the Commissioner on 15 August 2006 and asked him to consider CABE's refusal to provide him with the information that he had requested.
10. For the reasons set out below, the Commissioner is of the view that if CABE holds any information which constitutes correspondence between The Prince of Wales and CABE, then this information falls within the scope of the complainant's request. However, given the complainant's statement to CABE in his request for an internal review (as set out above), the Commissioner is of the view that the complainant is not disputing the withholding of any of the actual correspondence between itself and The Prince of Wales. The Commissioner has therefore not considered in this case whether any of this specific class of information should be disclosed.
11. In its letter to the Commissioner of 23 March 2010, CABE informed the Commissioner that it was now prepared to release some information contained within the scope of parts five, six and seven of the request.
12. The exact detail of this information, as set out in CABE's letter of 23 March 2010, is included in the confidential annex attached to this notice which will be sent to CABE only. This is so that there can be no

doubt as to the information which the Commissioner now expects CAGE to disclose to the complainant.

13. In respect of each aspect of the information it is now prepared to disclose to the complainant, the Commissioner understands that CAGE was either withdrawing its reliance on the aforementioned exemptions or it considers the information to be outside the scope of the request but is willing to disclose it anyway. Given that CAGE is prepared to disclose this information the Commissioner has not proceeded to consider whether it falls within the scope of the request or was correctly withheld at the time of the request.
14. The Commissioner has therefore restricted his decision in this notice to the information which CAGE continues to withhold, but excluding that which the complainant has advised he is not seeking.

### **Chronology**

15. Although the complainant originally contacted the Commissioner in June 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 CAGE in relation to this complaint. The Commissioner asked CAGE to confirm to him whether it held any information falling within the scope of the requests, and if so, to provide him with a description of this information.
16. 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.)
17. On 18 July 2007 CAGE provided the Commissioner with a response to his letter of 19 February 2007. In this letter CAGE confirmed to the Commissioner that it held information falling within the scope of the requests and provided the Commissioner with a list and description of the correspondence relevant to the requests. However, CAGE maintained its position that in dealing with the complainant's requests it was entitled to rely on section 37(2), and also section 41(2) to refuse to confirm or deny whether it held such information. Regardless of this position, CAGE noted that part of the requests sought a list of

approaches made to it but the fulfilment of such requests would involve the creation of new information, i.e. an actual list, which under the Act it believed it was not required to do.

18. 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.
19. 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.
20. The Commissioner received a response from the Royal Household in November 2008.
21. 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 complaints.
22. On 27 January 2009 the Commissioner contacted CAGE to explain that it was his understanding that following recent discussions CAGE was no longer refusing to confirm or deny whether it held information falling within the scope of these requests. The Commissioner therefore asked CAGE to contact the complainant and confirm to him that it did in fact hold information which fell within the scope of his requests. The Commissioner also asked CAGE to provide his office with copies of the information which fell within the scope of these requests.
23. As noted above, on 6 March 2009 CAGE contacted the complainant and confirmed that it held information but considered it to be exempt from disclosure on the basis of the exemptions contained at sections 37(1)(a) and 41(1). CAGE also confirmed that its position was that it did not hold a list or schedule of correspondence falling within the scope of the requests and although it could produce one it would be exempt from disclosure.
24. Also on 6 March 2009 CAGE provided the Commissioner with copies of the information it was seeking to withhold.
25. The Commissioner contacted CAGE again on 27 July 2009 in order to clarify a number of issues in relation to its position on this case.
26. CAGE sent the Commissioner a response on 23 March 2010. CAGE informed the Commissioner that it was prepared to disclose to the

complainant the information specified in the confidential annex to this notice, as referred to above. In respect of the remaining information, CABE provided further details about its application of sections 37(1)(a) and 41(1), and also explained that section 40(2) applies.

## Findings of fact

27. As the information in the Chronology explains the Commissioner exchanged communications about this complaint both with the public authority to which the request was submitted and with the Cabinet Office. In some instances the Cabinet Office has provided the Commissioner with submissions on the application of a particular exemption under the Act or exception under the EIR 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 CABE it may be the case that it was in fact provided by the Cabinet Office on its behalf.

## Analysis

---

### Substantive Procedural Matters

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, the requests submitted by the complainant can be separated into three types:
- The requests numbered 1 and 2 seek lists of approaches made by The Prince of Wales or his representatives to CABE and details of the nature of such approaches, e.g. the issues discussed in any approach;
  - The requests numbered 3 and 4 seek the number of times The Prince of Wales or his representatives contacted CABE, and details of these approaches;
  - Request 5 seeks the number of times The Prince of Wales met with a senior member of staff from CABE and details of these meetings;
  - Request 6 sought various internal documents; and

- Request 7 sought pieces of correspondence.
30. In relation to requests 1 to 5 the Commissioner notes that CAGE is of the view 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. However, CAGE has also argued that if it were to create this information it would be exempt under sections 37(1)(a) and 41(1).
31. For clarity the Commissioner wishes to confirm that his 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 CAGE holds correspondence falling within the scope of request 7, it is in a position to provide the complainant with a list of these approaches, including the nature of any approach, and confirm the number of such approaches, subject of course to the application of any exemptions.
32. As noted, request 7 seeks correspondence held by CAGE. The Commissioner notes that the complainant has phrased his request in a particular way, namely 'Please provide all correspondence between CAGE and any outside organisation or individual...**which relates** [emphasis added] to approaches from the HRH The Prince of Wales and or employees/representatives acting on his behalf'.
33. The Commissioner notes that in recent submissions he has received from CAGE, CAGE indicated that it did not believe that correspondence sent to it by The Prince of Wales or his representatives actually fell within the scope of any of the complainant's requests, including request 7.
34. The Commissioner wishes to clarify that in his opinion request 7, 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 this request includes correspondence between CAGE 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 on an objective reading that any request which seeks information

which relates to particular correspondence also covers the correspondence itself.

35. In relation to request 6, the Commissioner notes that this sought internal documents held by CABE which in any way related to approaches from The Prince of Wales or his representatives. CABE has informed the Commissioner that it does hold information falling within this scope of the request and has detailed what that is. However, apart from the information which CABE is now prepared to disclose, the Commissioner is satisfied that the information detailed by CABE does not in fact fall within the scope of the request.
36. In summary the Commissioner believes that CABE holds information relating to each part of the complainant's seven requests. However, in relation to request 7, the Commissioner has not made a decision about the actual correspondence between CABE and The Prince of Wales or the information falling within other parts of the request which CABE has now agreed to disclose.
37. Having established what information falls within the scope of the request and having identified the information held which CABE is prepared to disclose, the Commissioner has proceeded to consider whether the information that would fulfil requests 1 to 4 is exempt from disclosure.
38. However, before considering whether the information that would fulfil requests 1 to 4 is exempt from disclosure, the Commissioner must first assess whether the correspondence itself between CABE and The Prince of Wales and/or his representative is exempt from disclosure. Although the complainant is not seeking the correspondence itself, as previously explained the Commissioner is of the view that the information falling within requests 1 to 4 is contained within this correspondence. Therefore determining whether the correspondence is exempt will provide the Commissioner with a basis on which to reach a decision on requests 1 to 4.

### **Is any of the requested information 'environmental'?**

39. Before considering whether the correspondence between CABE and The Prince of Wales and/or his representatives is exempt from disclosure the Commissioner has to consider whether such information constitutes environmental information.
40. 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)'

41. 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.
42. 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 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).

43. 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 the 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.'

44. Moreover in reaching this conclusion the Tribunal appeared to reject BERR's arguments that there must be a sufficiently close connection between the information and a probable impact on the environment before it can be said that the information is 'environmental information'.
45. 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.'
46. 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.'
47. The Commissioner has reviewed the aforementioned correspondence and has concluded that much of this information constitutes environmental information because it falls within the definition in regulation 2(1) of the EIR.
48. In the Commissioner's opinion the key to determining whether information is environmental information for the purposes of the EIR is whether that information can be said to be 'information... on' one of the elements, factors etc listed in 2(1) – remembering of course the broad interpretation of this phrase. In other words, it is the content of information that determines whether it is environmental information and not the format in which that information is recorded or expressed. For example the Commissioner accepts that a comment in which a

particular individual stated 'that climate change was irreversible' will not constitute environmental information because it cannot be sufficiently linked back to the definition in regulation 2(1). However, a comment attributed to an individual which read 'that climate change was irreversible but I believe that policy X can slow down the effects of change' could be environmental information if policy X could be linked to the definition in regulation 2(1).

## Exemptions

49. 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.
50. The Commissioner has considered the non-environmental information first, albeit that there is inevitably some cross over between the reasoning why the exemptions in the Act and the exceptions in the EIR may apply to the withheld information.

## Section 41 – information provided in confidence

51. The Commissioner has been provided with detailed submissions to support CABE's position that any correspondence exchanged with The Prince of Wales is exempt from disclosure on the basis of section 41 of the Act. (This is without prejudice to CABE's position that any such correspondence does not in fact fall within the scope of any of the complainant's requests.)
52. 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.'
53. 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)

54. CABE has argued that any correspondence sent to it by The Prince of Wales 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 CABE from representatives of The Prince of Wales, meets the requirements of section 41(1)(a).
55. However, CABE 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 CABE 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.<sup>1</sup> On this basis CABE has argued that correspondence to The Prince of Wales from CABE 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.
56. 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.<sup>2</sup> However, the Commissioner does not agree with CABE'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.
57. 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 referenced by CABE is directly relevant to the engagement of section 41(1)(a). This is because the way in which section 41 of the Act is 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

---

<sup>1</sup> CABE 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.

<sup>2</sup> The Tribunal confirmed that such an approach was correct in *DBERR v Information Commissioner and FoE* (EA/2007/0072) – see para 78.

information from a third party. In effect section 41 of the Act 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 of the Act.

58. Secondly, the Commissioner believes that the approach suggested by CAGE 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 CAGE 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 of the Act.
59. Therefore although the Commissioner accepts that it is possible for correspondence which was created by CAGE 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.
60. In the Commissioner's opinion there has to be a significant degree of similarity to the information which CAGE 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 CAGE. 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, raised on a particular topic.
61. Having looked at the content of the non-environmental information falling within the scope of request 7 that CAGE sent to The Prince of Wales and/or his representatives, the Commissioner accepts that **all** of this information reflects the views of The Prince of Wales and/or his representatives sufficiently closely that it meets the requirements of section 41(1)(a).

#### Section 41(1)(b)

#### **CAGE's position on an actionable breach of confidence**

62. CAGE has provided the Commissioner with detailed submissions to support its position that the disclosure of any 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 then gone on to explain his view as to whether they apply to the information which has been withheld in this case.

63. 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 the disclosure of 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).
64. This judgment suggested that the following three limbed test should be considered in order to determine if 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.
65. In submissions to the Commissioner CAGE explained why the *Coco* test no longer represented the law in respect of information such as The Prince of Wales' correspondence sought by the complainant in this case. These submissions are summarised below.
66. CAGE 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. CAGE 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*.<sup>3</sup> CAGE 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.

---

<sup>3</sup> Full citation: *HRH The Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 (Ch), [2006] EWCA Civ 1776 [2008] Ch 57.

67. In support of this approach CABE 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.
68. CABE 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.<sup>4</sup>
69. CABE drew the Commissioner's attention to a number of sections of Eady J's judgment, including:

'[28] It is clear, for example, that the law of confidence is not confined to the principles governing the circumstances in which an equitable duty of confidence will arise; nor to the specialist field of commercial secrets. An obligation of confidence can arise by reason of an agreement, express or implied, and presumably also by the imposition of a statutory duty. Nowadays, in addition, it is recognized that there is a distinction to be drawn between "old-fashioned breach of confidence" and the tort law now characterized as "misuse of private information": see e.g. per Lord Nicholls in *Campbell v MGN Ltd* [2004] 2 AC 457 at [14] and the discussion by Buxton LJ in *McKennitt v Ash* [2008] QB 73, at 80 et seq., under the heading "A taxonomy of the law of privacy and confidence".

[29] [Counsel for the requester] described *Coco v Clark* as being "then and now the leading authority on breach of confidence". But there would seem to be traps for the unwary in placing unqualified reliance upon the case without paying due regard to what Lord Nicholls had to say about it in *Campbell v MGN Ltd* in the section of his speech entitled "Breach of confidence: misuse of private information".

70. And:

'[32] It is thus important to bear in mind, for the present case, the broad principle, stated by Buxton LJ in *McKennitt* at [11], that "...in order to find the rule of the English law of breach of

---

<sup>4</sup> *The Home Office v British Union for the Abolition of Vivisection and Information Commissioner* [2008] EWCH 892 (QB) 25 April 2008.

confidence we now have to look in the jurisprudence of articles 8 and 10." The Tribunal did not address these developments at all and thus proceeded on the basis of an incomplete understanding of the present law.'

71. CABE also noted the fact that Eady J doubted that the first bullet point of the *Coco* test was still applicable to the modern of law of confidence:

'[33]It is also beyond question that some information, especially in the context of personal matters, may be treated as private, even though it is quite trivial in nature and not such as to have about it any inherent "quality of confidence": see e.g. *Browne v Associated Newspapers Ltd* [2008] QB 103, 113-114...*McKennitt v Ash*...and the remarks of Lord Nicholls in *Campbell v MGN Ltd*...Thus, an obligation of confidentiality may sometimes arise in respect of such information merely because it is imparted as being confidential, either expressly or impliedly. Also, the law may imply an obligation on the basis that a communication has taken place in the context of an established relationship, which would itself give rise to such a duty.'

72. Indeed CABE highlighted the fact that in his conclusion Eady J suggested that the only limb of the *Coco* test that may relevant was the second:

'[35] Another way of putting the point would be to say that the law will afford protection, sometimes, where only the second of the *Coco v Clark* tests is satisfied: that is to say, the right to protection arises because it is clear to those concerned that the circumstances in which the information was imparted themselves give rise to a reasonable expectation of privacy. I would prefer, however, not to be tied to *Coco v Clark* where it simply has no application. (It was not even cited in the Court of Appeal in *McKennitt*, *Browne* or *HRH The Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57).

[36]...in the light of the modern authorities there is no reason to suppose that even an "actionable" breach of confidence, where sued upon, must inevitably be founded on the formulation of Sir Robert Megarry.'

73. In light of this, CABE explained that the test of confidence not only included the traditional breach as described in *Coco v Clark* but also claims to prevent the misuse of information entitled to protection under Article 8 ECHR.

74. 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.'

75. CABE 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. CABE 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 CABE 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...'

76. And:

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

not even advert to the possibility that Article 8 might be inapplicable on the ground that the correspondence was of a professional nature.<sup>5</sup>

77. Consequently, CAGE suggested that a number of different circumstances may arise in which a breach of confidence could exist:
- Some claims for the misuse of private information will cover information which has the quality of confidence, and which was imparted in circumstances inconsistent with a pre-existing relationship of confidence, but which is not entitled to protection under Article 8, e.g. trade secrets. Such claims would fall within the ambit of the traditional test set out in *Coco v Clark*.
  - Some claims will cover private information which is disclosed in breach of Article 8 ECHR, but which was not imparted in circumstances importing an obligation of confidence.
  - Further claims will concern information which was both confidential information in the sense that it was imparted in circumstances importing an obligation of confidence, and information entitled to protection under Article 8 ECHR, e.g. many claims in respect of private letters such as the information which was the focus of this present case.
78. In consideration of each of these circumstances CAGE noted that it was not necessary for any particular detriment to be demonstrated in order for a duty of confidence to be actionable. CAGE 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.
79. CAGE explained that in its view the withheld information in this case was confidential information within the sense of the traditional *Coco* test (albeit 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).
80. With regard to why the information met the three limbs of the *Coco* test CAGE 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.

---

<sup>5</sup> *Niemietz v Germany* (1993) 16 EHRR 97

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. CAGE argued that convention that The Prince of Wales will be informed about the business of government in order to prepare for being Sovereign can only be maintained if both His Royal Highness and government Ministers who advise and inform him about the business of government can be assured that their communications with each other remain confidential.

81. CAGE 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. CAGE 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.
82. In light of the constitutional convention relating to the Heir to the Throne, CAGE 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, CAGE 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 such information would constitute sufficient detriment to meet the third limb of the *Coco* test.

83. In relation to why the correspondence exchanged between the Prince of Wales and government departments constituted confidential information under the modern law of confidence, CAGE 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.
84. Although section 41 of the Act is an absolute exemption and thus not subject to the public interest test contained at section 2 of the Act, 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 public interest defence.
85. CAGE argued that in the circumstances of this case there was no effective public interest defence. In support of this position CAGE made the following arguments:
86. 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.
87. Secondly, in the circumstances of cases which involved correspondence between The Prince of Wales and the government there was a specific public interest in maintaining the confidentiality of such correspondence in order to preserve the conventions discussed above, and specifically His Royal Highness' political neutrality. It was strongly in the public interest to ensure the preservation of conventions in order to ensure the constitution was not undermined.
88. 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. CAGE 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.'

89. 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. CABE 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'.

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

91. Fifthly, it was important not to confuse the public interest with information which the public may be interested in. To illustrate this point CABE 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.'

92. 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...'

93. Finally, CAGE 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, CAGE 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**

94. At this stage the Commissioner wishes to highlight the fact that CAGE's submissions on the application of section 41 focus solely on correspondence exchanged between The Prince of Wales and government departments. However, in the Commissioner's opinion the information which potentially falls within the scope of request 7 includes correspondence which CAGE may have exchanged with The Prince of Wales and also correspondence exchanged with His Royal Highness' representatives. The Commissioner has therefore worded his consideration of the application of section 41 submissions as if it refers to both to correspondence CAGE may have exchanged with The Prince of Wales **and** to correspondence with His Royal Highness' representatives. This is because, given the way in which request 7 is phrased, if the Commissioner only analysed the submissions for one such class of information, he would, in effect, be indicating that the other class was not held by CAGE. However, due to the way in which request 7 is phrased CAGE was not obliged to divide up its response to the complainant in this way, and as it did not in fact do this the Commissioner cannot reveal whether both classes of information are held. Moreover, requests 2 and 4 specifically relate to information about representatives of CAGE and CAGE has not informed the complainant whether it holds any information falling within these specific parts of the overall request.

### Correspondence between The Prince of Wales and government departments

95. The Commissioner agrees with CAGE 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 CAGE 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 as a consideration of Article 10 ECHR (the right to freedom of expression) in the context of the public interest defence is necessary.

96. 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.
97. 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.
98. In relation to the first criterion 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.
99. 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 may be 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.)

100. 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 CAGE'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.
101. In relation to the second criterion, the Commissioner agrees with CAGE 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.
102. 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.
103. For these reasons the Commissioner accepts that disclosure of such correspondence would constitute an actionable breach of confidence.
104. However, before he can conclude 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.

105. As explained above CAGE 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 that have not been identified by CAGE 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**

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

107. 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 CAGE.

108. Disclosure of 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 CAGE 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.

109. 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.

110. 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.

111. 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?**

112. 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 contained within 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.

113. 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 L J expressed such a view in *LRT v Mayor of London*: 'the human rights highway leads to exactly the same outcome as the older road of equity and common law'.<sup>6</sup>

114. 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

---

<sup>6</sup> Quoted by the Information Tribunal in *Derry City Council v Information Commissioner*, (EA/2006/0014).

disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

115. 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.<sup>7</sup>
116. Turning to the various factors identified by CAGE the Commissioner does not entirely accept the argument that for there to be a successful public interest defence against a breach 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.
117. 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.
118. 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 CAGE, disclosure of such information require 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

---

<sup>7</sup> See *Kenedi v Hungary* 37374/05.

Commissioner believes that a potential deviation to 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.

119. In determining whether the correspondence which CAGE 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 be more private in nature than public and thus a very strong set of public interest arguments would need to be cited in order for there to be a valid public interest defence.
120. 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 CAGE in favour of non-disclosure.
121. 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 the 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.
122. 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 CAGE holds with The Prince of Wales should not be summarily dismissed in the fashion implied by CAGE. 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.

123. 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.
124. The Commissioner has applied the above analysis to the information falling within this part of the request 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 CAGE

125. The Commissioner recognises that the nature of correspondence exchanged by government departments 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; correspondence falling within the second category cannot necessarily be said to have been exchanged at such a high level of government or with actual members of The Royal Family.
126. 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. In the Commissioner's opinion such a position is also supported by the wording of the exemption contained at section 37(1)(a) of the Act: this exemption covers communications not only with the Royal Family but also with the Royal Household.

127. 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.

128. 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.

129. Where such 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 were disclosed.

130. However, the Commissioner is of the view that where correspondence exchanged between CABE and The Prince of Wales' representatives does not include the views and opinions of His Royal Highness then not all of the information contained in such correspondence is of a strictly personal and private nature. An example of this would be correspondence of an administrative nature. 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.

131. 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.
132. Having reviewed the correspondence in this case, he accepts that all of it has the quality of confidence; is clearly correspondence which focuses on matters of substance, is not generally available and is of importance to the confider.
133. However, before he can conclude 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.
134. 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 CAGE engaged with The Prince of Wales and actions it may have taken following such correspondence, and more on how CAGE engaged with His Royal Highness' representatives and actions its may have taken following such correspondence.
135. 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 privately with Ministers. 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.
136. 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.

137. 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 indicate a sufficiently strong reason for this correspondence to be disclosed. Consequently, the Commissioner has concluded that there would not be a public interest defence if the remaining correspondence were disclosed. As the Commissioner has concluded that all the non-environmental information held is exempt under section 41(1), he has not gone on to consider sections 37(1)(a) or 40(2).

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

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

139. As the Commissioner has concluded that some of the information falling within the scope of request 7 is environmental information, he has considered the application of these exceptions, starting with 12(5)(f).

140. 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;'

141. 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.<sup>8</sup>

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

143. 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 one of his representatives. Again, as with section 41, the Commissioner accepts that correspondence which the public authority sends to The Prince of Wales or his representatives can potentially fall within the scope of the regulation 12(5)(f) if it sufficiently closely replicates the content of the information originally provided to it.

144. 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 CABE by The Prince of Wales (or his representatives) and/or is contained within correspondence sent by CABE and is sufficiently focused on information it originally received from His Royal Highness (or his representatives).

---

<sup>8</sup> 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)

145. 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 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 Ministers, he is under no legally binding obligation to do so. The Commissioner believes that the second limb will be met where there is no specific statutory power to disclose the information in question. It is clear that there is no such power in this case and thus the second limb is met. Finally, with regard to the third limb, the Commissioner understands that neither The Prince of Wales nor his representatives have consented to disclosure of the withheld information.
146. The nature of the adverse effect which CAGE has argued would occur if the withheld information were disclosed effectively mirrors that discussed above in relation to the application of section 41. In essence, if the information were disclosed this would adversely affect The Prince of Wales because not only could it appear to undermine his political neutrality but it could also impinge upon His Royal Highness' privacy. For the reasons set out above the Commissioner accepts that disclosure of the withheld information could potentially have these effects.
147. Additionally, CAGE also argued that disclosure of the correspondence would have a chilling effect on the way in which The Prince of Wales corresponds with government Ministers, for example by The Prince of Wales no longer recording particular comments or the nature in which His Royal Highness' views and opinions are recorded being less free and frank nature. CAGE argued that such a chilling effect would directly impinge upon the established convention that The Prince of Wales is able to correspond confidentially with government Ministers.
148. In relation to this argument 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.
149. However, the Commissioner is aware of the authorised biography of The Prince of Wales by Jonathan Dimbleby which was published in 1994.<sup>9</sup> 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

---

<sup>9</sup> J Dimbleby, *The Prince of Wales: A Biography*, (Bath: Chivers Press, 1994)

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'.

150. 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 this letter. Although the quote is not particularly lengthy in nature it clearly shows The Prince of Wales' strong views on this issue. The Commissioner has not been provided with any evidence by CAGE that the inclusion of details of The Prince of Wales' correspondence in this book has resulted in any sort of the chilling effect.
151. However, the Commissioner accepts that a direct parallel cannot be drawn between the disclosure of the withheld information which is the focus of this case and the previous disclosures such as the Dimbleby biography. To some extent, as Dimbleby himself acknowledges, his book was been 'self-censored': extracts have not been included that would undermine the confidential nature of communications between the monarchy. In contrast, disclosure of the withheld information in this case would be without the consent of The Prince of Wales and would result in complete copies, as opposed to extracts or paraphrased sections, of correspondence being revealed.
152. Furthermore the Commissioner believes that an inherent part of the convention is the ability of both the Heir to the Throne and government Ministers to be free and frank when discussing matters of government business. This is to ensure that the Heir to the Throne is instructed in the business of government in the most effective and efficient way

possible. In the Commissioner's opinion, disclosure of information falling within the scope of convention could lead The Prince of Wales to feel constrained or more reluctant to take part in the process of being educated about the business of government.

153. In relation to the likelihood of such effects actually occurring, the Commissioner believes that the higher threshold of 'would occur' is met. This is because there a number of ways in which the adverse effect could manifest itself: it could be to his privacy, dignity, political neutrality and/or the practical way in which he actually corresponds with government Ministers. Furthermore, it is clear that The Prince of Wales communicates with Ministers across government, rather than simply to one or two departments, thus the likelihood of the adverse effects occurring is increased. Moreover, the disclosure of the information may not just affect the way in which the Prince of Wales communicates with government departments but also those within his Household.
154. Vitally, the Commissioner believes that arguments concerning political neutrality are still relevant, and indeed attract similar weight, even when the information being withheld does not fall within the scope of the constitutional convention relating to the Heir to the Throne. In other words disclosure of correspondence not strictly on issues related to the business of government could still lead to The Prince of Wales being perceived as having particular political views or preferences and thus could undermine his political neutrality. Similarly the Commissioner accepts that a chilling effect on the nature of correspondence falling within the convention could occur even if the withheld information does fall within the scope of the convention. That is too say, disclosure of information on topics not associated with the business of government, would still be likely to affect future correspondence not simply on similar topics but also on topics falling within the scope of the convention.
155. The Commissioner therefore accepts that regulation 12(5)(f) is engaged.

### **Public interest test**

156. However all exceptions in regulation 12 are qualified and therefore the Commissioner must consider the public interest test set out at regulation 12(1)(b) which states that information will only be exempt if the public interest in maintaining the exception outweighs the public interest in disclosing the information. However this test differs from the public interest test considered under section 41(1) of the Act.

Furthermore regulation 12(2) states explicitly that a public authority must apply a presumption in favour of disclosure.

### **Public interest arguments in favour of disclosing the information**

157. The Commissioner believes that the arguments in favour of disclosing the information which is exempt under regulation 12(5)(f) mirror the arguments in favour of disclosing the information withheld under section 41(1) which are set out above and therefore he has not repeated them here.

### **Public interest arguments in favour of maintaining the exception**

158. The public interest arguments in favour of maintaining the exception inevitably focus on the need to ensure that the adverse effects described above do not occur.

159. It is clearly in the public interest to preserve the political neutrality of the Royal Family as this is essential to ensuring the stability of the constitutional monarchy.

160. It would not be in the public interest for The Prince of Wales to alter the way in which he corresponds with the government Ministers. Such a chilling effect would result in The Prince of Wales being less prepared for the business of government when he is Monarch and furthermore may undermine His Royal Highness' ability to carry out his role as a Privy Councillor, as a Counsellor of State and to fulfil any duties he may be called upon to undertake in line with the Regency Act 1937.

161. There is a clear public interest in protecting the privacy, and by implication, the dignity of the Royal Family so as to preserve their position and ability to fulfil their constitutional role as a unifying symbol for the nation.

### **Balance of public interest arguments**

162. As discussed in relation to the public interest test under section 41, the Commissioner believes that significant weight should be attributed to the argument that disclosure would undermine The Prince of Wales' political neutrality. It is clearly in the public interest that The Prince of Wales, either as Heir to the Throne or when Monarch is not perceived to be politically biased in order to protect his position as Sovereign in a constitutional democracy. Vitally, as noted the Commissioner believes that arguments concerning political neutrality are still relevant, and indeed attract similar weight, even when the information being

withheld does not fall within the scope of the convention relating to the Heir to the Throne.

163. Furthermore, as noted, the Commissioner agrees that it is clearly in the public interest that the Heir to the Throne and government Ministers can be free and frank when discussing matters of government business. This is to ensure that the Heir to the Throne is instructed in the business of government in the most effective and efficient way possible. Again as noted above the Commissioner accepts that the chilling effect arguments are still relevant even when the correspondence itself may not fall within his interpretation of the convention and some weight should be given to them.
164. Again, as acknowledged above, the Commissioner accepts that 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.
166. Nevertheless as with the consideration under section 41, the various arguments in favour of disclosure should not be dismissed lightly and deciding where the balance ultimately lies will depend upon the content of the withheld information.
167. Having considered the information that has been withheld on the basis of regulation 12(5)(f) the Commissioner has concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure. This is because he does not believe that disclosing this particular information would necessarily fulfil the public interest arguments in disclosure to any great extent. The Commissioner is satisfied that this is the case in respect of all the environmental information contained within the correspondence held. He has therefore not gone on to consider regulations 12(5)(d) or 13(1).

#### **Requests 1 to 4**

168. Having reached these conclusions in relation to the actual correspondence exchanged between CAGE and The Prince of Wales and/or His representatives, the Commissioner has considered whether the information held which would fulfil requests 1 to 4 is exempt from disclosure. This information constitutes a list of approaches, along with the number of approaches, made by The Prince of Wales or other individuals representing His Royal Highness to CAGE. The complainant

specified that such a list should include details of the nature of the approach, the dates they occurred and the issues involved.

169. CABE 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).
170. In relation to section 41, CABE argued that disclosure of the details of the approaches made clearly constituted information which was provided to it by a third party and thus met the requirements of section 41(1)(a). As to why disclosure of this would constitute an actionable breach, CABE 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 CABE.
171. In relation to the application of section 37(1)(a), CABE 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 of approaches and/or the number of such approaches would not be in the public interest because disclosure of the details of when and with whom His Royal Highness corresponds, even in the absence of disclosure of the subject matter of the correspondence would lead to damaging speculation about the nature of that correspondence. Inferences would be drawn, whether warranted or not, from the knowledge that The Prince of Wales had written a certain number of times to a government department within a particular period, that he had written on particular topics or had expressed particular views. That in turn would inhibit His Royal Highness and Ministers from exchanging views on governmental matters which would inhibit the convention that the Heir to the Throne should be instructed in business of government. Again CABE noted that the reasons for the application of section 41(1) overlap and support the application of section 37(1)(a).
172. CABE 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 CABE suggested that there was a strong parallel to be drawn between this case and *HM Treasury v Information Commissioner and Evan Owen [2009] EWHC 1811*. That case, like the present case, concerned a narrow and specific exemption: in that case, the exemption related to the advice of Law Officers under section 35(1)(c). CABE 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. CABE argued that the same considerations applied in the context of this case.

173. In addition to this point CABE 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.)
174. Having considered the arguments advanced by CABE 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 of 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.
175. In reaching this conclusion the Commissioner notes that the time period covered by the scope of the requests is over five years (CABE only came into existence in 1999). The Commissioner accepts that this is a relatively broad time period compared to other similar requests previously considered by the Commissioner. For example in case reference FS50114757 the complainant sought a list and schedule of correspondence exchanged with The Prince of Wales for a period of eight months and the Commissioner concluded that such information was exempt from disclosure on the same basis as discussed in the preceding paragraph. In case FS50114757 the Commissioner noted that one reason for this decision was the narrow time period of the request and the fact that the request sought details of correspondence between The Prince of Wales and Ministers – as opposed to a broader request seeking for example correspondence between any individuals acting on behalf of His Royal Highness and any individual at the public authority.

176. Nevertheless 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 by other government departments in the future, to build up a relatively complete picture of which departments The Prince of Wales corresponds most frequently with.
177. The Commissioner notes that with regard to information sought by the complainant in requests 1 and 2 regarding the nature of any approach, if the documents contained environmental information, as some of the correspondence in this case does, any description of the environmental information (e.g. the nature of the approach) contained within the documents would in itself constitute environmental information. However, the Commissioner believes that those parts of such a schedule would be exempt from disclosure on the basis of regulation 12(5)(f) for the reasons set out above.

### **Procedural Requirements**

178. Both the Act and the EIR require a public authority to respond to an information request within 20 working days following receipt and either provide the information that was requested or issue a refusal notice citing the exemptions or exceptions that are being relied upon.
179. In handling this request CABE did issue a refusal notice within 20 working days which cited the exemptions within the Act which it was seeking to rely on.
180. However, as explained above, the Commissioner has concluded that a quantity of the information falling within the scope of these requests constitutes environmental information and thus disclosure of such information should be considered under the EIR rather than the Act. Although the Commissioner has concluded that such information is exempt from disclosure on the basis of the exception at regulation 12(5)(f) of the EIR, CABE did not issue the complainant with a refusal notice citing this.
181. The failure to provide such a notice constitutes a breach of regulations 14(1), 14(2) and 14(3).

## The Decision

---

182. The Commissioner's decision is that the following elements of the request were not dealt with in accordance with the Act:

- Some of the information held constitutes environmental information as defined by EIR.
- CABE breached regulations 14(1), 14(2) and 14(3) by failing to issue a refusal notice citing an exception within the EIR.

183. However, the Commissioner has also decided that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- The information CABE holds which would fulfil requests 1 to 4 is exempt from disclosure on the basis of section 41(1) or to the extent that such information would constitute environmental information, regulation 12(5)(f).

## Steps Required

---

184. The Commissioner requires CABE to disclose to the complainant that information which it has advised the Commissioner it is now prepared to release. That information is detailed in the confidential annex attached to this notice.

## Other matters

---

185. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

186. In his complaint to the Commissioner of 15 August 2006, the complainant stated that he was unhappy with the amount of time taken to process the internal review and was concerned that the internal review appeared to have been carried out by the same member of staff who handled the original request.

### **Timescale for dealing with internal review**

187. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint.
188. As he has made clear in his 'Good Practice Guidance No 5', published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took nearly 80 working days for an internal review to be completed.
189. Although the Commissioner acknowledges that this request predated the publication of this piece of guidance, he expects CAGE to adhere to the recommend time limits set out in the guidance when undertaking internal reviews in the future.

### **Personnel involved in undertaking internal review**

190. Paragraph 40 of the section 45 Code of Practice states:

"Where the complaint concerns a request for information under the general rights of access, the review should be undertaken by someone senior to the person who took the original decision, where this is reasonably practicable."
191. The Commissioner notes that both the refusal notice and the outcome of the internal review were signed by CAGE's Head of Corporate Governance.
192. In his letter to CAGE of 19 February 2007, the Commissioner asked CAGE to confirm whether the internal review was undertaken by an independent senior person within CAGE.
193. In its response to the Commissioner of 18 July 2007, CAGE advised him that the internal review was conducted by CAGE's Chief Executive, CAGE's Chair and CAGE's Director of Resources.

194. The Commissioner is satisfied that this constitutes an appropriate handling of the internal review, but believes that to avoid any ambiguity CABE should have made this clear to the complainant in its response to his request for an internal review.

## Right of Appeal

---

195. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

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

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 31<sup>st</sup> day of March 2010**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## **Annex – text of request**

The complainant sent the following request to CAGE on 22 February 2006:

1. A list of all approaches made by HRH the Prince of Wales to the CAGE. This should include the date the Prince contacted the commission (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 all approaches made by representatives of HRH the Prince of Wales to CAGE. This should include the date the representatives/employees contacted the commission 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 CAGE. Please provide details of these approaches, the dates they occurred and the issues concerned.
4. How many times have employees or representatives acting on behalf of HRH the Prince of Wales contacted anyone in the employ of CAGE. 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 CAGE? Could you please provide details of the 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 CAGE which relate in any way whatsoever to approaches from the Prince of Wales and 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 CAGE 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

#### General Right of Access

**Section 1(1)** provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

**Section 1(2)** provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

**Section 1(3)** provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

#### Effect of Exemptions

**Section 2(1)** provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

- (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.”

**Section 2(2)** provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

### **Time for Compliance**

**Section 10(1)** provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

**Section 10(3)** provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

## **Communications with Her Majesty**

**Section 37(1)** provides that –

“Information is exempt information if it relates to-

- (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household, or
- (b) the conferring by the Crown of any honour or dignity.”

**Section 37(2)** provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”

## **Personal information**

**Section 40(2)** provides that –

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

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

**Section 40(3)** provides that –

“The first condition is-

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

1998 (which relate to manual data held by public authorities) were disregarded.”

### **Information provided in confidence.**

**Section 41(1)** provides that –

“Information is exempt information if-

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

**Section 41(2)** provides that –

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

## **Environmental Information Regulations 2004**

### **Regulation 12 - Exceptions to the duty to disclose environmental information**

#### **Regulation 12(1)**

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

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

#### **Regulation 12(2)**

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

### **Regulation 12(3)**

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

### **Regulation 12(5)**

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

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

### **Regulation 12(9)**

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

### **Regulation 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).