

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

Decision notice

Date: 16 June 2020

Public Authority: The Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office seeking information about whether The Queen and the Prime Minister, Boris Johnson, had discussed the topics of Brexit or the prorogation of Parliament at their weekly meetings, or had exchanged correspondence on these subjects. Under FOIA the Cabinet Office refused to confirm or deny whether it held any information on the basis of section 37(2) by virtue of section 37(1)(a) (communications with the Sovereign). To the extent that any of the requested information, if held, would be environmental information the Cabinet Office refused to confirm or deny whether it held such information on the basis of regulations 13(5)(a) (personal data) and 12(6) (international relations) of the EIR.
2. The Commissioner has concluded that the Cabinet Office is entitled to rely on section 37(2) of FOIA and regulation 13(5)(a) of the EIR in the manner in which it has.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the Cabinet Office on 11 September 2019:

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

...Please note that I am only interested in information which relates to the period 24 July 2019 to the present day...

1...During the aforementioned period have The Queen and Mr Johnson enjoyed a private weekly audience? If the answer is yes in the case of each audience can you state the date and time it took place?

2...In the case of each audience can you state whether any issues relating to Brexit or the prorogation of Parliament were discussed. Please specify which topic was discussed at which meeting. In the case of each meeting can please provide copies of any relevant agendas and minutes. Please also provide copies of any informal/draft minutes and agendas compiled by staff in either The Royal Household and Downing Street either in preparation for each audience(s) or after each audience had taken place.

3...In the case of each audience where issues relating to Brexit or the prorogation of Parliament was discussed can you please provide copies of any briefing notes prepared for Mr Johnson about these subjects by his staff. Please note I am only interested in those notes produced as part of preparations for The Audience (s).

4...During the aforementioned period did The Prime Minister write and correspond with The Queen about issues relating to Brexit or the Prorogation of Parliament. If the answer is yes can you please provide copies of this correspondence and communication.

5...During the aforementioned period did The Queen write and correspond with The Prime Minister about issues relating to Brexit or the Prorogation of Parliament. If the answer is yes can you please provide copies of this correspondence and communication.

6...If any relevant documentation has been destroyed can you please supply the following details. In the case of each piece of destroyed documentation can you state when it was destroyed and why? In the case of each destroyed piece of correspondence and communication can you please provide details of the author (s), the recipient (s); the date sent and the date destroyed. In the case of each piece of destroyed correspondence and communication can you please provide a brief outline of its contents. In the case of all destroyed documentation can you please provide copies of any destroyed documentation which continues to be held in another form'.

5. The Cabinet Office responded on 15 October 2019. It explained that information regarding the dates of the Prime Minister's audiences with

The Queen, ie part 1 of the request, were available online on the Court Circular and therefore such information was considered to be exempt from disclosure on the basis of section 21 (information reasonably accessible to the requester) of FOIA. With regard to the remainder of the request, in so far as this encompassed information which was not environmental in nature, the Cabinet Office refused to confirm or deny whether it held such information on the basis of section 37(2) of FOIA by virtue of section 37(1)(a) (communications with the Sovereign). In so far as the request encompassed information, that if it were held would be environmental information, the Cabinet Office refused to confirm or deny whether such information was held on the basis of regulations 13(5)(a) (personal data) and 12(6) (international relations) of the EIR.

6. The complainant contacted the Cabinet Office on 23 October 2019 in order to ask it to conduct an internal review of this response.
7. The Cabinet Office informed him of the outcome of the internal review on 22 November 2019. The review upheld the application of section 37(2) of FOIA and regulations 13(5)(a) and 12(6) of the EIR.

Scope of the case

8. The complainant contacted the Commissioner on 5 December 2019 in order to complain about the Cabinet Office's handling of his request. He was dissatisfied with the Cabinet Office's failure to provide him with the information falling within parts 2 to 6 of his request.
9. In relation to this complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts. Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions. Furthermore, it is also important to note that some of the exceptions contained within the EIR also allow a public authority to refuse to confirm or deny whether requested information is held.
10. As explained above, the Cabinet Office is seeking to rely on section 37(2) to neither confirm nor deny (NCND) whether it holds information falling within the scope of the request. To the extent that any requested information, if held, would be environmental information it is relying on regulations 13(5)(a) and 12(6) of the EIR to NCND whether any such information is held. Therefore, this notice only considers whether the Cabinet Office is entitled, on the basis of this exemption within FOIA and

these exceptions within the EIR, to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.

Reasons for decision

Section 37 - Communications with the sovereign, other members of the Royal Family and the Royal Household

11. Section 37(2) of FOIA states that:

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

12. In the circumstances of this case the subsection within section 37(1) which has been cited by the Cabinet Office is 37(1)(a). This section states that information is exempt if it *'relates to communications with the Sovereign'*.

13. To engage section 37(2) the requested information (if held) would therefore have to fall within the scope of one of the exemptions contained within section 37(1).

14. As the complainant has requested information about The Queen's audiences with the Prime Minister, and any correspondence they may have exchanged, the Commissioner is satisfied that such information, if held, would clearly fall within the scope of the exemption contained at section 37(1)(a) of FOIA. Section 37(2) is therefore engaged.

15. Section 37(2), when engaged by virtue of section 37(1)(a), is an absolute exemption and not subject to the public interest test.

16. The Commissioner is therefore satisfied that, under FOIA, the Cabinet Office can rely on section 37(2) to refuse to confirm or deny whether it holds any information falling within the scope of the request.

Regulation 13(5)(a) – personal data

17. Regulation 13(5)(a)¹ of the EIR provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
18. Therefore, for the Cabinet Office to be entitled to rely on regulation 13(5)(a) of the EIR to refuse to confirm or deny whether it holds any environmental information falling within the scope of the request the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

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

19. Section 3(2) of the DPA 2018 defines personal data as:-

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

20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
22. The Cabinet Office argued that that confirming or denying whether it holds any environmental information falling within the request would reveal The Queen's personal data.
23. The Commissioner agrees with this position. Given the way in which the request is worded she accepts that confirming whether or not environmental information is held would reveal whether or not The Queen had discussed Brexit or the prorogation of Parliament with the Prime Minister, or entered in correspondence with him about these

¹ As amended by Schedule 19 Paragraph 307(6) of Data Protection Act 2018.

matters during the period covered by the request. The Commissioner accepts that either outcome would result in the disclosure of The Queen's personal data because it would reveal something of consequence about her.

Would providing this confirmation or denial would contravene one of the data protection principles?

24. The most relevant DP principle in this case is principle (a).

25. Article 5(1)(a) of the GDPR states that:

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

26. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed – or as in this case, the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful, be fair, and transparent.

27. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

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

28. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that 'processing shall be lawful only if and to the extent that at least one of the' lawful bases for processing listed in the Article applies.

29. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child'.²

² Article 6(1) goes on to state that:-

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

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

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

(ii) Necessity test: Whether confirming or deny whether the information is held is necessary to meet the legitimate interest in question;

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

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

(i) Legitimate interests

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

33. The Cabinet Office acknowledged that there was a legitimate public interest in understanding the opinions of The Queen. The complainant

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA) provides that:-

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

also argued that there was a legitimate interest in disclosure of the requested information (assuming of course that it was held).

34. The Commissioner agrees that there is a legitimate interest in the public understanding what The Queen and her Prime Minister discuss, particularly on matters of such significance such as those named in the request. The legitimate interests test is therefore met.

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

35. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under the EIR as to whether the requested information is must therefore be the least intrusive means of achieving the legitimate aim in question.
36. The Cabinet Office explained that it did not consider that the test of necessity was met.
37. However, in the particular circumstances of this case the Commissioner cannot envisage an alternative measure by which the legitimate interests identified above could be met. She therefore accepts that the necessary interest test is met.

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

38. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a EIR request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
39. The complainant argued that it was common knowledge that The Queen holds regular audiences with the Prime Minister of the day. He also argued that it was a matter of public record that The Queen and Boris Johnson discussed the recent prorogation of Parliament and the reasons for this.

40. The Cabinet Office argued that The Queen would have no reasonable expectation of processing in this case. This is because to confirm or deny whether The Queen had entered into correspondence or communications with the Prime Minister would impinge on the vital principle that communications between the Sovereign and the government are private and confidential.
41. Therefore, the Cabinet Office argued that to confirm that information is, or is not held, on the specific matters requested would reveal the presence or absence of topics communicated in confidence. Furthermore, the Cabinet Office argued that to confirm if information is or is not held would prejudice the privacy and the confidentiality to which The Queen is entitled. In the Cabinet Office's view such an outcome could not be warranted despite the legitimate public interest identified above.
42. The Commissioner accepts that it is a long standing principle that communications between the Sovereign and the government are confidential and private. This includes the audiences between The Queen and the Prime Minister. In light of this the Commissioner accepts that The Queen would have a very clear, and indeed reasonable, expectation that details of her weekly audiences with Boris Johnson would not be disclosed, including confirmation as to the topics that had – or had not – been discussed. In reaching this conclusion the Commissioner considers the fact that the request seeks details of audiences and communications which took place over the three month period immediately preceding the request adds further to The Queen's expectations that no details of such communications would be disclosed. With regard to the consequences of doing so, the Commissioner recognises that The Queen of course holds a unique position. However, the Commissioner accepts the Cabinet Office's point that despite the uniqueness of this position confirming whether or not the requested information is held would still result in the private and confidential discussions of an individual being revealed. As such, the Commissioner accepts that such a consequence would infringe upon The Queen's privacy.
43. As noted above, the Commissioner accepts that there is a legitimate interest in allowing the public to understand The Queen's views, particularly on matters as significant as the ones identified in the request. However, given the very significant expectation of The Queen that her communications with the government are confidential, the fact that the information sought is very recent, and taking into account the consequences of disclosure, the Commissioner has concluded that The Queen's interests and rights override the legitimate interests in confirming or denying whether information is held.

44. In reaching this conclusion the Commissioner appreciates that the complainant has argued that it is common knowledge that The Queen has weekly audiences with the Prime Minister. This is indeed the case, but this does not equate to the details of these discussions being public knowledge. The Commissioner also appreciates that the complainant has argued that it is a matter of public record that The Queen and Boris Johnson discussed the recent prorogation of Parliament and the reasons for this. The Commissioner acknowledges that there has been a significant amount of news reporting surrounding this issue and that it is matter of public record that the Queen approved the prorogation. However, in the Commissioner's opinion this does not mean that it is matter of public record that the Queen and Boris Johnson discussed this matter in their weekly audiences or exchanged correspondence about this during the time period covered by the request.
45. The Commissioner has therefore decided that the Cabinet Office was entitled to refuse to confirm whether or not it held any environmental information falling within the scope of the request on the basis of regulation 13(5)(a) of the EIR.
46. In light of this finding the Commissioner has not considered the Cabinet Office's reliance on regulation 12(6) of the EIR.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

48. 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.
49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF