

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

Decision notice

Date: 19 February 2024

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

Decision (including any steps ordered)

1. The complainant has requested correspondence between the then Prince of Wales and Tony Blair regarding the foot and mouth disease crisis. The Cabinet Office ("CO") denied holding any environmental information within the scope of the request. It refused to confirm or deny whether it held any non-environmental information within the scope of the request and cited the relevant provisions of section 37 (Communications with the Sovereign etc) of FOIA. It upheld this at internal review.
2. The Commissioner's decision is that the CO is correct when it says it holds no environmental information within the scope of the request. He has also decided that the CO is entitled to rely on section 37(2) as its basis for doing refusing to confirm or deny whether it holds non-environmental information within the scope of the request by virtue of section 37(1)(aa).
3. However, the CO failed in its obligations to the complainant under section 16 of FOIA to provide adequate advice and assistance.
4. It also failed to comply with its obligations under regulation 9 (advice and assistance) and regulation 11 (internal review) of the EIR.

5. No steps are required.

Request and response

6. On 7 January 2023 the complainant wrote to the CO and requested information of the following description:

"This revised request takes into account comments in your letter of 28 September 2022 - Your reference: EIR 2022/13248.

While I do not accept that the previous request was manifestly unreasonable, I have decided after careful consideration to put my initial concerns to one side and to narrow the request to a period of just one month.

Please note that I am now only interested in information which was generated between 1 May 2001 and 1 June 2001.

Please note that this material is now more than twenty years old. Please note that the reference to the then Prince of Wales in the questions below should be taken to mean the Prince himself (irrespective of whichever of his titles he was using) and or anyone in his office who was corresponding and communicating specifically on his behalf. This will include but not be limited to his Principal Private Secretary (ies) and or his Assistant Principal Private Secretary (ies) and or his Press Secretary. Please only include the correspondence and communications of these individuals if they themselves are corresponding and communicating on behalf of the Prince. (irrespective of whichever of his titles is used).

The reference to the prime minister in the questions below should include Mr Blair himself and or anyone in his private office able to compose and or reply to correspondence on his behalf and or to communicate on his behalf. Please only include the correspondence and communications of these other individuals if they are writing to and or replying to correspondence and or communicating on behalf of the Prime Minister.

Please note that the reference to correspondence and communications in the questions below should include all traditional forms of correspondence and communication such as letters, faxes, and memos, all emails irrespective of whether they were sent and or received through private and or public accounts, all telephone text messages, all G mail messages, and or all messages sent through encrypted messaging services in operation at the time.

Please note that I would like to receive complete copies of actual correspondence and communication rather than just excerpts. All letters should include the text as it was originally laid out in terms of sentence and paragraph structure. It should also include the original letter heads, any other design features, and the signatures. All emails and text messages should include the date and time they were sent and or received. They should also include the original layout and paragraph structure. If the Cabinet Office feels the need to redact material from any correspondence and communication, can it redact the material at the location it appears in the correspondence and communication. That way I will be able to see the extent and location of the redaction.

1...During the aforementioned period did the then Prince of Wales write to and or communicate with the Prime Minister about the foot and mouth crisis affecting the UK. Please note that I am only interested in that correspondence and communication which highlights the Prince's views on either the mass culling of animals (whether infected or not) and or the merits of a vaccination programme as an alternative to the cull.

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

3...During the aforementioned period did the prime minister write to and or communicate with the then Prince of Wales about the foot and mouth crisis affecting the UK. Please note that I am only interested in that correspondence and communication which highlights the Prince's views on either the mass culling of animals (whether infected or not) and or the merits of a vaccination programme as an alternative to the cull.

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

7. On 3 February 2023, the CO responded. It said that it did not hold any environmental information within the scope of the request. It refused to confirm or deny whether it held any non-environmental information within the scope of the request and argued that it was entitled to rely on section 37(2) as its basis for doing so by virtue of section 37(1)(a) of the FOIA which exempts information relating to communications with or on behalf of, the Sovereign.
8. The complainant requested an internal review on 3 February 2023. They asserted that previous news coverage indicated that the King (when he was Prince of Wales) did express an interest in issues of both the cull and the vaccination programme.
9. They chased a response from the CO on 22 May 2023 and 14 July 2023.

10. The CO sent them the outcome of its internal review on 28 July 2023. It upheld its original position although it acknowledged that it should have explained that section 37(1)(aa) was applicable and not 37(1)(a). However, it explained that this made no material difference to the outcome.

Scope of the case

11. The complainant contacted the Commissioner on 1 August 2023 to complain about the way their request for information had been handled.
12. The Commissioner considers that the scope of his investigation is to determine whether the CO holds environmental information within the scope of the request and whether it is entitled to refuse to confirm or deny whether it holds non-environmental information within the scope of the request on the basis of section 37(2) by virtue of section 37(1)(aa). This means that the Commissioner has considered this complaint under both the EIR and the FOIA.

Reasons for decision

Is the requested information environmental?

13. Regulation 2(1) of the EIR defines environmental information as being information 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)...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);

14. The Commissioner is of the view that the requested information, if held, would be information on the contamination of the food chain as well as measures affecting or likely to affect the elements and factors referred to in a) above. As such, he is satisfied that the information, if held, would be environmental information caught by the EIR.

Regulation 12(4)(a) – information not held

15. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information “to the extent that it does not hold that information when an applicant’s request is received”.
16. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request). For clarity, the Commissioner is not expected to prove categorically whether the information is held.

Cabinet Office position

17. The CO explained that for the period covered in the request, all information held from the administration (the first Tony Blair government) was in paper files. It explained that the

“At the end of an administration, the Prime Minister’s office transfers the whole collection of Prime Minister’s papers to the Cabinet Office Public Records and Archives team (COPRA). The transferred material forms the archive of the administration. COPRA do not add to or rearrange these papers after transfer but preserve them until they are transferred to The National Archives under the Public Records Act. There is a selection stage before transfer - any material not worthy of permanent preservation is destroyed - routine administrative information or where there is no discernible Prime Minister involvement. Those records selected for permanent preservation are transferred to The National Archives (TNA)”

18. It explained that if it held such correspondence (from the then Prince of Wales) it would have been retained.
19. It described the searches undertaken by the COPRA team and why these might have been likely to be successful. It said that no environmental information within the scope of the request was found.
20. It added:

“COPRA did not search for the Agriculture/Rural Affairs files. This was because at the time of the request these had been transferred to TNA and therefore were not held ... Under section 16 of the Act we should have advised the complainant of the existence of files on Agricultural policy/rural affairs that have been transferred to TNA”.

21. It also said:
22. Records from Tony Blair’s first administration were not captured and maintained in digital format (see page 49 of the Modernising Government White Paper at:
<https://ntouk.files.wordpress.com/2015/06/modgov.pdf>
23. The Commissioner would observe that the linked document does not explicitly state that such records were never captured in digital format. However, it appears to suggest that it was not common.
24. Finally, it said:

“We have explained in previous submissions accepted by the ICO that the Cabinet Office formal records management policy states that the Cabinet Office will always preserve correspondence between the Government and the Royal Family in compliance with the Public Records Act to preserve records worthy of permanent preservation at The National Archives”.

The complainant’s position

25. The complainant submitted links to a number of newspaper articles in support of their complaint. These included statements by third parties which appeared to concur with his assertion that the then Prince of Wales had made representations on this matter.¹ Two of those links

¹ <https://www.theguardian.com/uk/2004/feb/16/monarchy.footandmouth>

<https://www.dailymail.co.uk/news/article-378327/Charles-Im-interfering-busybody.html>

were behind a paywall and therefore the Commissioner has not included them as part of this notice.

26. The CO refused to comment on the newspaper articles. It said:

"It is not clear if you are asking us to comment on the above media stories and observations, but we respectfully decline to do so. It is neither appropriate nor necessary for the Cabinet Office to comment on media stories or offer an opinion on whether the then Prince of Wales did or did not communicate his views to the Prime Minister's office. The issue at hand is whether the Cabinet Office holds the requested information, not whether it exists".

27. The Commissioner notes that the second of the two articles provided at Note 1 refers to a communication apparently sent prior to the one specified in the request.

28. Having considered both the complainant's submissions and those of the CO, the Commissioner has determined that, on the balance of probabilities, CO does not hold the requested information.

Section 37(2) – Communications with the Sovereign, etc

29. Section 37(2) 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).

30. The relevant provision of section 37(1) is (1)(aa) which states:

"Information is exempt information if it relates to—

...

(aa) communications with the heir to, or the person who is for the time being second in line of succession to, the Throne,"

31. This provision of section 37(1) is a class-based and absolute exemption

32. The CO said:

"Section 37 of the Act is a class-based exemption, not a prejudice- or harm-based exemption. Any non-environmental information in scope of the request would, if held, fall within the definition of information relating to communications with or on behalf of the Heir to the Throne. The exemption is therefore engaged and as section 37(1)(aa) is an absolute exemption, section 37(2) provides an absolute exclusion from the duty to confirm or deny if any non-environmental information is held."

33. Given that correspondence with the then Prince of Wales (as described in the request) would, if held, fall within the class of information described in the relevant exemption, the CO is entitled to rely on section 37(2) as its basis for refusing to confirm or deny whether it holds such information.
34. The Commissioner also notes his previous decisions and analysis of section 37(2) in reaching his view.²

Procedural matters

Advice and assistance

35. Section 16(1) of FOIA provides that a public authority should provide advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the code of practice under section 45 in providing advice and assistance, it will have complied with section 16(1). There is a parallel provision in the EIR regarding the provision of advice and assistance (regulation 9)³.
36. The Commissioner notes that, by its own admission, the CO failed to provide adequate advice and assistance to the complainant in that it “should have advised the complainant of the existence of files on Agricultural policy/rural affairs that have been transferred to TNA”.
37. The complainant can now see this advice on the face of this Notice. Therefore the Commissioner does not require the CO take any further steps in order to comply with its obligations under section 16 or regulation 9 with respect to this request.

Regulation 11

38. Regulation 11(1) of the EIR provides that-

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4021852/ic-61531-j4t9.pdf> (paragraph 30)

<https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024902/ic-98121-m4y6.pdf> (paragraph 24)

³ <https://www.legislation.gov.uk/ukxi/2004/3391/regulation/9>

- (1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.
39. Regulation 11(4) requires that where an applicant requests that an authority reviews its response to a request for information under Regulation 11(1) that the authority notifies the applicant of its decision as soon as possible and no later than 40 working days after the date of receipt of the representations.
40. The complainant wrote to the CO on 3 February 2023 asking for an internal review to be carried out. The CO did not provide it until 28 July 2023. As this is clearly over 40 working days, regulation 11(4) of the EIR has been breached.

Other matters

41. Further to the Commissioner's comments above regarding regulation 11 of the EIR, the Commissioner also draws attention to the internal review insofar as it relates to the FOIA.
42. FOIA does not require a public authority to offer an internal review, but good practice recommendations about how to do so are set out in the Code of Practice issued under section 45 of FOIA.⁴
43. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review, unless there are legitimate reasons to take longer.⁵
44. However, in this case, the request for an internal review was made on 3 February 2023 and the response was issued on 28 July 2023. The Commissioner notes that in this case, the time taken to respond was 121 working days.

⁴ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

⁵ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

45. The Commissioner finds that this delay does not conform to good practice. He asks the CO to ensure that all requests for internal reviews are handled appropriately and in accordance with his guidance.

Right of appeal

46. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

47. 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.
48. 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

Alexander Ganotis
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF