

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

Date: 13 July 2017

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 a copy of any correspondence between The Prince of Wales and the Prime Minister dating from 2002 about hunting. The Cabinet Office has confirmed that it holds some environmental information falling within the scope of the request but has sought to withhold this on the basis of regulation 13(1) of the EIR. The Commissioner has concluded that this information is not exempt from disclosure on the basis of regulation 13(1).
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the environmental information which falls within the scope of this request.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. The complainant submitted the following request to the Cabinet Office on 2 April 2015:

'I would like to request the following information under the Environmental Information Regulations (EIRS).

I note that the EIRs carry a presumption in favour of disclosure.

I also note that they were introduced to ensure the maximum possible degree of transparency on issues relating to the environment.

Please note that I am only interested in information which relates to the period 1 January 2002 to 1 January 2003.

Please note that the reference to His Royal Highness the Prince of Wales should include His Royal Highness and or his Private Secretary and or his private office.

Please note that the reference to the Prime Minister should be taken to include Tony Blair and or his Private Secretary and or anyone working in his private office.

I would like to request the following:

1. During the aforementioned period did Tony Blair exchange correspondence and communications (including emails) with His Royal Highness the Prince of Wales which in any way related to the subject of hunting and or a ban on hunting and or the impact of hunting and or the impact of a ban on the countryside. If the answer is yes can you please provide copies of this correspondence and communications including emails.

2. During the aforementioned period did the Prince of Wales meet with Tony Blair to discuss the subject of hunting and or a ban on hunting and or the impact on hunting on the countryside. If the answer is yes could you please provide details.

In the case of each meeting can you please provide a date, time and venue.

In the case of each meeting can you please provide a list of all those present.

In the case of each meeting can you please provide details of the topics under discussion.

Could you please provide copies of any documents held by the Cabinet Office which specifically relate to the aforementioned periods.'

5. The Cabinet Office initially refused to confirm or deny whether it held any information falling within the scope of this request on the basis of section 37(2) of the FOIA and regulation 13(5)(a) of the EIR.
6. The complainant appealed to the Commissioner about this refusal and the Commissioner issued a decision notice, FER0587279, which upheld the Cabinet Office's reliance on section 37(2) of FOIA. However, the notice also concluded that regulation 13(5)(a) was not engaged and therefore the Cabinet Office was ordered to confirm or deny whether environmental information was held in relation to this request under the EIR and, if any information was held, either disclose it or refuse to disclose it citing an exception.
7. The Cabinet Office provided the complainant with a response to the decision notice on 23 December 2016. The Cabinet Office confirmed that it held environmental information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of regulation 13(1) of the EIR.
8. The complainant contacted the Cabinet Office on the same day in order to ask it to conduct an internal review of this position.
9. The Cabinet Office informed him of the outcome of the internal review on 25 January 2017. The review upheld the application of regulation 13(1).

Scope of the case

10. The complainant contacted the Commissioner on 22 February 2017 in order to complain about the Cabinet Office's decision to withhold the environmental information falling within the scope of his request.

Reasons for decision

Regulation 13(1) – personal data

11. Regulation 13(1) states that to the extent that information requested includes personal data of which the applicant is not the data subject and the disclosure of the information to a member of the public would contravene any of the data protection principles set out in the Data Protection Act (DPA), a public authority shall not disclose the personal data.

12. Clearly then for the withheld information to be exempt from disclosure on the basis of regulation 13(1) the information being withheld has to constitute 'personal data' which is defined by the DPA as:

'...data which relate to a living individual who can be identified

a) from those data, or

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

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'

13. The Cabinet Office noted that the withheld information consists of correspondence with the Prince of Wales about hunting. It argued that this clearly constitutes The Prince of Wales' personal data because he is clearly identifiable as the author of the correspondence and the information relates to him by virtue of being an expression of his personal opinions on the subject in question. The Commissioner is satisfied that the withheld information both identifies and relates to The Prince of Wales and therefore constitutes his personal data.

15. The Cabinet Office argued that disclosure of the withheld information would be unfair and thus breach the first data protection principle which states that:

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

(a) at least one of the conditions in Schedule 2 is met, and

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

16. In the circumstances of this case the only relevant condition in schedule 2 of the DPA is the sixth which states that:

'The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms of legitimate interests of the data subject'.

17. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, e.g. established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
- The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?

18. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.

19. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.
20. The Cabinet Office argued that while The Prince of Wales was content to communicate his views on the subject of hunting to the Prime Minister in this way, he would have no reasonable expectation that his personal data would be used for any additional purpose. The Cabinet Office emphasised that the correspondence in question was considered to be confidential and that disclosure of the withheld information would prejudice the privacy and the confidentiality to which The Prince of Wales is entitled. The Cabinet Office acknowledged that although there is a legitimate interest in understanding The Prince of Wales' correspondence with the Prime Minister on the subject of hunting, it did not consider the disclosure of this personal data to satisfy the test of necessity in the sixth condition of schedule 2 of the DPA. Furthermore, the Cabinet Office argued that even if the necessity test were met, disclosure would prejudice the privacy and the confidentiality to which The Prince of Wales is entitled, such that it would not be warranted.
21. With regards to The Prince of Wales' reasonable expectations the Commissioner acknowledges that the requested information dates from a period prior to the right of access provided by the EIR (and FOIA) coming into force on 1 January 2005. Moreover, although FOIA itself was passed in 2000 the Commissioner accepts that it is somewhat speculative to suggest that in 2002 - when this correspondence dates from - The Prince of Wales would, or should have had the expectation that in 2005 or at some point afterwards a request would be made under the EIR or FOIA for the correspondence.
22. However, the Commissioner's guidance on section 40 of FOIA, the equivalent exemption in that legislation, explains that in considering the reasonable expectations of a data subject:

'Public authorities will need to take into account the expectations of the data subject at the time the information was collected and the expectations at the time of the request as they may have changed in the intervening period. For example, this may involve consideration of assurances individuals were originally given and/or altered

*expectations due to public authorities developing their approach to disclosures in response to information requests.*¹

23. In this regard, the Commissioner notes the findings of the decision notice in which the complainant in that case sought information about a meeting which took place in 2014 between the Department for Transport and The Prince of Wales. In that case, in concluding that regulation 13(1) of the EIR was not engaged in relation to The Prince of Wales' personal data, the Commissioner argued that:

*'With the implementation of FOIA and the EIR ten years ago any individual regularly involved in discussions with government Ministers should have appreciated that there could no longer be any guarantee that their communications would remain confidential. This would extend to the Prince of Wales. The Upper Tribunal's finding that the Prince of Wales's [sic] letters to various government departments could be released in Rob Evans v Information Commissioner and others [2012] UKUT 313 (AAC), would also have served to raise the Prince of Wales's awareness of the potential for his contact with the government Ministers to be disclosed.'*²

24. Therefore, whilst the Commissioner acknowledges that there is a clear distinction between the age of the withheld information in this case and the information considered in decision notice FER0567018, given the comments in her guidance, she believes that at the point this request was submitted The Prince of Wales should not have had a guaranteed expectation that his discussion with the Prime Minister about hunting in 2002 would definitely be kept confidential.
25. With regard to the possible consequences for The Prince of Wales if the information was released, the Commissioner accepts that it would infringe his privacy to the extent that it would reveal his views on the subject of hunting which he discussed with the Prime Minister. The Commissioner also accepts that disclosure of the withheld information would be likely to generate media interest given that it would result in the disclosure of correspondence between The Prince of Wales and a former Prime Minister.
26. However, the Commissioner notes that it is public knowledge that The Prince of Wales is a supporter of hunting and in her view, having

¹ <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf> - paragraph 66

² [FER0567018](#) paragraph 47

considered the withheld information, she believes that its disclosure would be unlikely to result in a significant detrimental impact on The Prince of Wales.

27. In summary then, the Commissioner accepts that at the time the information was created The Prince of Wales no doubt had a firm – and reasonable expectation – that this correspondence would be kept private. However, in light of the developments referred to above, the Commissioner believes that it is plausible to suggest that these expectations should have shifted by the point the complainant submitted his request. Furthermore, the Commissioner is also not persuaded that the disclosure of the withheld information would result in a significant level of distress or damage to The Prince of Wales.
28. In any event, as noted above notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
29. In the Commissioner's opinion in this case there is a clear and compelling public interest in the disclosure of the withheld information. This is because The Prince of Wales is known to hold strong views on public policy and to communicate with ministers about those matters. The public interest in the disclosure of such 'advocacy correspondence' was considered at length by the Upper Tribunal in *Evans v Information Commissioner and others*. In that case, the Upper Tribunal concluded (paragraph 213) that '*the overall public interest balance will clearly, in the absence of special circumstances, be in favour of disclosure as regards correspondence between Prince Charles and ministers in a context where Prince Charles has an interest that government should take a particular course.*'³
30. In the Commissioner's opinion, and taking into account the Upper Tribunal's comments, The Prince of Wales' contact with the Prime Minister about hunting raises legitimate questions about the role the heir to the throne in a parliamentary democracy and increasingly the role he may play when he succeeds to the throne. In the particular circumstances of this case, the Commissioner notes that the correspondence dates from 2002, two years prior to the introduction of the Hunting Act which banned the hunting of animals with dogs. The complainant has argued that there is a public interest in the disclosure of the information not least because Tony Blair seemed to distance

³ [Evans v Information Commissioner and others \[2012\] UKUT 313 \(AAC\)](#) – paragraph 213

himself from his own government's ban on hunting and this apparent 'u-turn' lead to speculation that The Prince of Wales had lobbied him on the issue during and after his term as Prime Minister. It is not for the Commissioner to comment on The Prince of Wales's role, she is simply recognising that the Prince of Wales's communications with government ministers, including the Prime Minister, are a matter of legitimate and ongoing public debate.

31. In the Commissioner's opinion the weight of these arguments mean that the disclosure of the withheld information is necessary and the sixth condition of schedule 2 of the DPA is therefore met.

Right of appeal

32. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

33. 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.
34. 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

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