

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

### **Decision notice**

**Date:** 30 June 2020

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

### **Decision (including any steps ordered)**

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1. The complainant submitted a request to the Cabinet Office for correspondence between the then Prime Minister, Theresa May, and The Queen, concerning the UK's exit from the European Union (Brexit). The Cabinet Office refused to confirm or deny whether it held any information falling within the scope of the request. It relied on the exemption contained at section 37(1) of FOIA and regulation 13(5) and regulation 12(6) in conjunction with regulation 12(5)(a) of EIR. The complainant did not dispute the Cabinet Office's reliance on section 37(1)(a).
2. The Commissioner's decision is that the Cabinet Office was entitled to rely on regulation 13(5)(A) to refuse to confirm or deny that it held relevant environmental information.
3. The Commissioner does not require any steps to be taken.

### **Request and response**

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4. The complainant requested the following information from the Cabinet Office on 27 January 2019:

*"Please note that I am only interested in information which was generated between 1 October 2018 and the present day..."*

1. *During the aforementioned period has The Queen exchanged correspondence and communication with Mrs May about the subject of Brexit?*
  2. *If the answer is yes can you please provide copies of this correspondence and communication including emails.*
  3. *During the aforementioned period has Mrs May exchanged correspondence and communication with The Queen which in any way relate to the issue of Brexit?*
  4. *If the answer to question three is yes can you please provide copies of this correspondence and communication including emails.*
  5. *During the aforementioned period have Mrs May and The Queen discussed Brexit at any of their weekly audiences.*
  6. *If the answer to question five is yes can you please provide the following details. In the case of each audience can you please provide a date and time. In the case of each audience please provide an outline of the Brexit issues discussed. Can you also provide copies of any written briefing materials prepared for Mrs May in relation to this meeting. Please note that I am only interested in the briefing materials related to Brexit.*
5. The Cabinet Office responded on 25 February 2019. With regard to information that would, if held, fall under the FOIA, the Cabinet Office refused to confirm or deny that it held relevant information in reliance on the exemption at section 37(1)(a) of the FOIA.
  6. With regard to information that would, if held, constitute environmental information, the Cabinet Office refused to confirm or deny that it held relevant information in reliance on the exceptions at regulation 13(5), and regulation 12(6) in conjunction with regulation 12(5)(a).
  7. The complainant requested an internal review on 5 March 2019, and received the outcome of that review on 9 May 2019. The internal review upheld the Cabinet Office's refusal to confirm or deny that it held relevant information.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 9 May 2019 in order to complain about the Cabinet Office's handling of his request. He did not dispute the Cabinet Office's reliance on section 37(1)(a) of the FOIA. Therefore the Commissioner's investigation focused on the application of exceptions under the EIR.
9. The Commissioner notes that the Cabinet Office is seeking to refuse to confirm or deny whether it holds information that would fall to be

considered under the EIR. Therefore this notice only considers whether the Cabinet Office is entitled, on the basis of the exceptions cited, to refuse to confirm or deny whether it holds any relevant environmental information.

10. For the avoidance of doubt, nothing in this decision notice should be taken as indicating whether or not the Cabinet Office holds any information, environmental or otherwise, of the description specified in the request.

## Reasons for decision

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### Regulation 13: third party personal data

11. Regulation 13(5)(A) of the EIR provides that a public authority may refuse to confirm or deny whether information is held if to do so 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 (the GDPR).
12. 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 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.
13. The Commissioner notes that the wording of the request covers two different contexts in which correspondence or communication may have been exchanged.
14. The first (questions 1 and 3 of the request) covers correspondence between The Queen and the then Prime Minister on the subject of Brexit. The second (question 5 of the request) specifically references The Queen's weekly Audience with the Prime Minister.
15. The Royal Family website explains that the purpose of this Audience is to discuss Government matters. According to this website Audiences are "entirely private. No written transcript or recording is made."<sup>1</sup>

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<sup>1</sup> <https://www.royal.uk/audiences>

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

16. Section 3(2) of the Data Protection Act 2018 (the DPA 2018) defines personal data as:-

*"any information relating to an identified or identifiable living individual".*

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

18. 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.

19. The Cabinet Office maintains that confirming or denying whether the requested information is held would result in the disclosure of a third party's personal data, namely The Queen.

20. The Commissioner's published guidance<sup>2</sup> explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds information about an individual can itself reveal something about that individual. The Commissioner accepts that if relevant information is held by the Cabinet Office, it will be personal data relating to The Queen. Therefore the Commissioner also accepts that confirmation or denial in this case would result in the disclosure of personal data, in that either response would tell the public whether or not The Queen had exchanged correspondence or communications with the then Prime Minister regarding Brexit.

21. The complainant also asked for copies of any written briefing materials prepared for the Prime Minister in relation to any meeting falling within the scope of the request. The Commissioner accepts that confirming or denying that this information was held would result in the disclosure of The Queen's personal data because it would reveal something of consequence about her meetings with the Prime Minister.

**Would confirming whether or not the requested information is held contravene one of the data protection principles?**

22. The Cabinet Office has stated that confirming or denying that relevant information is held would contravene principle (a) as set out at Article 5(1)(a) of the GDPR. This states that:

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/2614719/neither-confirm-nor-deny-in-relation-to-personal-data-section-40-5-and-regulation-13-5-v20.pdf>

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

23. In the case of a request for information under the EIR, 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 (ie it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair, and be transparent.

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

24. 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"* conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

25. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:

*"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".<sup>3</sup>*

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

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<sup>3</sup> 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".*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) 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".*

27. (i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
28. (ii) **Necessity test:** Whether confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;
29. (iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
30. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.
31. The Commissioner invited the Cabinet Office to provide full details of its consideration of the three-part test. The Cabinet Office did not do so, but provided a more general and less structured explanation of its position. Given the subject matter the Commissioner has considered the Cabinet Office’s arguments in the context of her published guidance. She would however recommend that public authorities address each part of the test as described in order to ensure that all relevant points are taken into account and properly documented.

*(i) Legitimate interests*

32. In considering any legitimate interests in confirming whether or not the requested information is held in response to a request under the EIR, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
33. Further, a wide range of interests may be legitimate interests. They can be the applicant’s own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
34. The Cabinet Office advised the Commissioner that in respect of the “kind of information being sought” by the complainant, it would not usually consider there to be a legitimate interest that would override the protection of an individual’s personal data.
35. The Commissioner does not accept the Cabinet Office’s assertion that there is no legitimate interest in confirming or denying whether the requested information is held in this particular case. In the Commissioner’s view the matter of the United Kingdom leaving the European Union is of significant public interest. The Commissioner finds

that there is therefore a legitimate interest in the public being informed as to whether or not the Cabinet Office holds information falling within the scope of the request.

36. The Commissioner is however of the opinion that the legitimate interest cannot carry significant weight in this case. Confirmation or denial that environmental information was held would provide at best a limited insight into one aspect of what could be a very broad range of issues relating to Brexit.

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

37. '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.

38. The Cabinet Office did not explain how it had considered the necessity test, but the Commissioner is satisfied that confirmation or denial that relevant information is held would be necessary to meet the legitimate interest identified above. The Commissioner cannot identify an alternative measure by which the legitimate interest could be met.

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

39. 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 request under the EIR, 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.
40. Again, the Cabinet Office provided general arguments. It maintained that the relevant data subject in such circumstances would not have a reasonable expectation that it would confirm or deny that information was held. The Cabinet Office also set out that the data subject would likely consider such confirmation or denial to cause unjustified harm.

41. The Cabinet Office has not provided the Commissioner with detailed or specific evidence to support its position regarding reasonable expectations.
42. The Commissioner is not generally minded to accept such generic arguments as those set out above. However she considers that there are special circumstances in this case. The Commissioner notes that the request relates to communications with The Queen, who occupies a unique constitutional position as the Sovereign.
43. The Commissioner is further mindful of the statement on the Royal Family website that weekly Audiences between The Queen and the Prime Minister are private, and that no transcript or recording is made. The Commissioner considers this to be clear evidence of a reasonable expectation of confidentiality in communication with the Prime Minister.
44. The Cabinet Office further argued that the complainant in this case had not offered any legitimate interest argument that would override its position. The complainant in his request for internal review had referred to a speech given by The Queen to the Women's Institute,<sup>4</sup> describing it as controversial and suggesting that many commentators saw it as an intervention on behalf of the government.
45. The complainant argued to the Commissioner that it would be "surprising" if The Queen and the then Prime Minister had not discussed Brexit issues in one form or another. He set out the following argument to the Commissioner:

*"Whether Britain remains a member of the European Union is likely to have implications for various areas of public policy which touch upon the environment. An obvious example is agriculture and food production. At the same time whether Britain remains in the UK or not will have a profound impact on how the UK Government and its European partners tackle the issue of climate change."*
46. The Commissioner acknowledges the significance of the UK's decision to leave the EU, and in particular the potential impact on a wide range of important environmental issues. However she also acknowledges the fact that Audiences with the Prime Minister have always been treated as private.
47. The Commissioner has considered the complainant's arguments regarding political neutrality, and she understands that The Queen's speeches are the subject of considerable interest to commentators and

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<sup>4</sup> <https://www.theguardian.com/uk-news/2019/jan/24/queens-speech-calling-for-common-ground-seen-as-brexite-allusion>



the wider public. The Commissioner does not consider such speculation creates a legitimate interest in disclosing whether or not The Queen has corresponded on a particular topic.

48. Based on the above factors, the Commissioner accepts that there is a reasonable expectation of privacy regarding communications between The Queen and the Prime Minister. As set out above the Commissioner recognises that The Queen has a unique constitutional role, and the legitimate interest in her communications with the Prime Minister cannot be afforded significant weight. In the Commissioner's view it is clearly insufficient to outweigh The Queen's fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.
49. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that she does not need to go on to consider whether confirming or denying whether the requested information is held would be fair and transparent. The Commissioner has therefore decided that the Cabinet Office was entitled to refuse to confirm whether or not it held the requested information, to the extent that it is personal data, on the basis of regulation 13(5)(A).
50. 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

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51. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

52. 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.
53. 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** .....

**Sarah O’Cathain**  
**Senior Case Officer**  
**Information Commissioner’s Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**