

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 March 2023

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested correspondence and communications between The Prince of Wales and Prime Minister Boris Johnson concerning the Covid-19 pandemic. The Cabinet Office initially confirmed that they held no information which was environmental in nature which related to the request and refused the request under regulation 12(4)(a) of the Environmental Information Regulations 2004 (EIR). In respect of any information held that was not environmental in nature, the Cabinet Office neither confirmed nor denied whether they held such information in reliance on exemptions 37(1)(aa)(communications with the heir to the Throne), 40(5)(third party personal data) and 41(2)(information provided in confidence).
2. The Cabinet Office partially revised their position at internal review, maintaining that none of the information requested by the complainant was environmental in nature and that the request therefore falls under the Freedom of Information Act 2000 (FOIA) and not the EIR.
3. The Commissioner's decision is that the Cabinet Office were correct to find that the information requested by the complainant is not environmental in nature within the definitions of the EIR and that the Cabinet Office were correct to refuse to confirm or deny whether they hold the information requested under section 37(2) of the FOIA.

4. However, the Commissioner finds that the Cabinet Office breached section 10(1) of the FOIA in that they took longer than 20 working days to provide the complainant with a response to his request.

Request and response

5. On 11 June 2020, the complainant wrote to the Cabinet Office and requested information in the following terms:

'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 generated between 21 February 2020 and the present day. Please note that the Environmental Information Regulations covers material that relates to the state of human health and safety.

Please note that the reference to the Prince of Wales in the questions below should include the Prince himself, his Principal Private Secretary (ies) any other private secretary (ies) and anyone in the Royal Household able to correspond and communicate on his behalf.

Please note that the reference to correspondence and written communication in the questions below should include all traditional forms of correspondence such as letters and faxes, all emails irrespective of whether they were sent through private or official accounts and all messages sent through encrypted messaging services.

1. *During the aforementioned period did the Prince of Wales write to the Prime Minister about the Covid-19 virus and the impact of the virus at home and abroad. Please note that I am interested in receiving all correspondence and communication irrespective of how it relates to the virus. This correspondence and communication will include but not be limited to the Prince's own theories about the origins of the virus in China, the Chinese Government's handling of the crisis, the subsequent spread of the virus in the UK, his own experiences of both the virus and lockdown, his thoughts about the UK Government's response to the virus, the impact of the virus on both the NHS and the care home sector, the Prince's fears for the future of the UK economy, including its food, farming and agricultural sectors.*
2. *If the answer to question one is yes, please provide copies of this correspondence and communication.*
3. *During the aforementioned period, did Mr Johnson reply to the above OR write to the Prince about the Covid-19 crisis. Please note that I am interested in receiving all correspondence and communication*

irrespective of how it relates to the virus. Please see the additional information in question one which relates to the type of information which will be available.

- 4. If the answer to question three is yes, can you please provide copies of this correspondence and communication.*
- 5. During the aforementioned period, did the Prime Minister and the Prince of Wales discuss any aspect of the Covid-19 virus or crisis over the telephone or through any video conferencing service such as Zoom. Please note that I am only interested in that part of the conversation which relates in any way to the virus. If the answer is yes, can you please provide a copy of the transcript of the relevant part of the conversation or a copy of any sound recording of the conversation.*
- 6. If relevant material has been destroyed please provide the following details. In the case of each piece of destroyed correspondence and communication, can you please state when it was destroyed and why. In the case of each destroyed piece of correspondence and communication, can you identify authors, recipients and the date generated. If destroyed documentation continues to be held in another form, can you please provide copies of that documentation'.*
6. The Cabinet Office acknowledged receipt of the request but did not provide a substantive response to the request until 2 February 2021, more than seven months later¹.
7. The Cabinet Office confirmed that the complainant's request had been handled under both the FOIA and the EIR. The Cabinet Office stated that they held no information that was environmental in nature which related to the request. Consequently, the Cabinet Office refused the request under regulation 12(4)(a) of the EIR.
8. In respect of any information held that was not environmental in nature, the Cabinet Office advised that they could neither confirm nor deny if any such information was held, in reliance on the exemptions at sections 37(1)(aa)(communications with the heir to, or the person who is for the time being, second in line of succession to the Throne), 40(5)(third party personal data) and 41(2)(information provided by a third party in confidence) of the FOIA.

¹ On 29 December 2020 the complainant had complained to the ICO about the non-response and the Commissioner wrote to the Cabinet Office on 19 January 2021, giving them 10 working days to provide the outstanding substantive response to the request.

9. The Cabinet Office stated that they considered that confirming or denying that the requested information is held would contravene one of the Data Protection principles under Article 5(1)(a) of the General Data Protection Regulations (GDPR). In this case, their view was that confirming whether the requested information is or is not held would breach principle A of Article 5(1)(a) of the GDPR, which requires that personal data should be processed lawfully, fairly and transparently. The Cabinet Office advised that they had considered the legitimate interests in confirming or denying whether the requested information is held, and that they considered that, on balance, to confirm or deny that information is held was outweighed by the reasonable expectations of privacy of the data subject.
10. The Cabinet Office stated that their response should not be taken as an indication that the information requested is or is not held by the Prime Minister's Office (PMO).
11. The complainant requested an internal review on 4 February 2021. He requested a review of both the length of time taken by the Cabinet Office to provide him with a substantive response to his request, and the response itself. The complainant stated:

'You will note that the original request for information was submitted on 11 June 2020, but a response didn't arrive until today. I maintain that is an unacceptable delay. Moreover, the Cabinet Office did not provide advance warning of a delay in keeping with the various access regimes, or an explanation for the delay or an alternative date for a response. I further note that the Cabinet Office only replied after I complained to the Information Commissioner about its handling of the request'.
12. In respect of the response itself, the complainant stated that he was unhappy with the same because he considered it *'highly likely that the Prince, given his interest in matters relating to public health, will have communicated with the Prime Minister about the matters outlined in my original request. These communications should have been disclosed under the Environmental Information Regulations because they cover the 'state of human health and safety'.*
13. The Cabinet Office provided the complainant with their internal review on 10 March 2021. The review found that the exemptions under the FOIA had been correctly applied but that the request should not have been handled under the EIR.
14. The Cabinet Office acknowledged that the complainant was correct to point out that regulation 2(1)(f) of the EIR covers information relating to the state of human health and safety, but stated that, *'however, this is in relation to the factors set out in regulations 2(1)(a). We do not*

accept that those factors are in play here. For the request to fall under the EIR it would have to ask for:

- *Information on human health and safety that may be affected by the elements in (a) or*
- *Through those elements [human health] may be affected by the factors (b), measures or activities (c)'.*

In our view, your request falls under the FOI Act and not the EIR'.

15. The Cabinet Office apologised to the complainant for their failure to provide him with a response within the statutory time frame of the FOIA. They explained that his request had been logged, acknowledged and assigned to the correct team on the day of receipt, but unfortunately it was not actioned in a timely manner following a change of personnel in the relevant team. The Cabinet Office stated that they accepted that this was not an appropriate handling of his request and apologised for the delay.

Scope of the case

16. The complainant contacted the Commissioner on 15 March 2021 to complain about the way their request for information had been handled.
17. The complainant advised that he was unhappy with the Cabinet Office's failure to answer his request on time and with their failure to provide him with the information '*I think it may hold*'. The complainant explained that given the Prince of Wales's general interest in health related issues, he thought that the Prince may have corresponded with the Prime Minister on matters relating to the Covid-19 pandemic.
18. The complainant stated that he believed that he had only received the substantive response of 2 February 2021 from the Cabinet Office because of the Commissioner's intervention.
19. The Commissioner considers that the scope of his investigation is to determine whether the Cabinet Office correctly processed the complainant's request under the FOIA and the EIR.

Reasons for decision

FOIA – Section 37(1)(aa) – Communications with the heir to, or the person who is for the time being, second in line of succession to the Throne

20. Section 37(1)(aa) of FOIA is a class based exemption, which means that information falling within the description in section 37(1)(aa) automatically engages the exemption, regardless of whether there would be any harm in disclosure. The exemption is not subject to a public interest test.
21. Communications with the heir to the Throne need not necessarily be made directly by, or to, the heir to the Throne. The exemption will also include communications made, or received on his behalf, by officials. Furthermore, the communication need not be a written one; the exemption would apply equally to discussions with the heir to the Throne, in person or via telecommunications. The exemption covers any recorded information relating to such a communication.
22. Section 37(2) of the FOIA states:
'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)'.
23. To engage section 37(2), the requested information (if held) would therefore have to fall within the scope of one or more of the exemptions contained within section 37(1).
24. As the complainant has requested information relating to communications between the (then) heir to the Throne and the then Prime Minister, the Commissioner is satisfied that if the Cabinet Office held non-environmental information within scope of the request, it would be exempt from disclosure on the basis of section 37(1)(aa). He is therefore satisfied that section 37(2) is engaged, and that the Cabinet Office were entitled to issue a neither confirm nor deny response to the request.

Is the information requested environmental information?

Regulation 2(1) – Environmental information

25. The EIR 2004 only apply to environmental information. Regulation 2(1) of the EIR states that:

"Environmental information" has the same meaning as in Article 2(1) of the Directive², namely, any information in written, visual, aural, electronic or any other 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 elements of the environment referred to in (b) and (c)'.*
26. The complainant has contended that any correspondence or communications held by the Cabinet Office would constitute environmental information (and therefore require a response under the EIR) as they would concern the Covid-19 pandemic, and therefore cover the state of human health and safety.
27. The Cabinet Office acknowledged that regulation 2(1)(f) of the EIR covers information relating to the state of human health and safety, but this relates to the factors set out in regulation 2(1)(a) above. The Cabinet Office do not accept that any of those factors apply to the complainant's request. They explained to the complainant that for a request to fall within the EIR, it would need to ask for information on

² EU Directive 2003/4/EC

human health or safety that may be affected by the elements in (a) or through those elements (human health) may be affected by the factors in (b) or measures or activities in (c).

28. The Commissioner accepts that a viral pandemic such as Covid-19 clearly relates to human health and safety. However, it is not the case that any request for information relating to Covid-19 would necessarily be a request for environmental information. The request in this case is a generalised request for any correspondence and communications between the then Prince of Wales and the then Prime Minister relating to Covid-19.
29. Regulation 2(1)(f) of the EIR includes the state of human health and safety but only inasmuch as it is, or may be, affected by the state of the elements of the environment referred to in regulation 2(1)(a), or, through those elements, by any of the matters referred to in regulations 2(1)(b) and (c).
30. The information requested by the complainant in this instance may be specific to Covid-19, but it does not make the necessary connection showing how the state of human health and safety in respect of Covid-19 is, or may be affected by the state of the elements referred to in regulation 2(1)(a) or, through those elements, human health may be affected by the factors in regulation 2(1)(b) or measures or activities in regulation 2(1)(c).
31. Since the information requested by the complainant lacks the required specificity, the Commissioner considers that the Cabinet Office were correct to find (in their internal review) that the information requested does not constitute environmental information and therefore the complainant's request should be processed under the FOIA and not the EIR.
32. The Commissioner would emphasise that the finding in this case does not mean that a request for information which relates to Covid-19 could never be a request for environmental information under the EIR. It is entirely possible that a request for information could be framed in such a way, and for specific enough information within regulation 2(1) of the EIR so as to constitute a request for environmental information.
33. Having found that the information requested in this case is not environmental information within the definitions of the EIR, the Commissioner is satisfied that the Cabinet Office correctly provided a neither confirm nor deny response to the request under section 37(2) of the FOIA.

Procedural matters

34. The Cabinet Office breached section 10(1) of the FOIA by failing to respond to the complainant's request within 20 working days of receipt. The Commissioner notes that this was a significant breach of section 10(1), since there was a delay of over seven months in the complainant receiving a response to his request and then only following intervention by the Commissioner.
35. The Commissioner acknowledges and appreciates that the Cabinet Office provided the complainant with an explanation for the lengthy delay and an apology for the same. Nevertheless, the Commissioner would ask and expect the Cabinet Office to take appropriate steps to ensure that requests received are logged and tracked (especially during personnel handovers) efficiently in future.

Right of appeal

36. 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

37. 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.
38. 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

Gerrard Tracey
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