

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 February 2012

Public Authority: Department for Environment, Food & Rural Affairs

Address: Nobel House
17 Smith Square
London
SW1P 3JR

Decision

1. The complainant made a request to the Department for Environment, Food and Rural Affairs (Defra) for copies of correspondence with the Duchy of Cornwall relating to the drafting of the Marine and Coastal Access Bill. Defra refused the request under the exceptions in regulation 12(5)(d) (Confidentiality of proceedings), regulation 12(5)(f) (Interests of provider of information) and regulation 13(1) (Personal data). The Commissioner has investigated the complaint and found that where regulation 12(5)(d) was applied the information should be withheld. However, the Commissioner also found that regulation 12(5)(f) and regulation 13(1) were either not engaged or the public interest favoured disclosure and that therefore the information withheld under these exceptions should be provided to the complainant. The Commissioner also found that in its handling of the request Defra breached regulation 7(1) (Extension of time) and regulation 11(4) (Representations and reconsideration).
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Defra shall disclose to the complainant the information withheld under regulations 12(5)(f) and 13(1).
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. On 16 August 2010 the complainant made a request for information to Defra for copies of correspondence between the department and the Duchy of Cornwall in connection with the drafting of the Marine and Coastal Access Bill.
5. Defra contacted the complainant on 14 September 2010 when it identified the request as a request for environmental information and therefore the Environmental Information Regulations (EIR) was the correct information access regime to apply. The Commissioner concurs with this view. Defra said that, in accordance with regulation 7(1) it needed to extend the deadline for responding to the request by a further 20 working days due to the complexity of the request.
6. Defra subsequently missed the extended deadline and so on 19 November 2010 the complainant asked for a procedural internal review to consider the delay in dealing with his request.
7. On 7 December 2010 Defra presented the findings of the review where it acknowledged that it was in breach of regulations 5 and 7 relating to the time for compliance with requests. Defra issued its substantive response to the requests on the same day and confirmed that it held information falling within the scope of the request. However it said that the information was being withheld under the exceptions in regulations 12(5)(d) (confidentiality of proceedings), 12(5)(f) (adversely affect interests of provider of information) and 13(1) (personal data). Defra explained why each exception was believed to apply and its reasons for concluding that the public interest in maintaining the exceptions outweighed the public interest in disclosure.
8. On 22 December 2010 the complainant asked Defra to carry out a full internal review of its decision to refuse his request. Defra presented the findings of this review on 3 March 2011 at which point it upheld the decision to refuse the request by relying on the exceptions referred to in its earlier response.

Scope of the case

9. On 14 March 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

Reasons for decision

10. The complainant has requested copies of correspondence with the Duchy of Cornwall in relation to what was then the Marine and Coastal Access Bill. The Duchy of Cornwall is all the lands and estates held by the Heir to the Throne, HRH The Prince of Wales, as Duke of Cornwall. The consent of The Prince of Wales is required if a bill would affect the interests of the Duchy.¹ Defra has applied regulation 12(5)(d) to several emails between its officials and representatives of The Prince of Wales. Regulations 12(5)(f) and 13(1) have been applied to a letter sent to the Private Secretary to The Prince of Wales and the subsequent reply. The Commissioner has first considered the application of section 12(5)(d)

Regulation 12(5)(d) – adversely affect the confidentiality of proceedings

11. Regulation 12(5)(d) provides that:

“a public authority may refuse to disclose information to the extent that its disclosure would adversely affect:

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law”

12. Defra has said that the exception is engaged because disclosure would adversely affect the confidentiality of its proceedings with regard to the obtaining of Prince’s consent in relation to the Marine and Coastal Access Bill. It contends that in order for the exception to be engaged the proceedings themselves do not have to be adversely affected just the confidentiality of those proceedings. In this case the confidentiality of the proceedings would be adversely affected because, it argues, disclosure of information where there was a reasonable expectation of confidence would be a breach of the common law duty of confidence.

¹ http://interim.cabinetoffice.gov.uk/making-legislation-guide/queens_consent.aspx

13. The term 'proceedings' is not defined in the legislation. The dictionary defines the term as:
- an act or course of action;
 - institution of legal action or any step taken in legal action;
 - minutes of the meeting of a club, society etc;
 - legal action/litigation;
 - events of an occasion/day-to-day meeting.
14. Under the EIR there is an obligation to read exceptions restrictively therefore the Commissioner's view is that 'proceedings' suggests a certain level of formality and it is unlikely to cover all the activities of a public authority. In this particular case the proceedings in question are Defra's and the then government's preparation of the Marine and Coastal Access Bill and in particular the obtaining of Prince's consent. Cabinet Office guidance makes it clear that it is a requirement that the consent of the Prince of Wales is sought when a bill has the potential to affect the interests of the Duchy of Cornwall and sets out the process by which consent is obtained. Making legislation is perhaps the most important function of a government and is clearly a formal process. In these circumstances the Commissioner is satisfied that the obtaining of Prince's consent in preparation for the introduction of a government bill can be said to be "proceedings" for the purposes of this exception.
15. The Commissioner has now considered whether disclosure would have an adverse affect on the confidentiality of these proceedings. Defra has explained that its communications with representatives of The Prince of Wales in his capacity as Duke of Cornwall have the necessary quality of confidence because both sides have a reasonable expectation that the communications will not be disclosed, based on convention. Indeed, this expectation is made explicit in one of the documents which makes it clear that the communications should not be circulated more widely. The content of the exchanges is not in the public domain and therefore disclosure in response to a request under the regulations would adversely affect the confidentiality of the proceedings by releasing the information and breaching the obligation of confidence. Defra has also explained that the information has not been passed to any third parties except for the purposes for which it was created and therefore confidence has not been waived. The legal basis for this confidentiality is the common law duty of confidence and therefore the Commissioner is satisfied that disclosure under these regulations would adversely affect the confidentiality of the proceedings, with that confidentiality being provided for in law. Consequently where regulation 12(5)(d) has been applied the Commissioner has decided that the exception is engaged.

16. All exceptions in the EIR are qualified and so the Commissioner has carried out a public interest test in respect of the information withheld under 12(5)(d). In favour of disclosure the Commissioner would say that the public interest lies in knowing more about how The Prince of Wales in his capacity as Duke of Cornwall may influence government policy and the process by which his consent is obtained when Parliamentary bills may affect the interests of the Duchy of Cornwall. The Monarchy has a central role in the British constitution and in the Commissioner's view the public is entitled to know how the various mechanisms of the constitution operate in practice.
17. As regards the public interest in maintaining the exception the Commissioner's view is that there is an inherent public interest in protecting confidences and that a duty of confidence should not be overridden lightly. This is because the consequence of any disclosure of information will be to undermine, to some degree, the principle of confidentiality which is to do with the relationship of trust between confider and confidant. People would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected. In the *Bluck v Information Commissioner* case the Information Tribunal, quoting from *Attorney General v Guardian* in the High Court, found that:
- "...as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence..."*²
18. As well as the general public interest in protecting confidences the Commissioner will also take into account the particular interests of the confider of the information, in this case the representatives of the Prince of Wales as well as Defra itself. On this point Defra has referred to the "established constitutional Convention that correspondence between the Heir to the Throne and Government is confidential in nature". It explained that the rights and duties that The Prince of Wales exercises depend on the confidentiality of his communications with government and this would be undermined if the information was disclosed.
19. The Commissioner views with some scepticism Defra's argument that this type of information is covered by the principle regarding the Heir to

² *Bluck V Information Commissioner & Epsom and St Helier University NHS Trust* [EA/2006/90], para. 9.

the Throne and Government ministers being able to correspond in confidence. The information here is different from other royal communications because it concerns The Prince of Wales being consulted because legislation may affect his interests as Duke of Cornwall. Essentially he is being consulted in his role as a landowner rather than as the Heir to the Throne. In the Commissioner's view the purpose of the principle or convention referred to by Defra is to prepare the Heir to the Throne for the time when he or she will become Sovereign; to educate him/herself in the business of government. The information in this case does not form part of that process and the Commissioner does not accept that disclosure would undermine the ability of The Prince of Wales to correspond with ministers in preparation for his future role as Sovereign.

20. Whilst the Commissioner does not accept that this information is covered by the principle referred to by Defra, it remains the fact that the obligation to obtain Prince's consent when a bill may affect the interests of the Duchy of Cornwall is a valid constitutional process. Therefore, in the Commissioner's view this process still warrants protection and disclosure of this particular information would undermine this process by which ministers are able to obtain the views of The Prince of Wales as Duke of Cornwall on relevant proposed legislation.
21. The Commissioner accepts that there is a public interest in disclosure which would shed further light on the process by which Prince's consent is obtained. The Commissioner has given these arguments some weight but finds that they are more general in nature. For instance there is no suggestion that The Prince of Wales as Duke of Cornwall has exerted any undue influence over government policy. Balanced against the general public interest in upholding confidences and in protecting the process by which Prince's consent is obtained the Commissioner has found that the public interest in maintaining the exception outweighs the public interest in disclosure.

Regulation 12(5)(f) – Adversely affect the interests of provider of information

22. For two of the documents falling within the scope of the request Defra has applied regulation 12(5)(f) only. This information constitutes a letter from Defra to the Private Secretary to The Prince of Wales regarding the Marine and Coastal Access Bill together with the corresponding reply. Regulation 12(5)(f) provides that:

“a public authority may refuse to disclose information to the extent that its disclosure would adversely affect:

(f) the interests of the person who provided the information where that person-

(i) was not under, and could not have been under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure"

23. The Commissioner is conscious that the threshold to engage an exception under regulation 12(5) of the EIR is a high one compared to the threshold needed to engage a prejudice based exemption under the Act. Under regulation 12(5) for information to be exempt it is not enough that disclosure will have an effect, that effect must be 'adverse'. Furthermore, it is necessary for a public authority to show that disclosure 'would' have an adverse effect, not that it may or simply could have an effect. With regard to the interpretation of the phrase 'would' the Commissioner has been influenced by the Tribunal's comments in the case *Hogan v Oxford City Council & Information Commissioner* (EA/2005/0026 & 0030) in which the Tribunal suggested that although it was not necessary for a public authority to prove that prejudice would occur beyond any doubt whatsoever, prejudice must be at least more probable than not.³ It is also important to stress that the prejudice has to be to the person who provided the information rather than the public authority which holds the information.
24. Of the information withheld under this exception, correspondence sent to Defra clearly falls within the scope of regulation 12(5)(f) because it is information 'provided' to it by a third party, i.e. The Prince of Wales or his representatives. However one of the documents was correspondence sent by Defra to The Prince of Wales. This information focuses on the Bill itself and represents the views and/or opinions of Defra rather than The Prince of Wales. This document does not include any information obtained from the Prince of Wales or his representatives or indeed any other third party. Regulation 12(5)(f) cannot apply to this particular information.

³ These guiding principles in relation the engagement of exceptions contained at regulation 12(5) were set out in Tribunal case *Archer v Information Commissioner & Salisbury District Council* (EA/2006/0037)

25. Where the information is within the scope of regulation 12(5)(f) the Commissioner has considered whether the three limbs of the exception are met before considering the nature of the adverse affect. As regards the first limb, the Commissioner understands that whilst it is a constitutional convention that the consent of The Prince of Wales is sought and ultimately given in cases where a bill would affect the interests of the Duchy of Cornwall, there is no actual legal obligation to give consent and therefore the first limb of the test is met. The Commissioner considers that the second limb will be met where there is no specific statutory power to disclose the information in question. It is clear that there is no such power in this case and thus the second limb is also met. Finally with regard to the third limb the Commissioner understands that The Prince of Wales has not consented to disclosure of the withheld information.
26. Defra has argued that disclosure would adversely affect The Prince of Wales by invading his privacy and could also undermine the way in which he and his representatives correspond with ministers by impinging on the constitutional convention that the Prince of Wales is able to correspond with government ministers in confidence.
27. The Commissioner has considered the arguments put forward by Defra but is not satisfied that disclosure would adversely affect The Prince of Wales in the way it suggests. This is because the fact that Defra sought and obtained the consent of The Prince of Wales for the Marine and Coastal Access Bill is already in the public domain, it being a requirement that the granting of Prince's consent be communicated to Parliament during the passage of a bill.⁴ The Commissioner must be careful not to reveal the information itself in this decision notice but having reviewed the information falling within the scope of the request he would simply say that in his view disclosure would reveal very little beyond what is already known, and what is routinely known in similar situations.
28. The Commissioner would also repeat his earlier observation that in his view this type of information is not covered by the convention regarding the Heir to the Throne and Government ministers being able to correspond in confidence. For these reasons the Commissioner has decided that the exception in regulation 12(5)(f) is not engaged.

⁴ Hansard HL Vol 711 Col 421 (8 June 2009)

Regulation 13(1) – Personal data

29. Defra has also applied the regulation 13(1) exception to the two documents withheld under regulation 12(5)(f). Regulation 13(1) provides that information shall not be disclosed if it is personal data of someone other than the applicant and if it satisfies one of two conditions relating to the Data Protection Act 1998 (DPA 1998). In this case the relevant condition is that disclosure would contravene any of the data protection principles.
30. In order for the exception to apply the Commissioner must first consider whether the information is personal data. Personal data is defined in the DPA 1998 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 intentions of the data controller or any other person in respect of the individual;'
31. Having reviewed the information the Commissioner is satisfied that it amounts to the personal data of the Prince of Wales because it relates to his interests as Duke of Cornwall.
32. Defra has argued that disclosure of the information would contravene the first data protection principle which requires that personal data be processed fairly and lawfully and in particular shall not be processed unless one of the conditions in schedule 2 is met. Defra has not said why it believes disclosure would be unfair. However, when considering the fairness of disclosing personal data the Commissioner will usually take into account the expectations of the individual concerned, the possible consequences of disclosure and whether the legitimate interests of the public are sufficient to justify any negative impact on the rights and freedoms of the data subject.
33. The Commissioner has already said in relation to regulation 12(5)(f) above that in his view disclosure would add very little to what is already known regarding Prince's consent on the Marine and Coastal Access Bill. In these circumstances the Commissioner is of the view that disclosure would not be unfair. Disclosure of what is already known would not have any adverse consequences for the Prince of Wales and since it is a requirement that Prince's consent is communicated to Parliament there must have been a reasonable expectation that the particular information

covered by this exception would be disclosed. For these reasons the Commissioner has found that the exception in regulation 13(1) is not engaged in this particular case.

Other Matters

34. The complainant submitted his request on 16 August 2010. However, it was not until 7 December, almost 4 months later, that Defra issued its substantive response. Under regulation 7(1) a public authority may extend the 20 working day deadline for responding to a request to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable to comply with the request within the original deadline. By failing to respond to the request within the extended 40 working day deadline Defra breached regulation 7(1) of the Act.
35. After receiving the response to his request the complainant asked Defra to carry out an internal review on 22 December 2010. However, it was not until 3 March 2011 that Defra presented its findings. Regulation 11 of the Act provides for an applicant to make representations to a public authority if it appears to him that the authority has failed to comply with a requirement of the EIR. The public authority is obliged to consider the representations and decide if it has complied with the requirements of the EIR. However, under regulation 11(4) a public authority must notify the applicant of its decision as soon as possible and no later than 40 working days after receipt. Therefore, by failing to respond to the complainant's request for an internal review within 40 working days Defra breached regulation 11(4) of the EIR.

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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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

Graham Smith
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