

Decision Notice

Decision 022/2016: Mr Marc Ellison and the Board of Trustees of the Royal Botanic Garden Edinburgh

Correspondence with HRH Prince Charles

Reference No: 201501528

Decision Date: 4 February 2016



Scottish Information
Commissioner

Summary

On 24 June 2015, Mr Ellison asked the Board of Trustees of the Royal Botanic Garden Edinburgh (RBGE) for correspondence between HRH Prince Charles and RBGE since January 2007.

RBGE considered Mr Ellison's request under FOISA. It refused to provide the information requested as it believed disclosure would constitute an actionable breach of confidence. It also believed the information to be Prince Charles's personal data, and that the Royal Family was entitled to correspond with public authorities in private.

Following a review, Mr Ellison remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated. She found that RBGE had initially failed to identify that the information was environmental and should have been considered under the EIRs. She also found that RBGE was not entitled to rely on regulation 10(5)(f) of the EIRs to withhold the information.

The Commissioner required RBGE to provide Mr Ellison with the information requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraph (a) of definition of "environmental information") (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (5)(f) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 24 June 2015, Mr Ellison made a request for information to the Royal Botanic Garden Edinburgh (RBGE), seeking complete digital copies of correspondence sent by HRH Prince Charles since January 2007, and any responses sent to Prince Charles.
2. RBGE responded on 23 July 2015, refusing to provide the information requested. It considered the information exempt from disclosure under section 36(2) of FOISA (Confidentiality), believing it had been provided in circumstances which imposed an obligation of confidentiality. RBGE also considered the information exempt under section 38(1)(b) of FOISA (Personal information), as the personal data of a third party, disclosure of which would breach the Data Protection Act 1998. It further considered the information exempt from disclosure under section 41(a) of FOISA (Communications with Her Majesty etc. and honours), as it believed the public interest lay in maintaining a private and confidential channel of communication between RBGE and the Royal Family.

3. On 23 July 2015, Mr Ellison wrote to RBGE, requesting a review of its decision. He argued that a recent disclosure of correspondence with Prince Charles¹ had set a precedent for such disclosure being in the public interest. Mr Ellison was also agreeable to any personal data (such as address, telephone number or email address) being redacted from any information disclosed.
4. RBGE notified Mr Ellison of the outcome of its review on 19 August 2015, upholding its original decision in full.
5. On 21 August 2015, Mr Ellison wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr Ellison stated he was dissatisfied with the outcome of RBGE's review because he did not agree that RBGE could rely on the exemptions cited.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Ellison made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 2 September 2015, RBGE was notified in writing that Mr Ellison had made a valid application. RBGE was asked to send the Commissioner the information withheld from him. RBGE provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. RBGE was invited to comment on this application. In particular, it was asked to comment on the application of the EIRs to any of the information, and to justify its reliance on any provisions of FOISA or the EIRs it considered applicable to the information requested.
9. RBGE provided submissions to the investigating officer. Mr Ellison also provided submissions on why he believed it was in the public interest for the information to be disclosed.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Ellison and RBGE. She is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

11. During the investigation, RBGE informed the investigating officer that it had changed its position and now considered the withheld information to be environmental, as defined in regulation 2(1) of the EIRs. RBGE provided submissions solely in terms of the EIRs.
12. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.

¹ <https://www.supremecourt.uk/cases/uksc-2014-0137.html>

13. Having considered the nature of the withheld information, the Commissioner is satisfied that it is environmental information as defined within regulation 2(1) of the EIRs. The Commissioner considers it would fall within paragraph (a) of the definition of environmental information (as information on the state of the elements of the environment).
14. The Commissioner must, therefore, conclude that by initially failing to consider and respond to Mr Ellison's request, and requirement for review, under the EIRs, RBGE failed to comply with regulation 5(1) of the EIRs.

Section 39(2) of FOISA

15. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, RBGE informed the investigating officer that it wished to apply the exemption in section 39(2) to the information withheld.
16. Given her conclusion that the withheld information is properly classified as environmental, the Commissioner therefore concludes that RBGE was correct to apply section 39(2) of FOISA. The exemption is subject to the public interest test in section 2(1)(b) of FOISA: as there is a separate statutory right of access to environmental information available to Mr Ellison in this case (something he has not disputed), the Commissioner also finds that the public interest in maintaining this exemption and dealing with the request in line with the EIRs outweighs any public interest in disclosure of the information under FOISA.
17. The Commissioner will, therefore, consider this case in what follows solely in terms of the EIRs.

Information held

18. In order to ascertain whether all relevant information had been identified, RBGE was asked to explain the steps it took to establish what relevant information it held and which fell within the terms of Mr Ellison's request. RBGE explained the searches carried out, identifying the search terms it had used to search the index of its paper-based registry system, and those used to search for any relevant information held electronically.
19. Having considered the relevant submissions, the Commissioner accepts that the searches were proportionate in RBGE's circumstances and that any information relevant to the request was capable of being identified using these searches.

Regulation 5(1) of the EIRs

20. Regulation 5(1) of the EIRs, subject to the various qualifications contained in regulations 6 to 12 (regulation 5(2)(b)), requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
21. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.
22. In its submissions, RBGE confirmed that it wished to rely on regulation 10(5)(f) in respect of all of the withheld information.

Regulation 10(5)(f)

23. Regulation 10(5)(f) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the interests of the person who provided that information, where that person –
- (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from the EIRs, be made available; and
 - (iii) has not consented to its disclosure.
24. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).

Does regulation 10(5)(f) apply in this case?

25. A number of factors should be addressed in considering whether this exception applies. These include:
- Was the information provided by a third party?
 - Was the provider, or could the provider be, required by law to provide it?
 - Is the information otherwise publicly available?
 - Has the provider consented to disclosure?
 - Would disclosure of the information cause, or be likely to cause, substantial harm to the interests of the provider?

Was the information provided by a third party?

26. RBGE submitted that the information was supplied voluntarily in the expectation that it would not be disclosed to a third party. Having viewed the withheld information, the Commissioner accepts that some of the information (specifically, that in the correspondence from Prince Charles) was provided by a third party.
27. RBGE was asked to confirm whether it wished to rely on regulation 10(5)(f) in respect of the remaining correspondence from RBGE to Prince Charles. In response, RBGE maintained that the exception applied to the information in this correspondence, as it reiterated the points raised in Prince Charles's letter. It submitted that disclosure of the information, in its reiterated form, would reveal the information in the preceding correspondence from Prince Charles.
28. RBGE argued that regulation 10(5)(f) was focussed on the actual information that, in this case, had originated from Prince Charles. Given that the correspondence from RBGE reiterated the points raised in the correspondence from Prince Charles, RBGE did not consider the origins of the document, being distinct from the information itself, to be critical in applying the exception.
29. While the Commissioner accepts the distinction drawn between information and the medium in which it is conveyed, and that information obtained from a third party may be reiterated in

correspondence back to that third party, she cannot accept that this follows for the whole of the letter from RBGE to Prince Charles. It applies to the first sentence only, after which the remainder of the letter can only be described as conveying information and comment from RBGE.

30. Only that first sentence, therefore, can qualify as information provided by another person. For that reason, the Commissioner does not consider the information in the remainder of the letter to qualify for exception under regulation 10(5)(f) and so it must be disclosed to Mr Ellison.

Was the provider, or could the provider, be required by law to provide it?

31. RBGE submitted that the provider was not required, by law, to provide it.
32. Having viewed the withheld information, in the context in which it was provided, the Commissioner is satisfied that it is not information Prince Charles was required, or could have been required, to provide.

Is the information otherwise publicly available?

33. RBGE submitted that the information was not publicly available.
34. From examination of the withheld information, it was apparent to the Commissioner that at least some of it had been disclosed at an RBGE staff conference in January 2012. RBGE was invited to provide comment on this, and to explain the scale and scope of the conference.
35. RBGE submitted it was likely that Prince Charles's sentiments had been passed on verbally as part of the conference's opening presentation. It explained the conference was internal; there had been no charge for attendance and approximately 150-250 delegates, comprising staff, volunteers, students, research associates, trustees and Scottish Government representatives, had been invited, by email, to attend. RBGE confirmed that delegates had not been asked to keep the information secret, but took the view that it was not intended for disclosure to the general public.
36. The Commissioner has considered RBGE's submissions on this point carefully. Given the nature of what has been withheld, there would appear to be no reason for presuming an expectation that it would not be shared throughout the authority, including its volunteers, at the very least. Indeed, it is unclear why the sender would not wish sentiments such as those expressed to be shared more widely. There is nothing in their content or the circumstances of their communication to suggest the sender expected them to be kept private. In fact, they were communicated to the conference delegates, who could not all be described as internal to the authority, with no suggestion that the attendees should keep this information to themselves. Taking all of this into account, the Commissioner can see no reason why the delegates should have inferred there was an expectation that they should keep the information or the circumstances of its provision private.
37. In all the circumstances, therefore, the Commissioner is satisfied that the Prince's sentiments, as conveyed in the withheld letter, were effectively made public when they were communicated to the conference. The essence of the letter was conveyed and the Commissioner does not consider there to be anything of substance from it which has not been made public.

Has the provider consented to disclosure?

38. RBGE submitted the provider had not consented to disclosure.

39. RBGE explained that upon receipt of Mr Ellison's request, it had notified the Royal Household, which responded that –
- “... the general policy for responses to the public at large has been to indicate that, as a matter of constitutional propriety, seeking consent to releasing the personal data of HRH is not an avenue that is available as it is assumed that consent would not be given”.*
40. RBGE provided copies of email correspondence with the Royal Household, pursuant to Mr Ellison's request and application, evidencing this position.
41. The Commissioner invited RBGE to explain the basis upon which the Royal Household had been invited to comment, together with any evidence that specific consent was sought from (or refused by) Prince Charles for the information requested in this case. RBGE was also invited to comment on whether, in this regard, it believed it had met the requirements of section 7 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs (the Section 60 Code)².
42. RBGE explained that the Royal Household communicates on behalf of members of the Royal Family who undertake public engagements. It believed the statement made by the Royal Household to have been aimed at making public authorities aware of the assumption that, due to considerations of constitutional order and propriety, members of the Royal Family do not grant consent to disclosure of their personal and confidential data.
43. RBGE considered the underlying principle to be that the goodwill work carried out by members of the Royal Family is dependent upon maintaining confidentiality of communications with public authorities. RBGE referred to the principle that communications between the Heir to the Throne and the Government are subject to an expectation of confidence, analogous to the convention of confidentiality that exists between the Sovereign and the Government. It submitted that this, together with the correspondence from the Royal Household, was sufficient evidence to conclude that consent to disclosure would not be given.
44. RBGE considered the statement by the Royal Household provided sufficient evidence that specific consent had been sought from (or refused by) Prince Charles in this particular case. The Buckingham Palace's Private Secretary's Office, with which the matter had been raised, was authorised to deal with all FOI-related enquiries on behalf of members of the Royal Family. In this regard, RBGE referred to the guidance on page 20 of the Scottish Government's Step-By-Step Guide to Handling FOI and EIRs Requests³.
45. RBGE maintained it had met the requirements of section 7 of the Section 60 Code by consulting the Royal Household in accordance with steps 8 and 32 of the Step-By-Step Guide.
46. The Commissioner has carefully considered RBGE's submissions on this matter, together with the supporting correspondence with the Royal Household. She acknowledges that RBGE believes specific consent was sought from, and refused by, Prince Charles in this particular case, for the reasons set out above.
47. However, the Commissioner cannot agree with RBGE's conclusion on this point. RBGE's arguments are based on both a presumption about the assumed authority of the Private Secretary's Office, and on the acceptance that blanket refusal can be given without reference to the particular information in question. She does not dispute that the Private Secretary's

² <http://www.gov.scot/Resource/0046/00465757.pdf>

³ <http://www.gov.scot/Resource/Doc/933/0113676.pdf>

Office has such authority, but the question is whether or not it demonstrated that it gave or withheld consent in this particular case. Generally, in the Commissioner's view, consent (and its refusal) will involve an active expression of the wishes of the individual concerned, and is specific to the circumstances for which it was sought. Generally, therefore, the issue must be approached on a case-by-case basis and clearly apply to the information in question.

48. It is not clear, and has not been explained, why it should be constitutionally improper for cases of this kind to be approached individually, particularly in relation to issues of no conceivable constitutional import. A presumption of universal application is not sufficient. The Commissioner is not satisfied, therefore, from the submissions she has received, that consent can be considered to have been properly sought and duly refused in this particular case in respect of disclosure under the EIRs.

Substantial prejudice

49. As regulation 10(5)(f) is focussed on substantial prejudice to the interests of the person who provided the information, RBGE was invited to explain specifically what interests of Prince Charles would be prejudiced, in what way, and how this could be expected to follow from disclosure of the particular information requested.
50. RBGE referred to the dictionary definition of "patronage", submitting that this meant a voluntary and personal commitment to a charitable cause. It argued that Prince Charles's patronage of RBGE was an office held by him as a private individual. RBGE considered there to be no outright assumption that all private and confidential information relating to an individual's patronage would be disclosed. Referring to the Scottish Government's Guidelines "FOISA/EIRs Working Assumption – Honour and Royal Information", RBGE submitted that members of the Royal Family are in a unique position in that it is difficult to disentangle their public and private personas.
51. RBGE further maintained that disclosure of the information would prejudice Prince Charles's ability to act effectively as patron, not only of RBGE, but also other organisations, a role which it submitted was an important part of his public and private life. RBGE submitted that Prince Charles selects the relevant organisations personally and has discretion on the level of attention and support offered, expressed either publicly or privately. Given his high profile, RBGE considered disclosure of the information requested would likely result in unhelpful and unnecessary speculation, or comparisons on the level of personal attention Prince Charles offers to one organisation or another.
52. The Commissioner has considered the submissions made by RBGE on the perceived substantial prejudice to Prince Charles's interests. She must take into account all factors bearing on the expectations it would be reasonable to hold, in relation to the information. She must, above all, take account of the information itself.
53. The Commissioner does not accept that patronage of an organisation, by such a high-profile public figure as Prince Charles, can be said to be an office held by him in a purely private capacity. While she accepts that being patron, and the extent to which a patron is involved, will ultimately be a matter of personal choice, Prince Charles's status as a public figure must have a considerable bearing on his being patron at all. The Commissioner also considers it reasonable to expect that the patron of any organisation would take an active interest in that organisation, including corresponding with the organisation on any matters of concern.
54. The Commissioner has touched on the question of confidentiality above, in considering whether the information is publicly available. Having considered the content of the

correspondence from Prince Charles and the circumstances in which it was provided, the Commissioner can find nothing from which it can be inferred that Prince Charles would have a reasonable expectation that the contents of his letter would be held in confidence by RBGE. This, too, is something she would expect to be approached on a case-by-case basis.

55. RBGE's arguments appear to be based on the premise that correspondence from a particular Royal figure will always be confidential, just because that is who the sender is. That is not an argument the Commissioner can accept, not least because it would have the effect of turning regulation 10(5)(f) into a blanket exception, where substantial prejudice would be presumed just because of the identity of the person providing the information. There is no foundation for this approach. Even if the authority is making an argument based on the law of confidentiality, an obligation to keep information confidential needs to be implied from the circumstances in which it was imparted, not simply from the status of the person providing the information.
56. The Commissioner does not consider that RBGE has provided sufficient evidence to satisfy her that disclosure of the information would result in the prejudice claimed to Prince Charles's interests. She does not accept that the information could be characterised as confidential, while the submissions on harm to the Prince's role as a patron appear to be speculative and wholly unrelated to the relatively innocuous nature of the information withheld.
57. Having considered all the evidence before her, therefore, the Commissioner does not accept that RBGE was entitled to apply regulation 10(5)(f) to the withheld information.

Compliance required

58. RBGE is required to disclose to Mr Ellison all the correspondence it has identified as falling within the scope of this request. Mr Ellison has already indicated (both in his requirement for review and in his application to the Commissioner) that he does not object to the redaction of any personal information (such as address, telephone number, email address): on this basis, the Commissioner will accept the redaction of signatures from the correspondence, in addition to any private addresses, telephone numbers and email addresses.

Decision

The Commissioner finds that the Board of Trustees of the Royal Botanic Garden Edinburgh (RBGE) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Ellison.

The Commissioner finds that RBGE failed to comply with the EIRs, in particular regulation 5(1), by:

- (i) failing to identify the information Mr Ellison requested as environmental information and respond under the EIRs, and
- (ii) incorrectly withholding the information under regulation 10(5)(f) of the EIRs.

The Commissioner therefore requires RBGE to provide Mr Ellison with the withheld information (with any personal information redacted) by **21 March 2016**.

Appeal

Should either Mr Ellison or the Board of Trustees of the Royal Botanic Garden Edinburgh wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If the Board of Trustees of the Royal Botanic Garden Edinburgh (RBGE) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that RBGE has failed to comply. The Court has the right to inquire into the matter and may deal with RBGE as if it had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

4 February 2016

Freedom of Information (Scotland) Act 2002

1 General entitlement

(1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

(6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

(1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

(b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

39 Health, safety and the environment

...

(2) Information is exempt information if a Scottish public authority-

(a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or

(b) would be so obliged but for any exemption contained in the regulations.

...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, 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;

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)–

...

- (b) is subject to regulations 6 to 12.

...

10 Exceptions from duty to make environmental information available–

(1) A Scottish public authority may refuse a request to make environmental information available if–

- (a) there is an exception to disclosure under paragraphs (4) or (5); and
- (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

(2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall–

- (a) interpret those paragraphs in a restrictive way; and
- (b) apply a presumption in favour of disclosure.

...

(5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially–

...

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

- (i) was not under, and could not have been put under, any legal obligation to supply the information;
- (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
- (iii) has not consented to its disclosure;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info