

## **Freedom of Information Act 2000 (FOIA)**

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 18 August 2021

**Public Authority:** The National Archives  
**Address:** Kew, Richmond  
Surrey  
TW9 4DU

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

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1. The complainant has requested information from The National Archives (TNA) held in closed files 'PREM 19/4418/1 and 19/4418/2 from the open parent piece PREM 19/4418: ROYAL FAMILY. Prince Charles' interest in youth unemployment: The Prince's Trust; The Prince's Youth Business Trust; part 1. TNA withheld the requested information citing section 37(1)(a) and later amended this to section 37(1)(aa) which relates to communications with the heir to the throne. TNA also cited section 40(2) and section 41 regarding the withheld information. TNA denied that the files contained any environmental information falling within the scope of the EIR.
2. The Commissioner's decision is that TNA was correct in withholding most of the information on the basis of the exemption at section 37(1)(aa). However, the Commissioner considers that some limited information falls within the scope of the EIR 2004. The Commissioner also finds that TNA breached section 10(1) FOIA by not responding within the statutory timeframe.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Issue a further response to the complainant under the EIR solely regarding the parts of the information held in PREM 19/4418/1 identified in the confidential annex to this decision notice.
4. 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**

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5. On 9 March 2020 the complainant made the following request for information under the FOIA –

*"I would like to request copies of the contents of the following closed extracts under the Freedom of Information Act and the Environmental Information Regulations. The closed extracts are PREM 19/4418/1 and 19/4418/2. I note the extracts are more than twenty years old and I can see no reason why they can not be made available now..."*
6. On 22 April 2020, 13 May 2020, and 20 May 2020 TNA sent holding emails apologising for not being able to respond sooner.
7. On 28 May 2020 TNA refused to provide the requested information, citing sections 37(1)(a) – communications with or on behalf of the sovereign, section 40(2) – personal information, and section 41(1) – information provided in confidence. The refusal notice did not mention the EIR.
8. The complainant made a request for a review on the same day. He asked why the EIR had not been considered and questioned the use of the exemptions under FOIA.
9. TNA provided an internal review on 20 July 2020 in which it partially maintained its original position by citing section 40(2) and section 41 but accepted that the question of environmental information had not been addressed in the refusal notice and stated that TNA did not consider that the withheld information contained any information falling within the scope of the EIR. The review decided that section 37(1)(a) had not been appropriately cited and that section 37(1)(aa) should have

been cited instead. The review also acknowledged that TNA had exceeded the statutory timeframe when it sent the refusal notice.

## **Scope of the case**

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10. The complainant wrote to the Commissioner on 20 July 2020 to complain about the way his request for information had been handled. Due to the pandemic, the postal correspondence was not scanned on the system until 22 September 2020.
11. The Commissioner considers that the scope of this case concerns TNA's application of section 37(1)(aa), section 41 and section 40(2) to the files PREM 19/4418/1 and PREM 19/4418/2. As the complainant stresses that there may be environmental information, she intends to look at whether any of the information would fall under the EIR. She will also consider any procedural breaches that may have occurred.

## **Reasons for decision**

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### **Regulation 2(1) - Is the requested information environmental?**

12. Information is "environmental" if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR.
13. The Commissioner has published guidance on regulation 2(1). The Commissioner's guidance states that the test that should be applied by public authorities is whether the information is on, or about, something falling within the definitions in regulations 2(1)(a) – (f), and not whether the information directly mentions the environment or any environmental matter.
14. Regulation 2(1) of the EIR defines environmental information as information 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...emissions...and other releases into the environment, likely to affect the elements 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..."*

15. The complainant's view is that communications from the Prince of Wales are not exempt from the EIR if they relate to matters involving the environment. His view is that TNA wanted to ignore environmental aspects because it wanted to block the release of the material. The complainant argues that the closed extracts are likely to relate to the state of human health and safety, conditions of human life and built structures.
16. TNA's view is that the contents of the file are not environmental in nature according to the criteria listed in paragraph 14 above. This was confirmed to the complainant in the internal review response, though it had not been in its refusal notice.
17. TNA also confirmed its view in the response it sent to the Commissioner.
18. The Commissioner subsequently highlighted certain parts of the information from PREM 19/4418/1 that she considered to be environmental and asked TNA to look again and consider releasing this information. She did not consider any of the unreleased information from PREM 19/4418/2 to fall under the EIR.
19. TNA consulted with the relevant stakeholders but maintained its position that none of the information was environmental. It argued that for information to fall under regulation 2(1)(c) the information has to be information 'on' a measure that would be likely to affect the elements and factors listed. In TNA's view no such information is present in the text identified by the Commissioner.
20. TNA referred to an FTT appeal<sup>1</sup> that argued that the age of the information has an effect on the regime choice and that the remoteness

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<sup>1</sup> [EA/2020/0080](#)

of time from the creation of the information to the request meant that the distinction between FOIA and EIR was not significant and that consideration of whether any of the information affected or was likely to affect the elements and factors of the environment was not necessary.

21. TNA stated that the "distinction in handling" would be different in this case because the treatment of "Royal" information differs considerably between FOIA and EIR. However, it contended that the requested information is older than that being considered in the appeal referred to and considerable research would be required into actions from several decades ago.
22. It further argues that the information identified by the Commissioner seems too remote from information 'on' a measure. TNA suggests that where the FOIA and EIR are mixed, we need to look at the purpose of the information. It suggests that when it comes to historical information, the judgment is the likelihood of a measure having an effect rather than the likelihood of it going ahead. It supports its argument by quoting from [EA/2019/0262](#) where the FTT considered a request concerning Norfolk County Council's incinerator project that had been abandoned for some years by the time the request was made. As there was no likelihood of the scheme making an impact, it was not environmental information. TNA provides certain details and arguments that cannot be disclosed here but its central view is that the information falls solely under FOIA.
23. The Commissioner is unable to comment on what is actually contained in the files. She accepts some of TNA's arguments on certain specific parts of the information. However, having seen the information, she considers that some limited information in PREM 19/4418/1 is environmental within the definition at regulation 2 EIR. She does not accept that either the age of the information or the apparent inability to establish whether any of the environmental information had an effect means that it does not fall under the EIR.
24. The Commissioner's guidance<sup>2</sup> states that public authorities should interpret the phrase 'any information on' broadly, meaning the broad subject matter under consideration -

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<sup>2</sup> [eir\\_what\\_is\\_environmental\\_information.pdf \(ico.org.uk\)](#)

*"The test that public authorities should apply is whether the information is on or about something falling within the definitions in regulations 2(1)(a)-(f), and not whether the information directly mentions the environment or any environmental matter."*

25. The guidance as to what is environmental information also explains that,

*"The effect could be either detrimental or beneficial, and large or small scale. ...Therefore when the measure under consideration is something that is proposed for the future, public authorities should consider whether, if the measure were to go ahead, it would be likely to affect the elements and factors referred to in regulations 2(1)(a) and (b). The likelihood of a plan actually coming to fruition is not a relevant consideration. Once it is established that there is an intention to initiate a plan or to develop a policy, then this is sufficient to bring information which will contribute to the preparation of that plan within regulation 2(1)(c)."*<sup>3</sup>

26. The Commissioner has therefore determined that a limited amount of information contained in PREM 19/4418/1 is environmental information and falls under regulation 2(1)(c). This information is set out in a confidential annex and provided exclusively to TNA in order that it can make a further response to the complainant under the EIR.

### **Section 37(1)(aa) – Communications with the heir to the throne**

27. Section 37(1)(aa) exempts information relating to communications with the heir and second in line to the Throne.

28. All of the provisions of section 37 were qualified prior to 19 January 2011. This meant that all the provisions were previously subject to the public interest test. However, the Constitutional Reform and Governance Act 2010 amended section 37 to make the following categories of information subject to an absolute exemption:

- information relating to communications with the sovereign [section 37(1)(a)]; and

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<sup>3</sup> ibid

- information relating to communications with the heir to the Throne or second in line to the Throne [section 37(1)(aa)].<sup>4</sup>
29. This means that where the exemption is engaged there is no public interest test to be considered. The withheld information simply has to fit the exemption.
  30. The Commissioner has had sight of the withheld information and she is satisfied that it relates to communications with the Prince of Wales. The information does not have to be sensitive.
  31. The Commissioner's guidance states that the term 'relates to' should be interpreted broadly. In practice this means that the scope of the exemption will cover more than just the actual communications themselves; it will also apply to information that refers to, or is derived from those communications.
  32. TNA has provided its arguments to the Commissioner that the requested information is exempt from release because it relates to communications with the heir to the throne. It consulted with the relevant stakeholder, which agreed that the information should be withheld under the stated exemptions. TNA refers the Commissioner to [FS54546458](#) in which the ICO upheld the application of section 37(1)(aa).
  33. However, the complainant's view is that there are reasons why the information should be released:
    - Its age.
    - The fact that public figures know that material relating to their life and work can be released into the National Archives during their lifetime.
    - TNA has previously released material relating to the Prince of Wales.
    - Environmental information is not exempt from disclosure.
    - The presumption in favour of disclosure at the heart of FOIA and EIR.

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<sup>4</sup> [https://ico.org.uk/media/for-organisations/documents/1194/communications\\_with\\_her\\_majesty\\_and\\_the\\_awarding\\_of\\_honours.pdf](https://ico.org.uk/media/for-organisations/documents/1194/communications_with_her_majesty_and_the_awarding_of_honours.pdf)

- The Commissioner has previously ruled that the Prince of Wales should expect his correspondence and communications to be released if it shows signs of lobbying.
34. However, the Commissioner is not able to take any of these arguments into consideration. She is satisfied that TNA is entitled to withhold the information held in PREM 19/4418/1 (aside from a limited amount of environmental information) and PREM 19/4418/2 on the basis of the exemption at section 37(1)(aa) as the information relates to communications with the heir to the throne. The Commissioner accepts that section 37(1)(aa) is engaged. The exemption is absolute, there is no further consideration to be made and no public interest to consider.
35. For the above reasons the requested information is exempt. Therefore the Commissioner has not gone on to look at either sections 41 or 40(2) which were also cited in relation to the withheld information.

### **Section 10 – time for compliance**

36. Section 10(1) of the FOIA provides that a public authority must comply with its obligations under section 1(1) within twenty working days of the request being received.
37. The complainant made his request on 9 March 2020. TNA did not respond until 28 May 2020. Even allowing for the extra time for compliance provided under section 4(2) of the Freedom of Information (Time for Compliance with Request) Regulations 2004, TNA breached section 10(1) of the FOIA.



**Right of appeal**

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38. 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)

39. 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.

40. 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 .....**

**Janine Gregory**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**