

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 15 December 2009

**Public Authority:** Department for Children, Schools and Families  
**Address:** Sanctuary Buildings  
Great Smith Street  
Westminster  
London  
SW1P 3BT

#### Summary

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The complainant requested copies of correspondence exchanged between The Prince of Wales and government ministers at the public authority over an eight month period. The complainant also requested a list and schedule of this correspondence. The public authority initially relied on the interaction of sections 37(1)(a) and 37(2) to refuse to confirm or deny whether it held any correspondence falling within the scope of the requests. During the course of the Commissioner's investigation the public authority confirmed to the complainant that it did hold correspondence falling within the scope of his requests but it considered this information to be exempt from disclosure on the basis of sections 37(1)(a), 40(2) and 41(1). The public authority also confirmed that it believed that a list and/or schedule of correspondence sent by The Prince of Wales would be exempt from disclosure on the basis of sections 37(1)(a), 40(2) and 41(1) of the Act and that a list and/or schedule of information sent to The Prince of Wales would be exempt on the basis of sections 37(1)(a) and 40(2) of the Act.

The Commissioner has concluded that some of the correspondence is exempt from disclosure on the basis of section 41(1) of the Act but the remainder of the correspondence does not meet the requirements of section 41(1)(a) and thus cannot be exempt under this exemption. However, the Commissioner is satisfied that remainder of the correspondence is exempt from disclosure on the basis of section 37(1)(a). The Commissioner has also concluded that a list and/or schedule of correspondence sent by The Prince of Wales are exempt on the basis of section 41(1) and a list and/or schedule of information sent to The Prince of Wales are exempt on the basis of section 37(1)(a).

#### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part

1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## Background

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2. The public authority to which the complainant originally submitted his requests, the Department for Education and Skills (DfES) ceased to exist on 28 June 2007 with responsibility for its remit being passed to the Department for Children, Schools and Families (DCSF) and Department for Innovation, Universities and Skills. Therefore throughout this Notice the references to the name of the government department responsible for the requested information changes to reflect the various machinery of government changes. However, the Commissioner is satisfied that it is appropriate to serve this notice on the DCSF as the public authority with current responsibility for handling these requests.

## The Request

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3. The complainant submitted an email to the DfES on 8 April 2005. This email contained a number of requests which focused on correspondence which the DfES may have exchanged with The Prince of Wales. The full text of this email is included in an annex which is appended to this Notice.
4. The DfES contacted the complainant on 12 April 2005 to acknowledge receipt of the request.
5. The DfES sent a further letter to the complainant on 9 May 2005 in which it explained that it was still 'undertaking appropriate consultation' in respect of his requests and it was regrettably still not in a position to provide a substantive response.
6. On 9 June 2005 the DfES contacted the complainant and informed him that it was considering the application of section 37(2) to his requests but it needed, in line with section 10(3) of the Act, to extend the time it needed to consider the public interest test.
7. The DfES informed the complainant on 1 November 2005 that it had concluded that the balance of the public interest favoured maintaining the exemption contained at section 37(2). It therefore refused to confirm or deny whether it held any information falling within the scope of his requests.
8. On 30 December 2005 the complainant asked the DfES to conduct an internal review of this decision.
9. The DfES informed the complainant of the outcome of the review on 16 March 2006. The review upheld the decision set out in the refusal notice.
10. Following the intervention of the Commissioner (details of which are contained below) the DCSF contacted the complainant again in March 2009. In this

communication the DCSF confirmed that it had re-considered the balance of the public interest test and it believed that the public interest now favoured confirming that it did hold information falling within the scope of the requests. However, the DCSF explained that it believed that all of this information was exempt from disclosure on the basis of section 37(1)(a) and some of the information was also exempt from disclosure on the basis of sections 41(1) and 40(2). The DCSF also confirmed that it did not hold a list or schedule of correspondence falling within the scope of the requests and although it agreed that it could create one, it believed the contents would also be exempt from disclosure.

## The Investigation

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### Scope of the case

11. The complainant contacted the Commissioner on 12 May 2006 and asked him to consider the DfES' refusal to confirm or deny whether it held information falling within the scope of his requests. The complainant also asked the Commissioner to consider the DfES' delays in handling his requests.
12. Following discussions between the DfES (and subsequently the DCSF) and the Commissioner, in March 2009 the DCSF confirmed to complainant that it held information falling within the scope his requests. Following this confirmation, the complainant asked the Commissioner to consider the DCSF's decision:
  - To withhold information the correspondence falling within the scope of his requests on the basis of section 37(1)(a), 40(2) and 41(1); and
  - Not to provide a list and/or schedule of the correspondence which was held.

### Chronology

13. Although the complainant originally contacted the Commissioner in May 2006, due to a backlog of complaints received about public authorities' compliance with the Act, the Commissioner was unable to begin his investigation of this case immediately. Therefore it was not until 13 February 2007 that the Commissioner contacted the DfES in relation to this complaint.
14. During the course of his investigation the Commissioner also contacted the Cabinet Office in order to discuss the issues relating to this case as a number of other government departments had received similar requests seeking details of correspondence with The Prince of Wales and the Cabinet Office was involved in co-ordinating the various public authorities' responses. (The Commissioner subsequently received a number of complaints about the responses provided by these public authorities).
15. The DfES provided the Commissioner with a substantive response to his letter of 13 February 2007 on 31 May 2007.

16. The Commissioner subsequently contacted the DCSF on 8 August 2007 and asked to be provided with copies of the information falling within the scope of the requests.
17. On 3 September 2007 the DCSF provided Commissioner with copies of the information falling within the scope of these requests.
18. In March 2008 representatives of the Royal Household, the Cabinet Office and the Commissioner's office met to discuss the issues raised by the various complaints the Commissioner had received involving requests for H.R.H The Prince of Wales' correspondence with government departments.
19. On 7 July 2008 the Commissioner wrote to the Royal Household in order to seek further views on the application of the exemptions in these cases, in particular the refusal to confirm or deny whether information falling within the scope of the requests was in fact held.
20. The Commissioner received a response from the Royal Household in November 2008.
21. In December 2008 representatives of the Royal Household, the Cabinet Office and the Commissioner's office met again in order to further discuss the issues raised by these complainants.
22. On 27 January 2009 the Commissioner contacted the DCSF to explain that following discussions with the Cabinet Office and the Royal Household, it was his understanding that the DCSF was no longer refusing to confirm or deny whether it held information falling within the scope of these requests. The Commissioner therefore asked the DCSF to contact the complainant and confirm to him that it did in fact hold information which fell within the scope of his requests.
23. As noted above, in March 2009 the DCSF contacted the complainant and confirmed that it held information but considered it to be exempt from disclosure on the basis of the exemptions contained at sections 37(1)(a), 40(2) and 41(1). The DCSF also confirmed that its position was that it did not hold a list or schedule of correspondence falling within the scope of the requests.
24. The Commissioner contacted the DCSF again on 11 September 2009 and asked it to clarify its position with regard to the application of the various exemptions.
25. The Commissioner received a response to this letter from the Cabinet Office on 7 October 2009 and from the DCSF on 8 October 2009. Both letters provided further submissions and clarifications as to the basis upon which the DCSF considered the requested information to be exempt from disclosure,

## Findings of fact

26. As the information in the Chronology explains, the Commissioner exchanged communications about this complaint both with the public authority to which the request was submitted and also with the Cabinet Office. In some instances the Cabinet Office has provided the Commissioner with a submission on the application of a particular exemption and asked Commissioner to consider these submissions when reaching his decision in all cases involving requests for correspondence with The Prince of Wales. The Commissioner has agreed to do so. Therefore although for consistency and ease of reference the remainder of this Notice suggests that information or a particular submission has been provided by the DCSF it maybe the case that it was in fact provided by the Cabinet Office on its behalf.
27. At the time that this Notice is being issued the DCSF's position is that **all** of the correspondence falling within the scope of the requests is exempt from disclosure on the basis the exemptions contained at sections 37(1)(a), 40(2) and 41(1) of the Act.
28. The DCSF has also confirmed that it believed that a list and/or schedule of correspondence sent by The Prince of Wales would be exempt from disclosure on the basis of sections 37(1)(a), 40(2) and 41(1) of the Act and that a list and/or schedule of information sent to The Prince of Wales would be exempt on the basis of sections 37(1)(a) and 40(2) of the Act.

## Analysis

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29. The Commissioner has first considered whether the correspondence that falls within the scope of the complainant's requests is exempt from disclosure before moving on to consider whether the lists and schedules requested by the complainant are exempt from disclosure.

### The request for the correspondence

#### Section 41 – information provided in confidence

30. The Commissioner has been provided with detailed submissions to support the DCSF's position that all of the withheld information is exempt from disclosure on the basis of section 41 of the Act.
31. This section states that:

'41-(1) Information is exempt information if -

  - (a) it was obtained by the public authority from any other person (including another public authority), and

- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'

32. Therefore for this exemption to be engaged two criteria have to be met, the public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.

### Section 41(1)(a)

33. The DCSF has argued that correspondence sent by The Prince of Wales to it meets the first limb of section 41 because it is clearly information it received from another person. On this basis the Commissioner accepts that such information meets the requirements of section 41(1)(a).

34. However, the DCSF has also argued that the requirement of section 41(1)(a) of the Act that information be 'obtained from another person' is sufficiently broad to include information about a person, as well as information actually provided by a person. To support this approach the DCSF made the point that the modern law of breach of confidence (which is discussed in detail below) covers information not only obtained from a person, but also information about a person, for example a photograph.<sup>1</sup> On this basis the DCSF has argued that correspondence to The Prince of Wales from the DCSF also falls within the scope of section 41(1)(a) because the content of the correspondence clearly indicates what matters His Royal Highness has raised with Ministers.

35. The Commissioner recognises that deciding whether information has been 'obtained from any other person' requires an assessment of the content of information not simply of the mechanism by which it was imparted and recorded.<sup>2</sup> However, the Commissioner does not agree with the DCSF's assertion that simply because information it holds is about an identifiable individual it constitutes information obtained from that person. In the Commissioner's view such an interpretation of section 41(1)(a) is too broad for two reasons:

36. Firstly, although the Commissioner accepts – for the reasons set out below – that the modern law of breach of confidence needs to be taken into account when considering whether disclosure of information would constitute an actionable breach and thus engage section 41(1)(b), he does not believe that the case law referenced by the DCSF is directly relevant to the engagement of section 41(1)(a). This is because the way in which section 41 of the Act is drafted means that information is not exempt simply if its disclosure would constitute an actionable breach of confidence as in common law. Rather the inclusion of section 41(1)(a) means that the public authority also has to have received that information from a third party. In effect section 41 of the Act creates an additional

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<sup>1</sup> The DCSF referenced the case of *Campbell v MGN Ltd* [2004] 2 AC 457 in which a claim was brought by Ms Campbell under the tort of breach of confidence in respect of details of drug addiction treatment and covertly taken photographs.

<sup>2</sup> The Tribunal confirmed that such an approach was correct in *DBERR v Information Commissioner and FoE* (EA/2007/0072) – see para 78.

requirement for withholding information which is confidential under the common law and it would be inappropriate simply to apply the common law test to lower the threshold of engaging section 41 of the Act.

37. Secondly, the Commissioner's believes that the approach suggested by the DCSF effectively represents an attempt to broaden out the basis upon which section 41 is engaged to also ensure that it offers protection to an individual's privacy regardless of whether a public authority had 'obtained' information about that individual from a third party. However, in the Commissioner's view such an interpretation of section 41 is not necessary; whilst this exemption may not always protect an individual's privacy in the way in which the DCSF is arguing that it should, the Act clearly offers weighty protection to an individual's privacy in the form of the exemption contained at section 40 of the Act.
38. Therefore although the Commissioner accepts that it is possible for correspondence which was created by the DCSF and sent to The Prince of Wales to still meet the requirements of section 41(1)(a), whether it does in any particular case will depend upon the content of the information which was communicated.
39. In the Commissioner's opinion there has to be a significant degree of similarity to the information which the DCSF is sending to The Prince of Wales and the information which His Royal Highness originally provided to the DCSF. In the Commissioner's opinion it is not sufficient, for the purposes of section 41(1)(a), that the information is simply on the same topic; the correspondence being sent to The Prince of Wales has to reflect the actual views or opinions His Royal Highness may have raised on a particular topic.
40. Having looked at the content of the correspondence falling within the scope of this case that the DCSF sent to The Prince of Wales, the Commissioner accepts that some of this correspondence reflects the views of The Prince of Wales sufficiently closely that it meets the requirements of section 41(1)(a).
41. However, the Commissioner has also concluded that the remainder of the correspondence that the DCSF sent to The Prince of Wales does not sufficiently closely reflect the views of The Prince of Wales such that this information can be said to have been obtained from another person. Rather the focus of this information is the views and opinions of the DCSF and/or the sender of the letter and thus such information does not meet the requirements of section 41(1)(a). Such information cannot therefore be exempt from disclosure by virtue of section 41(1).
42. Clearly in order to explain which parts of the correspondence he considers to meet the requirements of section 41(1)(a), the Commissioner has to make detailed reference to the correspondence itself. Therefore the Commissioner has set out in a confidential annex which will be provided to the DCSF, but not to the complainant, which particular pieces of correspondence or parts of correspondence do not, in his opinion, meet the requirements of section 41(1)(a).

## Section 41(1)(b)

### *The DCSF's position on an actionable breach of confidence*

43. The DCSF has provided the Commissioner with detailed submissions to support its position that the disclosure of the withheld information would constitute an actionable breach and thus meet the requirements of section 41(1)(b). The Commissioner has summarised these submissions below and then gone on to explain his view as to whether they apply to the information which has been withheld in this case.
44. In most cases involving the application of section 41 which the Commissioner has previously considered, the requested information has been of a commercial nature rather than the more personal information which is the focus of this case. The approach usually adopted by the Commissioner in assessing whether disclosure commercial information would constitute an actionable breach is to follow the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415 (the *Coco* test).
45. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:
- Whether the information had the necessary quality of confidence;
  - Whether the information was imparted in circumstances importing an obligation of confidence; and
  - Whether an unauthorised use of the information would result in detriment to the confider.
46. In submissions to the Commissioner the DCSF explained why the *Coco* test no longer represented the law in respect of information such as The Prince of Wales correspondence which is the focus of this case. These submissions are summarised below:
47. The DCSF noted that the *Coco* test involved a claim in relation to commercially confidential information whereas the information which was the focus of this case, The Prince of Wales' correspondence, was essentially personal information. The DCSF explained that more recent cases than *Coco v Clark* had considered the law of confidence and/or misuse of personal or private information in the context of Article 8 of the European Convention of Human Rights (ECHR). Such cases included *Campbell v MGN* and *HRH The Prince of Wales v Associated Newspapers Ltd*.<sup>3</sup> The DCSF argued that it was the approach to the law of confidence set out in these cases, rather than in *Coco* that should be considered in the circumstances of this case.
48. In support of this approach the DCSF referenced the only High Court case to date to deal with the application of section 41 of the Act. This case involved a request

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<sup>3</sup> Full citation: *HRH The Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 (Ch), [2006] EWCA Civ 1776 [2008] Ch 57.



submitted to the Home Office by the British Union for Abolition of Vivisection (BUAV) for applications for licenses to conduct animal experimentation.

49. The DCSF highlighted the fact that in his judgment in this case Eady J confirmed that the *Coco* test was not the only test of confidence that existed and that recognition had to be given to how misuse of private information may give rise to an actionable breach of confidence and furthermore any assessment of confidence had to take into account the impact of the Human Rights Act.<sup>4</sup>
50. The DCSF drew the Commissioner's attention to a number of sections of Eady J's judgment, including:

[28] It is clear, for example, that the law of confidence is not confined to the principles governing the circumstances in which an equitable duty of confidence will arise; nor to the specialist field of commercial secrets. An obligation of confidence can arise by reason of an agreement, express or implied, and presumably also by the imposition of a statutory duty. Nowadays, in addition, it is recognized that there is a distinction to be drawn between "old-fashioned breach of confidence" and the tort law now characterized as "misuse of private information": see e.g. per Lord Nicholls in *Campbell v MGN Ltd* [2004] 2 AC 457 at [14] and the discussion by Buxton LJ in *McKennitt v Ash* [2008] QB 73, at 80 et seq., under the heading "A taxonomy of the law of privacy and confidence".

[29] [Counsel for the requester] described *Coco v Clark* as being "then and now the leading authority on breach of confidence". But there would seem to be traps for the unwary in placing unqualified reliance upon the case without paying due regard to what Lord Nicholls had to say about it in *Campbell v MGN Ltd* in the section of his speech entitled "Breach of confidence: misuse of private information".

51. And:

[32] It is thus important to bear in mind, for the present case, the broad principle, stated by Buxton LJ in *McKennitt* at [11], that "...in order to find the rule of the English law of breach of confidence we now have to look in the jurisprudence of articles 8 and 10." The Tribunal did not address these developments at all and thus proceeded on the basis of an incomplete understanding of the present law.'

52. The DCSF also noted the fact that Eady J doubted that the first bullet point of the *Coco* test was still applicable to the modern of law of confidence:

[33] It is also beyond question that some information, especially in the context of personal matters, may be treated as private, even though it is quite trivial in nature and not such as to have about it any inherent "quality of confidence": see e.g. *Browne v Associated Newspapers Ltd* [2008] QB

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<sup>4</sup> *The Home Office v British Union for the Abolition of Vivisection and Information Commissioner* [2008] EWCH 892 (QB) 25 April 2008.

103, 113-114...*McKennitt v Ash*...and the remarks of Lord Nicholls in *Campbell v MGN Ltd*...Thus, an obligation of confidentiality may sometimes arise in respect of such information merely because it is imparted as being confidential, either expressly or impliedly. Also, the law may imply an obligation on the basis that a communication has taken place in the context of an established relationship, which would itself give rise to such a duty.'

53. Indeed in his conclusion the DCSF highlighted the fact that Eady J suggested that the only limb of the *Coco* test that may relevant was the second:

'[35] Another way of putting the point would be to say that the law will afford protection, sometimes, where only the second of the *Coco v Clark* tests is satisfied: that is to say, the right to protection arises because it is clear to those concerned that the circumstances in which the information was imparted themselves give rise to a reasonable expectation of privacy. I would prefer, however, not to be tied to *Coco v Clark* where it simply has no application. (It was not even cited in the Court of Appeal in *McKennitt, Browne* or *HRH The Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57).

[36]...in the light of the modern authorities there is no reason to suppose that even an "actionable" breach of confidence, where sued upon, must inevitably be founded on the formulation of Sir Robert Megarry.'

54. In light of this, the DCSF explained that the test of confidence not only included the traditional breach as described in *Coco v Clark* but also claims to prevent the misuse of information entitled to protection under Article 8 ECHR.

55. Article 8 provides that:

'1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society for the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

56. The DCSF highlighted the fact that the concept of 'private life' within Article 8(1) is a broad one, based upon the need to protect a person's autonomy and relationships with others from outside interference. The DCSF argued that the right is not confined to activities which are personal in the sense of being intimate or domestic but can be extended to business or professional activities. To support this broad interpretation the DCSF quoted the European Court of Human Rights case of *Niemietz v Germany* and also noted that this judgment confirmed that Article 8(1) was intended to protect correspondence, (i.e. the type of information which is the focus of this case):

'[29]The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which an individual may choose to live his personal life as he chooses at to exclude entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.

There appears, furthermore, to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world...'

57. And:

'[32] In this connection, it is sufficient to note that the provision does not use, as it does for the word "life", any adjective to qualify the word "correspondence". And, indeed, the Court has already held that, in the context of correspondence in the form of telephone calls, no such qualification is to be made...in a number of cases relating to correspondence with a lawyer...the Court did not even advert to the possibility that Article 8 might be inapplicable on the ground that the correspondence was of a professional nature.'<sup>5</sup>

58. Consequently, the DCSF suggested that a number of different circumstances may arise in which a breach of confidence could exist:

- Some claims for the misuse of private information will cover information which has the quality of confidence, and which was imparted in circumstances inconsistent with a pre-existing relationship of confidence, but which is not entitled to protection under Article 8, e.g. trade secrets. Such claims would fall within the ambit of the traditional test set out in *Coco v Clark*.
- Some claims will cover private information which is disclosed in breach of Article 8 ECHR, but which was not imparted in circumstances importing an obligation of confidence.
- Further claims will concern information which was both confidential information in the sense that it was imparted in circumstances importing an obligation of confidence, and information entitled to protection under Article 8 ECHR, e.g. many claims in respect of private letters such as the information which was the focus of this present case.

59. In consideration of each of these circumstances the DCSF noted that it was not necessary for any particular detriment to be demonstrated in order for a duty of confidence to be actionable. The DCSF explained that this position was supported by the judge in *Coco v Clark* who questioned whether in fact detriment would always be a necessary ingredient of an actionable breach (para 421) and

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<sup>5</sup> *Niemietz v Germany* (1993) 16 EHRR 97

furthermore by the fact that in order for Article 8(1) to be engaged it was not necessary to demonstrate any detriment.

60. The DCSF explained that in its view the withheld information in this case was confidential information within the sense of the traditional *Coco* test (albeit that for the reasons set out above it believed that this was incorrect test to apply) and also constituted confidential information because it attracted the protection of Article 8(1).
61. With regard to why the information met the three limbs of the *Coco* test the DCSF emphasised the significance of the Constitutional convention that The Prince of Wales should be educated in, and about, the business of government in order to prepare him for the time when he will be the Sovereign, without that process putting at risk the political neutrality which is essential to the role and functions of the Sovereign. It is essential to the operation of the convention that His Royal Highness should be able to express views to Ministers on important issues of government and moreover should receive their views in response. This also ensures that The Prince of Wales can carry out his role as Privy Councillor, a Counsellor of State and as next in line to the throne he also has a statutory duty under the Regency Act 1937 to act for The Queen during her absence or incapacitation. The DCSF argued that convention that The Prince of Wales will be informed about the business of government in order to prepare for being Sovereign can only be maintained if both His Royal Highness, and government Ministers who advise and inform him about the business of government, can be assured that their communications with each other remain confidential.
62. The DCSF explained that this convention is inextricably tied to the role of the Sovereign in the British constitution and the separate constitutional convention which the Sovereign has: namely to counsel, encourage and warn the Government and thus to have opinions on government policy and to express those opinions to her Ministers. However, whatever personal opinions the Sovereign may hold she is bound to accept and act on the advice of her Ministers and is obliged to treat her communications with them as absolutely confidential. Such confidentiality is necessary in order to ensure that the Sovereign's political neutrality is not compromised in case Her Majesty has to exercise her executive powers, e.g. initiating discussions with political parties in the scenario of a hung Parliament in order to ensure that a government can be formed. Consequently, The Prince of Wales must not be in a position where his position of political neutrality is compromised (or appear to be compromised) because it cannot be restored on accession to the throne. The DCSF argued that if correspondence between The Prince of Wales and government Ministers was routinely disclosed His Royal Highness' political neutrality would be put at risk.
63. In light of the constitutional convention relating to the Heir to Throne, the DCSF argued that it was clear that the withheld information had the quality of confidence: the content of the information was clearly not of a trivial nature but rather focused on the business of government. The information was clearly imparted in circumstances which had given rise to the obligation of confidence: all parties understood, because of the operation of the convention, the need to keep such communications private. Finally, the DCSF argued that even if detriment

needed to be identified, the harm which would occur to the operation of the convention, and the potential undermining of The Prince of Wales' political neutrality following disclosure of the information would constitute sufficient detriment to meet the third limb of the *Coco* test.

64. In relation to why the withheld information constituted confidential information under the modern law of confidence, the DCSF explained that it was clear that the correspondence engaged Article 8(1) where the topic of the correspondence was of a particularly private nature of topic, but also, in light of the quoted case law above, where the correspondence reflects The Prince of Wales' opinions on matters of government business. Therefore disclosure of the correspondence would lead to a clear infringement of The Prince of Wales' right of privacy and thus constitute a breach of confidence.
65. Although section 41 of the Act is an absolute exemption and thus not subject to the public interest test contained at section 2 of the Act, the common law concept of confidence suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on public interest defence.
66. The DCSF argued that in the circumstances of this case there was no effective public interest defence. In support of this position the DCSF made the following arguments:
67. Firstly, there is an inherent public interest in the preservation of confidences and their protection by law, which in itself is a weighty factor in favour of maintaining confidentiality.
68. Secondly, in the circumstances of this case there was a specific public interest in maintaining the confidentiality of The Prince of Wales' correspondence with government in order to preserve the conventions discussed above, and specifically his political neutrality. It was strongly in the public interest to ensure the preservation of conventions in order to ensure the constitution was not undermined.
69. Thirdly, it is not simply a question of whether the information is a matter of public interest, but rather whether in all of the circumstances of the case, it is in the public interest that the duty of confidence should be breached. The DCSF highlighted the Court of Appeal in *Associated Newspapers Ltd v HRH The Prince of Wales* to illustrate this point:

[68] But a significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence that are created between individuals. It is not enough to justify publication that the information in question is a matter of public interest. To take an extreme example, the content of a budget speech is a matter of great public interest. But if a disloyal typist were to sell as copy to a newspaper in advance of the delivery of the speech in Parliament, there can surely be no doubt that the newspaper would be in breach of duty if it purchased and published the speech.'

70. Fourthly, to justify disclosure of confidential information on the grounds of public interest, it is not sufficient that the information is simply interesting to the public. Rather, the public interest in overriding confidentiality must be of very considerable significance, whether that be related to, for example, the proper conduct of public affairs, public health, prevention of crime etc. Disclosure must in fact be 'necessary' in order to override obligations of confidentiality with the test of necessity reflecting both the traditional test of confidence and the test for justification with Article 8 rights under the ECHR. The DCSF referenced the Court of Appeal in *McKennitt v Ash* which involved a confidence being overridden on the basis of allegations of misconduct:

'I would nevertheless accept that Mr Browne is broadly correct when he submits that for a claimant's conduct to "trigger the public interest defence" a very high degree of misbehaviour must be demonstrated'.

71. The DCSF argued that it was clear from the content of the correspondence – both that sent to and received by The Prince of Wales – no such level of significance was present to meet this high threshold.
72. Fifthly, it was important not to confuse the public interest with information which the public may be interested in. To illustrate this point the DCSF referenced Blackburne J in his judgment at first instance in *HRH The Prince of Wales v Associated Newspapers*:

'[118]...it is important not to overlook the fact that what may be in the public interest to know and thus for the media to publicise in exercise of their freedom of speech is not to be confused with what is interesting to the public and therefore in a newspaper's commercial interest to publish. This is particularly so in the case of someone like the claimant whose every thought and action is, in some quarters at least, a matter of endless fascination.'

73. And noted that this point was subsequently accepted by the Court of Appeal at [70]:

'As heir to the throne, Prince Charles is an important public figure. In respect of such persons the public takes an interest in information about them that is relatively trivial. For this reason public disclosure of such information can be particularly intrusive. The judge rightly had regard to this factor...'

74. Finally, the DCSF suggested that whatever public interest which may exist in disclosure of this correspondence could be best described as a public interest in knowing what matters of public importance The Prince of Wales raises with Ministers, and how they respond to him, in light of the access which his constitutional position affords him. However, the DCSF suggested that disclosure of some of the correspondence would not serve this public interest at all because it related to purely administrative issues or focused solely on purely private matters.

*The Commissioner's position on an actionable breach of confidence*

75. The Commissioner agrees with the DCSF that a strict and rigid following of the *Coco* test is not an appropriate approach to the test of confidence in this case. The Commissioner's reasoning for this mirrors the arguments highlighted by the DCSF namely the recent case law which has been referenced, most notably *BUAV*, and also the impact of the ECHR. Therefore when considering whether personal and private information is confidential the Commissioner agrees that consideration of Article 8 ECHR as well a consideration of Article 10 ECHR (the right to freedom of expression) in the context of the public interest defence is necessary.
76. However, the Commissioner does not believe that some of the concepts raised in *Coco v Clark* should be abandoned completely as they can still be useful in determining whether information of a personal and private nature is confidential. Indeed as Eady J noted in his conclusion at [35] whether information was imparted in circumstances where there was an expectation of confidence can be relevant to determining whether there would be an actionable breach if information of a private and personal nature was disclosed.
77. Therefore for information which is of personal and private nature, such as the information which is the focus of this request, rather than use the three limbed test employed by *Coco v Clark*, the Commissioner will consider:
- Whether information was imparted with an expectation that it would be kept confidential (be that an explicit or implicit expectation); and
  - Whether disclosure of the information would infringe the confider's right of privacy as protected by Article 8(1) ECHR.
78. In relation to the first criteria the Commissioner accepts that the constitutional convention which provides that the Heir to the Throne should be educated in the ways and workings of government means that both The Prince of Wales, and those he corresponded with, will have had an explicit (and weighty) expectation that such communications would be confidential.
79. In reaching this conclusion the Commissioner wishes to clarify his position in relation to the scope of the constitutional convention provided to the Heir to the Throne. In the Commissioner's opinion given that the purpose of this convention is to allow the Heir to the Throne to be educated in the ways and workings of government, the only information which will attract the protective confidentiality of this convention is information which relates to The Prince of Wales being educated in the ways and workings of government. In the Commissioner's opinion this convention cannot be interpreted so widely as to encompass **all** of The Prince of Wales' communications with the government; for example it does not cover correspondence in which His Royal Highness may be discussing his charitable work or indeed information of a particularly personal nature. (This is not to say of course that the withheld information in this case includes examples of either class of information.)

80. Nevertheless, the Commissioner accepts that for communications between the parties that do not fall within his interpretation of the convention, there is still a weighty expectation that such correspondence will be kept confidential. The Commissioner finds support for such a conclusion given the established practice that communications between The Prince of Wales and government ministers have not been disclosed or commented on by either party, regardless of the content of the correspondence. Moreover, it is the Commissioner's understanding that the DCSF's position is that all correspondence the Prince of Wales exchanges with government ministers falls within the scope of the convention and thus the individuals involved in exchanging this correspondence will have had a weighty and explicit expectation that such information will not be disclosed.
81. In relation to the second criteria, the Commissioner agrees with the DCSF that in respect of Article 8(1) the term 'private' should be interpreted broadly to ensure that a person's relationships with others are free from interference. The Commissioner also accepts that matters of a business and professional nature are covered by the protection afforded by Article 8(1). Furthermore, in the quoted case reference to 'correspondence' confirms that Article 8(1) can apply to information contained within the format which is the focus of this request.
82. In light of this broad reading of Article 8(1) the Commissioner accepts that disclosure of information which is the focus of this case would place in the public domain details of The Prince of Wales' views and opinions on a number of issues and such an action would amount to an invasion of his privacy. Thus the Commissioner accepts that disclosure of the information would constitute an infringement of Article 8(1) and would constitute an actionable breach of confidence.
83. For these reasons the Commissioner accepts that disclosure of the withheld information would constitute an actionable breach of confidence.
84. However, before it can be concluded that this information is exempt from disclosure by virtue of section 41, the Commissioner has to consider whether there is a public interest defence to disclosing the information, which includes an assessment of the weight that should be attributed to Article 10 ECHR.
85. As explained above the DCSF identified only a very general and limited public interest in disclosure of the withheld information. In the Commissioner's opinion there are a number of further public interest arguments in favour of disclosing this information than have been identified by the DCSF and he has set out below what he believes these interests are. The Commissioner has then gone on to consider whether such arguments provide a sufficient public interest defence.

### **Additional arguments in favour of disclosing the information**

86. There is a public interest in disclosure of information to ensure that the government is accountable for, and transparent in its decision making processes.
87. Moreover, there is a specific public interest in disclosure of information that would increase the public's understanding of how the Government interacts with the



Royal Family and the Royal Household and, in particular in the circumstances of this case, the Heir to the Throne. This is because the Monarchy has a central role in the British constitution and the public is entitled to know how the various mechanisms of the constitution operate. This includes, in the Commissioner's opinion, how the Heir to the Throne is educated in the ways of government in preparation for his role as Sovereign. In the Commissioner's opinion such an interest is clearly distinct from the prurient public interest alluded to by the DCSF.

88. Disclosure of the information may allow the public to understand the influence (if any) exerted by The Prince of Wales on matters of public policy. If the withheld information demonstrated that the DCSF or government in general had placed undue weight on the preferences of The Prince of Wales then it could add to the public interest in disclosing the information.
89. Conversely, if the withheld information actually revealed that The Prince of Wales did not have undue influence on the direction of public policy, then there would be a public interest in disclosing the information in order to reassure the public that no inappropriate weight had been placed on the views and preferences of The Heir to Throne. In essence disclosure could enhance public confidence in respect of how the government deals with The Prince of Wales.
90. These two arguments could be seen as particularly relevant in light of media stories which focus on The Prince of Wales' alleged inappropriate interference in matters of government and political lobbying.
91. Linked to this argument, is the fact that disclosure of the withheld information could further public debate regarding the constitutional role of the Monarchy and particularly the Heir to the Throne. Similarly, disclosure of the information could inform the broader debate surrounding constitutional reform.

### **Can disclosure of the information be justified on public interest grounds?**

92. Before turning to the balance of the public interest in respect of this case, the Commissioner wishes to highlight that the public interest test inherent within section 41 differs from the public interest test contained in the qualified exemptions contained within the Act; the default position for the public interest test in the qualified exemptions is that the information should be disclosed unless the public interest in withholding the information outweighs the public interest in disclosing the information. With regard to the public interest test inherent within section 41, this position is reversed; the default position being that information should not be disclosed unless the public interest in disclosure outweighs the interest in upholding the duty of confidence and therefore withholding the information.
93. In the Commissioner's opinion the introduction of the concept of privacy and the impact of ECHR into the law of confidence has not affected this balancing exercise; Sedley L J expressed such a view in *LRT v Mayor of London*: 'the

human rights highway leads to exactly the same outcome as the older road of equity and common law'.<sup>6</sup>

94. Therefore in conducting this balancing exercise as well as taking into account the protection afforded by Article 8(1), consideration must also be given to Article 10 ECHR which provides that:

'1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

95. The Commissioner notes that recent European Court of Human Rights judgments have highlighted the relationship between Article 10 and access to public information. In particular, the Court has recognised that individuals involved in the legitimate process of gathering information on a matter of public importance can rely on Article 10(1) as a basis upon which to argue that public authorities interfered with this process by restricting access to information.<sup>7</sup>

96. Turning to the various factors identified by the DCSF the Commissioner does not entirely accept the argument that for there to be a successful public interest defence against a breach of confidence there would always have to be an exceptional public interest in disclosure. The Commissioner's reasoning is as follows: The Information Tribunal in *Derry City Council v Information Commissioner* in discussing the case of *LRT v The Mayor of London* noted that in the first instance the judge said that an exceptional case had to be shown to justify a disclosure which would otherwise breach a contractual obligation of confidence. When hearing the case, the Court of Appeal although not expressly overturning this view, did leave this question open and its final decision was that the information should be disclosed. The Tribunal in *Derry* interpreted this to mean that:

- No exceptional case has to be made to override the duty of confidence that would otherwise exist;
- All that was required is balancing of the public interest in putting the information into the public domain and the public interest in maintaining the confidence.

97. Consequently in cases where the information is of a commercial nature, the Commissioner's approach is to follow the lead of the Tribunal in that no

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<sup>6</sup> Quoted by the Information Tribunal in *Derry City Council v Information Commissioner*, (EA/2006/0014).

<sup>7</sup> See *Kenedi v Hungary* 37374/05.

exceptional case has to be made for disclosure, albeit the balancing exercise will still be of an inverse nature.

98. However, in cases where the information is of a private and personal nature, the Commissioner accepts that in light of the case law referenced by the DCSF, disclosure of such information require a very strong set of public interest arguments. The difference in the Commissioner's approach to such cases can be explained by the weighty protection that Article 8 offers to private information; in other words the Commissioner accepts that there will always be an inherent and strong public interest in protecting an individual's privacy. The Commissioner's believes that a potential deviation to this approach maybe appropriate where the personal information relates to the individual's public and professional life, as opposed to their intimate personal or family life, and in such a scenario such a strong set of public interest arguments may not be needed because the interests of the individual may not be paramount.
99. In determining whether the information which is the focus of the case relates more to The Prince of Wales' professional or public life, rather than his private life, the Commissioner faces a particularly difficult dilemma given the unique position which His Royal Highness occupies. There is clearly significant overlap between the Prince of Wales' public role as Heir to the Throne and a senior member of the Royal Family and his private life; he only occupies such positions because of the family into which he was born. In the Commissioner's opinion The Prince of Wales' public and private lives can be said to be inextricably linked. Therefore for the purposes of this case, and the consideration of Article 8, the Commissioner believes that he has to adopt the position that the information which is the focus of this case can be said to more private in nature than public and thus a very strong set of public interest arguments would be needed to cited in order for there to be a valid public interest defence.
100. Before turning to whether the arguments in this case can meet such a threshold, the Commissioner wishes to make a number of comments in relation to the weight that should be attributed to the additional arguments identified by the DCSF in favour non-disclosure.
101. As implied by the comments above, the Commissioner accepts the argument that there is weighty public interest in maintaining confidences. Furthermore, the Commissioner agrees that there is a significant public interest in the ensuring the convention that the Heir to the Throne can be instructed in the business of government is not undermined; it would clearly not be in the public interest if the Heir to Throne and future Monarch appeared to be politically partisan. The Commissioner of course also agrees that there is a clear and important distinction between disclosure of information which the public would be interested in and disclosure of information which is genuinely in the public interest.
102. However, given the number of public interest arguments in favour of disclosure that the Commissioner has identified, he is of the perhaps unsurprising opinion that the benefit of disclosing this information should not be summarily dismissed in the fashion implied by the DCSF. Rather the arguments identified by the Commissioner touch directly on many, if not all, of the central public interest

arguments underpinning the Act, namely ensuring that public authorities are accountable for and transparent in their actions; furthering public debate; improving confidence in decisions taken by public authorities.. Furthermore, the specific arguments relevant to this case in relation to The Prince of Wales relationship with government Ministers deserves to be given particular weight.

103. Nevertheless, the Commissioner has to remember that disclosure of such information would require an exceptional set of public interest arguments and disclosure would have to be justified by the content of the withheld information itself not simply on the basis of generic or abstract public interest arguments.
104. The Commissioner has reviewed the content of the information which he believes meets the requirements of section 41(1)(a) carefully and he has reached the conclusion that despite the weight of the public interest arguments in favour of disclosure, the content does not present an exceptional reason or reasons for the information to be disclosed. Consequently, the Commissioner has concluded that there would not be a public interest defence if the information that falls within the scope of section 41(1)(a) were disclosed.

### **Section 37(1)(a) – communications with the Royal Family and Royal Household**

105. For the information which the Commissioner does not believe falls within the scope of section 41(1)(a), he has considered whether such information is exempt from disclosure by virtue of section 37(1)(a).
106. This section states that:

'37 – (1) Information is exempt information if it relates to –

(a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household'.
107. In line with his approach to the term 'relates to' when it appears in other sections of the Act (for example section 35), the Commissioner interprets this term broadly and thus the exemption contained at section 37(1)(a) provides an exemption for information which 'relates to' communications with the Royal Family or with the Royal Household rather than simply communications with such parties.
108. Therefore, this exemption has the potential to cover draft letters, memorandums or references to the existence of meetings with the Royal Family or Royal Household irrespective of whether such communications have in fact been sent or received or indeed whether such meetings have in fact occurred.
109. However, information must still constitute, or relate to, a communication to fall within the exemption. So, for example an internal note held by a government department that simply references the Royal Family or Royal Household will not necessarily fall within this definition. It must be evident that the information is intended for communication, or has been communicated, or that it references some other communication falling within the definition.

110. Furthermore, the Commissioner is aware that many members of the Royal Family act as patrons for a wide range of charities. If correspondence withheld by a public authority relates to those charities **and** is either from a member of the Royal Family or the Royal Household then it will fall within the scope of section 37(1)(a). However correspondence simply between one of the charities which enjoys the patronage of a member of the Royal Family and a public authority will not fall within the exemption, for example letters between Companies House and the charity offices regarding the accounts because it does not relate to a communication with a member of the Royal Family or the Royal Household.
111. The Commissioner has reviewed the remaining withheld information and he is satisfied that it falls within the broad ambit of section 37(1)(a) and thus is exempt from disclosure.

### **Public interest test**

112. However section 37 is a qualified exemption and is therefore subject to the public interest test set out in section 2(2)(b) of the Act, i.e. whether in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Under the public interest test under section 2 of the Act the assumption is in favour of disclosure so if the arguments on both sides are equally weighted the public interest will favour disclosure of the information.
113. The DCSF has provided the Commissioner with detailed arguments to support its position that the public interest in relation section 37(1)(a) favours maintaining the exemption. The DCSF noted how these arguments overlapped and buttressed the arguments in support of the application of section 41 of the Act. The Commissioner has set out below what these arguments are and then moved on to comment on the public interest arguments in favour of disclosure before setting out his position on where the balance of the public interest lies in respect of the information in this case.

### **Public interest arguments in favour of maintaining the exemption**

114. The DCSF argued that the prime reason why the exemption should be maintained is in order to ensure that the confidentiality essential to the two conventions discussed above is not undermined. The DCSF explained that it was strongly in the public interest that these conventions were not undermined as to do so would result in The Prince of Wales, who in due course would become Monarch, losing his political neutrality. Preserving the political neutrality of the Royal Family was essential to ensuring the stability of the constitutional Monarchy (for the reasons set out in relation to section 41 above), an outcome which was clearly in the public interest.
115. Furthermore the DCSF argued that disclosure of the information could lead to a chilling effect in respect of The Prince of Wales, and those he corresponds with, altering the manner in which they communicate, for example by comments no longer being recorded or the nature in the which the comments are recorded being of a less free and frank nature. Such an effect would not be in the public

interest because it would result in The Prince of Wales being less prepared for the business of government when he is Monarch and furthermore might undermine His Royal Highness' ability to carry out his role as a Privy Councillor, a Counsellor of State and any duties he may be called upon to undertake in line with the Regency Act 1937.

116. The DCSF has also argued that disclosure of this information may also have a wider chilling effect because it could deter other private individuals from contacting the government if they felt their correspondence would be disclosed under the Act. The DCSF has argued that it is in the public interest that anyone should feel free to correspond with members of the government on any subject matter and that such an input has been a valuable source of information about the public's view on many matters. Consequently, a valuable channel of communication of between government and governed could break down to great public detriment. Not only would the government lose access to otherwise unreachable ideas, citizens deprived of this long-established channel for expressing opinions to our leaders could come to feel alienated from government.
117. The DCSF also argued that given the broad scope of section 37(1)(a), the public interest extended to protecting the privacy and the dignity of the Royal Family. It would not be in the public interest if disclosure of the withheld information infringed this privacy.

### **Public interest arguments in favour of disclosing the requested information**

118. The Commissioner believes that the public interest arguments in favour of disclosing this information mirror those set out above under the consideration of section 41 and thus he has not repeated them here.

### **Balance of the public interest arguments**

119. In the Commissioner's opinion given the broad reading of the term 'relates to' the subject matter of information which can fall within the scope of section 37(1)(a) can be very broad because communications, and information relating to such communications, could potentially cover a huge variety of different issues. Therefore establishing what the inherent public interest is in maintaining the exemption contained at section 37(1)(a) is more difficult than identifying the public interest inherent in a more narrowly defined exemption, for example section 42, which clearly provides a protection for legally privileged information.
120. The Commissioner believes that the following four public interest factors can be said to be inherent in the maintaining the exemption and relevant in this case:
- Protecting the ability of the Sovereign to exercise her right to consult, to encourage and to warn her Government and to preserve her position of political neutrality;
  - Protecting the ability of the Heir to the Throne to be instructed in the business of government in preparation for when he is King and in connection with existing constitutional duties, whilst preserving his own position of political neutrality and that of the Sovereign;

- Preserving the political neutrality of the Royal Family and particularly the Sovereign and the Heir to the Throne to ensure the stability of the constitutional Monarchy; and
  - Protecting the privacy and dignity of the Royal Family.
121. As noted above in his analysis of the application of section 41, the Commissioner believes that the scope of the constitutional convention in respect of the Heir to the Throne is relatively narrow. That is to say it will only cover correspondence in which The Prince of Wales is in fact being educated in the ways and workings of government; it cannot be interpreted so widely as to encompass **all** of The Prince of Wales' communications with the government, i.e. it does not cover correspondence in which His Royal Highness may be discussing his charitable work or indeed information of particularly personal nature (this is not to say of course that the withheld information in this case includes examples of either class of information).
122. However, where the information does fall within the Commissioner's definition of this convention, he accepts that there is a significant and weighty public interest in preserving the operation of this convention, i.e. it would not be in the public interest that the operation of the established confidential convention would be undermined. This is particularly so given that the convention is designed to protect communications at the heart of government, i.e. the Heir to the Throne and government Ministers. The significant weight which protecting the convention attracts can be seen correctly seen as akin to the strong weight applied to maintaining the exemption in contained at section 42 as it will always be strongly in the public interest to protect legal professional privilege.
123. The Commissioner also accepts that it is logical to argue that disclosure of the information covered by the convention could undermine The Prince of Wales' political neutrality for the reasons advanced by the DCSF. The Commissioner believes that significant weight should be attributed to the argument that disclosure would undermine The Prince of Wales' political neutrality: it is clearly in the public interest that The Prince of Wales, either as Heir to the Throne or when Monarch is not perceived to be politically biased in order to protect his position as Sovereign in a constitutional democracy.
124. Vitally, the Commissioner believes that arguments concerning political neutrality are still relevant, and indeed attract similar weight, even when the information being withheld does not fall within the scope of the constitutional convention relating to the Heir to the Throne. In other words disclosure of correspondence not strictly on issues related to the business of government could still lead to The Prince of Wales being perceived as having particular political views or preferences and thus could undermine his political neutrality. As noted above, the Commissioner accepts that it is inherent in the exemption contained at section 37(1)(a) that it is in the public interest for the political neutrality of all members of the Royal Family to be preserved.
125. Turning to the chilling effect arguments, as the DCSF correctly suggests such arguments are directly concerned with the loss of frankness and candour in

debate and advice which would flow from the disclosure of information. Such arguments can encompass a number of related scenarios:

- Disclosing information about a given policy or decision making process, whilst that particular process is ongoing, will be likely to affect the frankness and candour with which relevant parties will make future contributions to that policy/decision making;
- The idea that disclosing information about a given policy or decision making process, whilst that process is ongoing, will be likely to affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates and decision making processes; and
- Finally an even broader scenario where disclosing information relating to the formulation and development of a given policy or decision making process (even after the process is complete), will be likely to affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates and decision making processes.

126. In the Commissioner's opinion all three scenarios are potentially relevant here: some of the withheld information can be seen (at the time of the request) to relate to discussions on issues where the policy debate or decision making can still be seen as 'live', e.g. where a government position has yet to be finalised and some of the information can be said to relate to decisions which have been taken.

127. With regard to attributing weight to the argument that disclosure of the withheld information would have a chilling effect on the way in which The Prince of Wales and/or government Ministers would correspond, the Commissioner believes that it is difficult to make an assessment of such an argument given the unique nature of this relationship and thus the lack of any clear precedents, e.g. previous disclosures under the Act of similar information.

128. However, the Commissioner is aware of the authorised biography of The Prince of Wales by Jonathan Dimbleby which was published in 1994.<sup>8</sup> In his introduction to this publication, Dimbleby explains that The Prince of Wales provided him with access to His Royal Highness' archives at St James's Place and Windsor Castle. Dimbleby therefore had access to The Prince of Wales' journals, papers and correspondence between with Whitehall. In relation to the inclusion of such information in his book Dimbleby explains that:

'I have been persuaded that the verbatim publication of the material might have a deleterious effect either on the conduct of British diplomacy or on the confidential nature of communications between the monarchy and Whitehall or Westminster; in these cases I have either withheld information or paraphrased the relevant documents or correspondence. However, when it was obvious that only the culture of secrecy which pervades Whitehall was under threat and not the conduct of good governance, I have not complied with requests to delete pertinent material'.

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<sup>8</sup> J Dimbleby, *The Prince of Wales: A Biography*, (Bath: Chivers Press, 1994)



129. Therefore, it would clearly be incorrect to argue that details of Prince of Wales' communications with government have **never** been placed in the public domain. To take but two examples from *The Prince of Wales: A Biography*, at page 582 Dimbleby quotes from a letter sent by His Royal Highness in 1985 to the then Prime Minister Margaret Thatcher, in addition to quoting from a draft section of the letter which did not make the final version. And at page 809 Dimbleby notes that The Prince of Wales wrote to the then Secretary of State for Defence, Malcolm Rifkind, about the implications of cutting the Army's manpower and quotes from the this letter. Although the quote is not particularly lengthy in nature it clearly shows The Prince of Wales' strong views on this issue. The Commissioner has not been provided with any evidence by the DCSF that the inclusion of details of The Prince of Wales' correspondence in this book has resulted in any sort of the chilling effect.
130. However, the Commissioner accepts that a direct parallel cannot be drawn between the disclosure of the withheld information which is the focus of this case and the previous disclosures such as the Dimbleby biography. To some extent, as Dimbleby himself acknowledges, his book was been 'self-censored': extracts have not been included that would undermine the confidential nature of communications between the monarchy. In contrast, disclosure of the withheld information in this case would be without the consent of The Prince of Wales and would result in complete copies, as opposed to extracts or paraphrased sections, of correspondence being revealed.
131. Furthermore the Commissioner believes that an inherent part of the convention is the ability of both the Heir to the Throne and government ministers to be free and frank when discussing matters of government business. This is to ensure that the Heir to the Throne is instructed in the business of government in the most effective and efficient way possible. In the Commissioner's opinion, disclosure of information falling within the scope of convention would lead The Prince of Wales, and possibly the government minister with whom he corresponds, to feel constrained or more reluctant to take part in the process of being educated about the business of government. Therefore, given the protection which the Commissioner believes should be provided to the convention itself, it follows that notable weight should be given to the argument that disclosure of information which falls within the scope of the convention would result in a chilling effect.
132. In reaching this conclusion the Commissioner wishes to note that he believes that in the context of section 37(1)(a) the protection afforded to communications **from** government ministers only extends to their contribution to educating the Heir to the Throne; it would be incorrect to argue that section 37(1)(a) provides a protection for government ministers to discuss more widely matters of policy formulation or development – protection for such information is offered by, and inherent in, the exemption contained at section 35(1)(a) of the Act not in section 37(1)(a).
133. With regard to attributing weight to the chilling effect arguments for correspondence which does not fall within the scope of the convention, the Commissioner does not believe that such arguments automatically attract weight in the way in which correspondence falling within the convention does. Rather,

- the assessment as to whether a chilling effect will occur will be based upon factors considered in other cases involving an assessment of the chilling effect, most notably the content of the information itself. This is because, in the Commissioner's opinion, in order for a chilling effect argument to be convincing the information which is disclosed has to be more than anodyne in nature otherwise disclosure of such information is unlikely to dissuade individuals from making frank and candid comments in the future. In the circumstances of this case the Commissioner accepts that the correspondence which is not covered by the chilling effect is of a relatively frank and candid nature and thus some weight should be attributed to the argument that disclosure of this information would result in a chilling effect in the way in which The Prince of Wales drafts his correspondence.
134. Again, as with the concept of political neutrality, the Commissioner accepts that a chilling effect on the nature of correspondence falling within the convention could occur even if the withheld information does fall within the scope of the convention. That is to say, disclosure of information on topics not associated with the business of government would still be likely to affect future correspondence not simply on similar topics but also on topics falling within the scope of the convention.
135. However, the Commissioner is not prepared to accept that disclosure of this information would have a chilling effect on the way in which other individuals contact the government. In the Commissioner's opinion it is not logical to suggest that because some of The Prince of Wales' correspondence with government is disclosed, private individuals would fear that their correspondence would also be disclosed. Clearly, if The Prince of Wales' correspondence was disclosed in response to a request submitted under the Act, despite the strong protection afforded to it by sections 41 and 37 (and by implication the effect of the constitutional convention and Article 8 ECHR) it would be obvious that disclosure would be necessary to satisfy a significant and distinct public interest. This interest would almost inevitably be related to the position that His Royal Highness holds rather than simply the content of the information itself. Consequently, the Commissioner believes that the public would be perfectly capable of distinguishing between the government disclosing specific pieces of correspondence with The Prince of Wales (and moreover only disclosing such information after a request under the Act and/or in response to a section 50 Notice) and the potential disclosure of information which they may send to the government in their role as private citizens. Without any evidence to the contrary, and bearing in mind the comments of the Tribunal referenced above, the Commissioner believes that such an argument does not attract any particular weight.
136. With regard to the final argument, i.e. the privacy considerations contained within section 37, the Commissioner believes that these should not be dismissed lightly. There is a clear public interest in protecting the dignity of the Royal Family so as to preserve their position and ability to fulfil their constitutional role as a unifying symbol for the nation. To the extent that disclosure of the withheld information would undermine His Royal Highness' dignity by invasion of his privacy, the Commissioner accepts that this adds further weight to maintaining the exemption.

137. The Commissioner believes that his position in relation to the weight that should be attributed to the public interest arguments in favour of disclosing this information are clearly set out in relation to the comments above in section 41.
138. Again, in reaching a conclusion about where the balance of the public interest lies the Commissioner has to focus on the specific content of the information. In this case for the information which falls within the scope of the convention, the Commissioner believes that the public interest in maintaining the exemption is very strong because of weight that should be attributed to maintaining the convention – i.e. a confidential space in which the Heir to the Throne can communicate with Ministers - and the concepts which underpin it, i.e. political neutrality and confidentiality, along with the weight that should be given to the chilling effect arguments for such correspondence. Even when taken together the Commissioner does not feel that the public interest arguments in favour of disclosing the particular information which falls within the scope of this request overrides this weighty public interest in maintaining the exemption.
139. In relation to any of the information which may fall outside the Commissioner's definition of the convention, the Commissioner believes that the public interest is more finely balanced because the argument in favour of maintaining a constitutional convention attracts far less weight. (It should not be inferred that such information is indeed contained within the scope of this request.) Therefore, it would certainly be possible (and easier) to envisage a scenario where disclosure of the correspondence between The Prince of Wales and government Ministers would be in the public interest. However, as noted above just because information does not fall within the scope of the convention this does not mean that its disclosure would not undermine two key concepts inherent to it: political neutrality and the potential to have a chilling effect on future correspondence. Moreover, having once again considered the content of the withheld information in this case which does not fall within the scope of section 41(1)(a), the Commissioner believes that the public interest favours maintaining the exemption contained at section 37(1)(a).

### **The requests for the lists and schedules**

140. In addition to asking for copies of correspondence exchanged between The Prince of Wales and Ministers at the DCSF, the complainant also requested a list of this correspondence and furthermore a schedule of such correspondence. The complainant's request specified that the list should include the recipient of the correspondence, the sender of the correspondence and the date of the correspondence. The complainant's request also specified that the schedule should include a brief description of each relevant document including the nature of the document, the date of the document, and whether the document is being released or not.
141. The DCSF has argued that a list/schedule of documents which The Prince of Wales sent to the DCSF is exempt from disclosure on the basis of section 37(1)(a), 40(2) and 41(1) and that a list/schedule of documents which the DCSF

sent to The Prince of Wales is exempt from disclosure on basis of sections 37(1)(a) and 40(2).

142. In relation to section 41, the DCSF argued that details of the letters The Prince of Wales sent to the DCSF clearly constituted information which was provided to it by a third party and thus met the requirements of section 41(1)(a). As to why disclosure of this would constitute an actionable breach, the DCSF referred to the arguments set out above in relation to the application of section 41(1)(b) to copies of the letters.
143. In relation to the application of section 37(1)(a), the DCSF explained that whilst it is publicly acknowledged that The Prince of Wales corresponds on occasion with government, it is not generally known when and with whom he corresponds. Disclosure of such information, i.e. by providing a list and/or schedule of the correspondence falling within the scope of this request would not be in the public interest because disclosure of the details of when and with whom His Royal Highness corresponds, even in the absence of disclosure of the subject matter of the correspondence would lead to damaging speculation about the nature of that correspondence. Inferences would be drawn, whether warranted or not, from the knowledge that The Prince of Wales had written a certain number of times to a government department within a particular period, that he had written on particular topics or had expressed particular views. That in turn would inhibit His Royal Highness and Ministers from exchanging views on governmental matters which would inhibit the convention that the Heir to the Throne should be instructed in business of government. Again the DCSF noted that the reasons for the application of section 41(1) overlapped and supported the application of section 37(1)(a).
144. The DCSF argued that these public interest concerns should be given particular weight even without the need to demonstrate particular prejudice arising from these particular lists; section 37(1)(a) applied without proof of damage. To support this point the DCSF suggested that there was a strong parallel to be drawn between this case and *HM Treasury v Information Commissioner and Evan Owen [2009] EWHC 1811*. That case, like the present case, concerned a narrow and specific exemption. In that case, the exemption related to the advice of Law Officers under section 35(1)(c). The DCSF highlighted the fact that Blake J held that the general public interest considerations behind non-disclosure, which are reflected in section 35(1)(c), should be taken into account in the absence of proof of damage. This was why Parliament had enacted the specific exemption for Law Officers' advice under section 35(1)(c) without requiring proof of damage. The DCSF argued that the same considerations applied in the context of this case.
145. In addition to this point the DCSF highlighted to the Commissioner a particular instance where a particular public authority had disclosed the number of times The Prince of Wales had contacted it and the harm this had caused to His Royal Highness, in particular his position of political neutrality. (The Commissioner does not consider it necessary or appropriate to include details of this in the main body of this Notice).

146. Having considered the arguments advanced by the DCSF very carefully the Commissioner has concluded that the list and schedule information in relation to correspondence sent by The Prince of Wales is exempt from disclosure on the basis of section 41(1). The Commissioner accepts that disclosure of this information would constitute an actionable breach of confidence broadly for the reasons the Commissioner has set out above with regard to the application of section 41(1) to the correspondence itself. Although the Commissioner acknowledges that disclosure simply of a list and/or schedule of information would result in less information being placed into the public domain, the Commissioner still believes that this would constitute an infringement of The Prince of Wales' right of privacy under Article 8 ECHR. For the reasons set out above the Commissioner does not believe that there is a sufficient public interest defence to warrant disclosure of this information.
147. In relation to the application of section 37(1)(a) to the lists and schedules detailing the correspondence sent to The Prince of Wales, the Commissioner also accepts that balance of the public interest favours non-disclosure of such details. In reaching this conclusion the Commissioner again broadly adopts his logic with regard to why the public interest favours maintaining section 37(1)(a) in relation to the correspondence itself. Furthermore, the Commissioner placed some weight on the example provided to him by the DCSF where disclosure of some information arguably lead to a negative impact on The Prince of Wales' position of political neutrality. In reaching this conclusion the Commissioner has also placed particular weight on the fact that the time period specified by the complainant in this request is a narrow one, eight months, and the request seeks details of correspondence between The Prince of Wales and Ministers – as opposed to a broader request seeking for example correspondence between any individuals acting on behalf of His Royal Highness and any individual at the DCSF.

### **Procedural Requirements**

148. Part I of the Act includes a number of procedural requirements with which public authorities must comply.
149. These include section 1(1) which states that:
- ‘Any person making a request for information to a public authority is entitled –
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.’
150. Section 10(1) requires a public authority to respond to a request within 20 working days following the date of receipt. Section 10(3) states that a public authority can reasonably extend the time it needs to consider the public interest but it must still comply with the requirements of section 17 within 20 working days.
151. Section 17 of the Act requires a public authority to provide an applicant with refusal notice stating the basis upon which it has refused a request for

information. Section 17(1) requires that such a notice be provided within 20 working days of the request.

152. In this case the complainant submitted his complaint on 8 April 2005. The DfES did not issue a valid refusal notice citing the exemption upon which it intended to rely until 8 June 2005. Therefore by failing to issue this refusal notice within 20 working days the Commissioner has found that the DfES breached section 17(1) of the Act.

## The Decision

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153. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- Some of the correspondence falling within the scope of the requests is exempt from disclosure on the basis of section 41(1) of the Act. The remainder of the correspondence is exempt from disclosure on the basis of section 37(1)(a) of the Act and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.
  - The list and schedule information in relation to correspondence sent by The Prince of Wales is exempt from disclosure on the basis of section 41(1) of the Act.
  - The list and schedule information in relation to correspondence sent to The Prince of Wales is exempt from disclosure on the basis of section 37(1)(a) of the Act and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.
154. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The correspondence which the Commissioner has concluded is exempt from disclosure on the basis of section 37(1)(a) does not meet the requirements of section 41(1)(a) and therefore is not exempt on the basis of section 41(1).
  - The public authority breached section 17(1) by failing to issue a refusal notice within 20 working days.

## Steps Required

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155. The Commissioner requires no steps to be taken.

## Other matters

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156. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
157. In February 2007 the Commissioner issued guidance on the time public authorities should take when considering the public interest test.<sup>9</sup> This guidance notes that whilst the Act and the section 45 Code of Practice do not specify how long a public authority can extend the public interest for, even in exceptional cases, the time taken should not exceed 40 working days. Clearly, in dealing with this request the DfES took substantially longer than 40 working days to reach its conclusions in relation to the balance of the public interest test.
158. Although the delay preceded the guidance, the Commissioner expects the DCSF to ensure that when it extends its consideration of the public interest test when dealing with future requests that it adheres to the time guidelines set out in the guidance paper reference above.

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<sup>9</sup> [Freedom of Information Good Practice Guide No. 4](#)

## Right of Appeal

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159. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 15<sup>th</sup> day of December 2009**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**



## **Annex – text of request**

The complainant submitted the following request to DfES on 8 April 2005:

'My request relates to correspondence between Prince Charles and ministers in the Department for Education and Skills.

Under the act, I would like to request a list of any and all correspondence which has been sent by Prince Charles to each minister in the Department for Education and Skills between September 1 2004 and April 1 2005. I assume that this would cover letters, emails, faxes, and any other forms of correspondence.

Under the act, I would also like to request a list of any and all correspondence which has been sent by each minister in the Department for Education and Skills to Prince Charles between September 1 2004 and 1 April 2005. I assume that this would cover letters, emails, faxes and other forms of correspondence.

For each piece of correspondence, I would be grateful if you could list the recipient of the correspondence, the sender of the correspondence and the date of the correspondence.

Under the act, I would also like to request complete copies of each piece of correspondence listed above between ministers in the Department for Education and Skills and Prince Charles between September 1 2004 and April 1 2005. This request covers correspondence which has been both received and sent by ministers in the Department for Education and Skills to and from Prince Charles. I assume that this would cover letters, emails faxes, and any other forms of correspondence.

I would also like to ask the Department for Education and Skills on answering the above request, to comply with a further request under the Freedom of Information act. This request is to provide a schedule of the documents which are relevant to the above request. I believe that there should be a brief description of each relevant documents including the nature of the document, the date of the document, and whether the documents is being released or not. I believe that providing such a schedule would clarify what documents are being released and what is being withheld. This is a specific request for information to which I believe I am entitled under the Freedom of Information act, and would also represent best practice in open government'.

## **Legal Annex**

### **Freedom of Information Act 2000**

#### **General Right of Access**

**Section 1(1)** provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

**Section 1(2)** provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

**Section 1(3)** provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

#### **Effect of Exemptions**

**Section 2(1)** provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.”

**Section 2(2)** provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

### **Time for Compliance**

**Section 10(1)** provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

**Section 10(3)** provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

### **Refusal of Request**

**Section 17(1)** provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

## **Communications with Her Majesty.**

**Section 37(1)** provides that –

“Information is exempt information if it relates to-

- (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household, or
- (b) the conferring by the Crown of any honour or dignity.”

**Section 37(2)** provides that –

“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).”

## **Personal information.**

**Section 40(2)** provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

**Section 40(3)** provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

**Information provided in confidence.**

**Section 41(1)** provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

**Section 41(2)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”