

**Freedom of Information Act 2000 (FOIA)  
Environmental Information Regulations 2004 (EIR)  
Decision notice**

**Date:** 29 March 2017

**Public Authority:** The Foreign and Commonwealth Office  
**Address:** King Charles Street  
London  
SW1A 2AH

**Decision (including any steps ordered)**

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1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) for communications between the Prince of Wales and FCO Ministers about the UN Climate Change Conference which took place in Paris in 2015. The FCO refused to confirm or deny whether it held any information falling within the scope of the request on the basis of section 37(2) of FOIA and regulation 13(5)(a) of the EIR.
2. The Commissioner has concluded that the FCO is entitled to rely on section 37(2). However, she has also concluded that some of the requested information, if held, would constitute environmental information as defined by the EIR. In respect of such information the Commissioner has concluded that regulation 13(5)(a) is not engaged.
3. The Commissioner therefore requires the public authority to take the following steps to ensure compliance with the legislation.
  - Confirm or deny whether environmental information is held in relation to the complainant's request under the EIR and if any such information is held either disclose it or issue a refusal notice compliant with regulation 14 of the EIR.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. The complainant submitted the following request to the FCO on 16 March 2016:

*'I would like to request the following information under the Environmental Information Regulations (EIRS)...*

*...Please note that I am only interested in information which relates to the period 1 January 2015 to the 1 December 2015.*

*Please note that the reference to the Prince of Wales should include the Prince himself and or his private office and or anyone officially representing him or acting on his behalf.*

*Please note that the reference to the Secretary of State and or Minister should include the Secretary of State and or Minister themselves as well as their private office and or anyone acting on their behalf.*

*1...During the aforementioned did the Prince of Wales exchange correspondence and communications (including emails) with the Secretary of State and or the relevant Minister(s) which in any way referred to the UN Climate Change Conference which took place in Paris in 2015 and or the issues to be raised at that conference and or the UK Government's participation in that conference and or the Prince's involvement in and or speech to that conference and or any subsequent agreement/policy agreed by that conference/convention. This correspondence could have pre-dated the conference or it could have occurred afterwards. If the answer is yes can you please provide copies of this correspondence and communications including emails.*

*2...During the aforementioned period has the Prince of Wales met with either the Secretary of State and or relevant Minister(s) to discuss any of the aforementioned issues. If the answer is yes can you please provide the following details. In the case of each meeting can you please provide the date, time and venue. In the case of each meeting can you please provide a full list of those present. In the case of each meeting can you please provide a full list of relevant topics. In the case of each meeting can you please provide copies of any agendas or briefing notes which were submitted to the Ministers and or their representatives either before or after the meeting(s).*

*3...During the aforementioned period did the Prince of Wales speak on the telephone to the Secretary of State and or the relevant Minister(s) about any of the issues outlined in question one of this request. If the answer is yes can you please provide any relevant transcripts and sound recordings.'*

6. The FCO responded on 18 April 2016 and refused to confirm or deny whether it held any information falling within the scope of the request. In order to do so, the FCO sought to rely on section 37(2), by virtue of section 37(1)(aa), of FOIA and regulation 13(5)(a) of the EIR.
7. The complainant contacted the FCO on 19 April 2016 and asked it conduct an internal review of this decision. He argued that disclosure of the requested information would not breach the Data Protection Act (DPA) and referred the FCO to a previous decision of the Commissioner which also involved a request for information made to the Department for Transport about the Prince of Wales.<sup>1</sup>
8. At the point the complainant contacted the Commissioner the FCO had not informed him of the outcome of the internal review. The FCO subsequently explained to the Commissioner that it had no record of the complainant's request for an internal review.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 15 June 2016 in order to complain about the FCO's refusal to provide him with the information he had requested.
10. The Commissioner considers the scope of the case to be whether the FCO is entitled to neither confirm nor deny (NCND) whether relevant information is held. For reasons that are explained in the Commissioner's analysis below, she has considered both the FCO's reliance on section 37(2) of FOIA and its reliance on regulation 13(5)(a) of the EIR.

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<sup>1</sup> [FER0567018](#)

## Reasons for decision

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### Is the requested information environmental information?

11. Regulation 2(1) of the EIR defines 'environmental information'. The relevant parts of the definition in this case are found in regulations 2(1)(a) to (c) which state that environmental information is information in any material form on:

*'(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

*(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

*(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements...'*

12. In the context of regulation 2(1) the public authorities should interpret the phrase 'any information on' broadly.
13. In the Commissioner's opinion, wherever possible the decision on whether requested information constitutes environmental information as defined by the EIRs should be made on a review of the actual information itself, rather than on an assessment of the request. However, the Commissioner recognises that in some scenarios – including where a public authority is adopting a NCND position – such an approach is not possible and an assessment as to whether the requested information (if held) is environmental information must be made simply on the wording of the request.
14. In the Commissioner's opinion, based upon the wording of this request, any requested information – if held – could contain both environmental and non-environmental information. In respect of the environmental information, the Commissioner notes that the request focuses on the

Climate Change Conference which took place in Paris in 2015 (COP21), and more specifically on the speech the Prince of Wales gave at that conference. In the Commissioner's opinion if the requested information contained discussions of the topics covered by the Prince's speech<sup>2</sup>, or indeed other matters directly related to the subject of climate change, then such information would constitute environmental information by virtue of regulations 2(1)(a), 2(1)(b) and/or 2(1)(c). However, the Commissioner recognises that the request was broad in nature seeking information '*which in any way*' referred to either COP21 or the Prince's involvement in the conference. In the Commissioner's opinion such a broad ranging request could encompass information which would not fall within the definition environmental information, for example if the requested information simply contained discussions of the arrangements for, or logistics of, the Prince's attendance at the conference.

15. In scenarios such as this where the wording of the request suggests that the requested information – if held – could contain both environmental and non-environmental information, the Commissioner will issue a decision notice which considers the request under both FOIA and the EIR.

### **Section 37 of FOIA**

16. Section 37(2) states 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).'*

17. Section 37(1)(aa) states that:

*'Information is exempt information if it relates to – communications with the heir to, or the person who is for the time being second in line of succession to, the Throne'*.

18. Section 37(1)(aa) is class-based and an absolute exemption. This means that if the information were held and it would fall within the class of information described in the exemption in question, it is exempt from disclosure. It is not subject to a balance of the public interest test.
19. In the Commissioner's opinion the term 'communications' is seen as wide-ranging. It does not simply relate to written correspondence by the

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<sup>2</sup> A copy of the Prince's speech is available at this link:  
<http://www.princeofwales.gov.uk/media/speeches/speech-hrh-the-prince-of-wales-the-cop21-opening-session-paris>

Prince of Wales but also includes discussions, whether made in person or by telephone. The exemption also goes beyond being only from the Prince of Wales himself but includes communications with his officials and staff acting on his behalf.

20. In the Commissioner's view all of the information falling within the scope of the request that is not environmental information - if indeed such information is held – would fall within the exemption provided by section 37(1)(aa) of FOIA. This is because such information would clearly fall within the definition of communications within the context of section 37(1)(aa) given that point 1 of the request asks for correspondence with the Prince of Wales, point 2 of the request asks for details of meetings with the Prince and point 3 asks for records of telephone conversations with the Prince.
21. As section 37(1)(aa) would apply to the relevant information, section 37(2) is engaged and the FCO is not required to confirm or deny whether it holds any non-environmental information that comes within the scope of the request.

### **Regulation 13(5) of the EIR**

22. The FCO also relied on regulation 13(5)(a) of the EIR to refuse to confirm whether it held any information falling within the scope of this request. This regulation states that:

*'(5) For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that –*

*(a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles...'*

23. Therefore for a public authority to be able to correctly rely on this regulation two criteria have to be met:
  - Firstly, the confirmation as to whether information is held would constitute the disclosure of personal data, and
  - Secondly, the disclosure of such personal data would have to constitute a breach of one of the data protection principles in the DPA.

*Would confirming or denying whether the information is held constitute personal data?*

24. Personal data is defined in the DPA as information which relates to a living individual who can be identified from that data, or from that data

along with any other information in the possession, or is likely to come into the possession of the data controller.

25. The FCO noted that the request seeks to establish whether the Prince of Wales had communicated with it on a specific subject matter, namely COP21. Therefore, in the FCO's opinion confirmation as to whether or not it held the requested information would constitute the disclosure of the Prince's personal data as it would reveal whether or not he had chosen to correspond with the FCO about the subject matter in question. The Commissioner agrees that confirmation as to whether or not the FCO holds the requested information would constitute the disclosure of the Prince of Wales' personal data for the reasons outlined by the FCO.

*Would confirming or denying whether the information is held breach one of the data protection principles?*

26. The FCO argued that to confirm whether or not it held the requested information would breach the first data protection principle in the DPA which states that:

*'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*

*(a) at least one of the conditions in Schedule 2 is met, and*

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'*

27. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
  - what the public authority may have told them about what would happen to their personal data;
  - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
  - the nature or content of the information itself;
  - the circumstances in which the personal data was obtained;
  - any particular circumstances of the case, eg established custom or practice within the public authority; and
  - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.

- The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed, or in the circumstances of this case the consequences of confirming whether or not the information was held? In consideration of this factor the Commissioner may take into account:
  - whether information of the nature requested is already in the public domain;
  - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?

28. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by confirming whether personal data is held, it may still be fair to provide such a confirmation if it can be argued that there is a more compelling legitimate interest to the public in doing so.
29. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.

#### The complainant's position

30. The complainant argued that disclosure of the information he requested would not breach the first data protection principle. Drawing upon the decision notice cited at footnote 1 previously issued by the Commissioner, he argued that issues of public policy are not inherently private to the Prince of Wales, and moreover that there was a legitimate public interest in the disclosure of information about the issues on which the Prince communicates with Ministers.

#### The FCO's position

31. The FCO argued that the Prince of Wales would have a reasonable expectation that a public authority would not confirm whether or not it had discussed a particular issue with him. Consequently, if the FCO confirmed whether or not it held the requested information – and thus revealed whether it had discussed the topic of COP21 with the Prince of Wales during the time period covered by the request – this would be against the Prince's expectations and thus would be unfair and constitute a breach of the first principle.



32. The FCO also argued that there was a distinction between this request and the one in the decision notice cited by the complainant as it specifically concerned a meeting that was known to have taken place. Furthermore, the FCO noted that the Department for Transport successfully appealed the decision notice to the First Tier Tribunal.<sup>3</sup>

### The Commissioner's position

33. With regard to the Prince of Wales' expectations, in the Commissioner's opinion given that FOIA and the EIR were implemented over ten years ago any individual regularly involved in discussions with government Ministers should have appreciated that there could no longer be any guarantee that their communications would remain confidential. In the Commissioner's view this includes the Prince of Wales. Indeed the Upper Tribunal's finding in 2012 that the Prince of Wales' letters to various government departments could be released would also have served to raise the Prince's awareness of the potential for his contact with the government Ministers to be disclosed.<sup>4</sup> Whilst the Commissioner acknowledges that subsequent amendments to FOIA ensured an absolute rather than qualified exemption for communications with the heir to the throne, no such amendments were made to the EIR. Consequently, whilst the Prince of Wales may have had an expectation that no confirmation would be given as whether he had contacted the FCO before making his speech at COP21, the Commissioner is not persuaded that this was necessarily a reasonable expectation in respect of information which constituted 'environmental information' as defined by the EIR.
34. Furthermore, the Commissioner would draw a distinction between the Prince of Wales' expectations in respect of confirming whether or not he had corresponded with Ministers on a particular issue and his expectations that the actual correspondence itself (if held) would be disclosed. In the Commissioner's view there is arguably a greater degree of expectation on the Prince's part that the correspondence itself (if held) would be withheld than there is in simply confirming whether correspondence had taken place.
35. With regard to the consequences of the FCO confirming whether it holds any environmental information falling within the scope of the request, the Commissioner believes that it is important to recognise that it is widely known that the Prince of Wales has written to Ministers in the past about a range of issues. Whilst there has been public debate about

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<sup>3</sup> [EA/2015/0277](#)

<sup>4</sup> [Rob Evans v Information Commissioner and others \[2012\] UKUT 313 \(AAC\)](#)

disclosure of the fact such correspondence has been sent, this has not threatened the Prince's constitutional position, nor significantly affected his interests. Furthermore, in finding that confirmation as to whether the requested information is held would constitute the disclosure of the personal data of the Prince of Wales, the Commissioner has accepted that such a confirmation relates to the Prince in so far as it would reveal whether he choose to correspond with Ministers on this specific issue. However, although this is sufficient to make the confirmation as to whether information is held within the ambit of personal data, this does not necessarily mean that such a confirmation would amount to an infringement into the Prince's privacy.

36. Furthermore, the Prince of Wales' speech to the COP21 conference is in the public domain and therefore his views on the issues concerning climate change in the context of COP21 are in the public domain. Indeed, the Prince has made previous public comments about issues associated with climate change and his views on this subject are well known.
37. Taking all of these factors into account, in the Commissioner's opinion, confirmation as to whether the FCO holds information – and thus revealing whether the Prince had discussed the COP21 conference with Ministers – could not be said to equate to a significant infringement into the Prince's privacy. Consequently, the Commissioner is satisfied that confirming whether the FCO holds information falling within the scope of the request would not be unfair to the Prince of Wales.
38. However, in order for personal data to be disclosed under FOIA one of the conditions in schedule 2 of the DPA has to be met. In the circumstances of this case the Commissioner believes that the relevant condition is the sixth which states that:

*'The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'*

39. In considering the legitimate interests of the public in this context, the Commissioner believes that it is important to recognise that the Prince of Wales is known to hold strong views on public policy and to communicate with Ministers about those matters. The public interest in the disclosure of such "advocacy correspondence" was considered at length by the Upper Tribunal in *Evans*. In that case, the Upper Tribunal concluded (paragraph 213) that:

*'the overall public interest balance will clearly, in the absence of special circumstances, be in favour of disclosure as regards correspondence between Prince Charles and ministers in a context where Prince Charles has an interest that government should take a particular course.'*

40. In the Commissioner's opinion, and taking account of the Upper Tribunal's comments, the Prince of Wales' contact with government Ministers raises legitimate questions about the role of the heir to the throne in a parliamentary democracy and increasingly the role he may play when he succeeds to the throne. Whilst it is clearly not for the Commissioner to comment on the Prince of Wales' role, she is simply recognising that his communications with Ministers are a matter of legitimate and ongoing public debate.
41. The Commissioner therefore finds that there is a very strong public interest in revealing the nature of the communications between the Prince of Wales and government Ministers, including the subjects which the Prince of Wales wished to discuss. In the context of this request, the Commissioner believes that there is a clear public interest in confirming whether the Prince of Wales communicated with Ministers about the COP21 conference.
42. As explained above, the Commissioner has already concluded that there would be no significant infringement into the Prince of Wales' privacy if the FCO confirmed whether it held information falling within the scope of this request and thus in the Commissioner's view such a confirmation would be unlikely to have any detrimental impact on the Prince's legitimate interests. Consequently, the Commissioner is satisfied that the legitimate interests in the FCO confirming whether it holds any environmental information falling within the scope of the request significantly outweigh any legitimate interests in protecting the Prince of Wales' privacy. Therefore, the Commissioner is satisfied that condition 6 of schedule 2 of the DPA is met.
43. The Commissioner has therefore concluded that regulation 13(5) of the EIR is not engaged as confirmation as to whether the FCO holds any environmental information falling within the scope of the request would not breach the data protection principles.
44. In reaching this conclusion, the Commissioner acknowledges that as the FCO indicated the DfT successfully appealed the Commissioner's decision notice in the case cited by the complainant. However, the Tribunal found in the DfT's favour by virtue of concluding that the remaining withheld information was not 'environmental information' and thus fell to be considered under FOIA, rather than the EIR, and was therefore exempt from disclosure on the basis of section 37(1)(aa) of FOIA. As a result the Tribunal did not consider the DfT's reliance on regulation 13 of EIR. In any event, for the reasons set out above, in this present case the

Reference: FS50642892

Commissioner is satisfied that regulation 13(5)(a) is not engaged in respect of this particular request.

## Right of appeal

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45. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504  
Fax: 0870 739 5836  
Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

46. 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.
47. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed** .....

**Steve Wood**  
**Head of International Strategy and Intelligence**  
**Information Commissioner's Office**  
**Wycliffe House**  
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**Cheshire**  
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