

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

Date: 28 March 2019

Public Authority: Ministry of Housing, Communities and Local Government

Address: Fry Building
2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information about a meeting held between HRH the Prince of Wales and the Right Honourable Sajid Javid MP on 28 March 2017. The Ministry of Housing, Communities and Local Government (MHCLG) disclosed some information falling within the scope of the request but withheld the remainder citing section 37(1)(aa) of the FOIA – communications with the heir to the throne and regulation 12(4)(e) of the EIR - internal communications.
2. The Commissioner's decision is that the MHCLG has correctly applied the exemption under 37(1)(aa) to the withheld information. For the information that the Ministry has applied regulation 12(4)(e) to, the exception is engaged but the public interest in disclosure outweighs that of maintaining the exception. The Commissioner also finds that the Ministry breached section 10 of the FOIA – time for compliance; and regulation and 5(2) – duty to make environmental information available within 20 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information identified by the Ministry as Annex B.

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

5. On 22 March 2018, the complainant wrote to the MHCLG and requested information in the following terms:

'I would like to request the following information under The Freedom of Information Act and The Environmental Information Regulations (EIRS).

I note that The Prince is not exempt from The Environmental Information Regulations and I understand the request will take 20 working days to process.

Please note that my reference to The Prince of Wales should include the Prince himself and or his private office.

Please note that my reference to Mr Javid should include the Secretary of State and or his private office.

My requests concerns the meeting between The Prince of Wales and Sajid Javid MP which according to The Court Circular took place at Clarence House on 28 March 2017.

Could I please request the following information.

1...Could you identify any departmental representatives and employees who accompanied Mr Javid to the meeting.

2...Could you please identify anyone else who was present at the meeting including representatives and employees of The Prince of Wales.

3...Could you please detail what topics and issues were discussed at the meeting.

4...Can you please provide copies of any briefing notes which were prepared for Mr Javid prior to the meeting taking place.

5...Prior to the meeting taking place did Mr Javid write to the Prince about the meeting and the issues to be discussed at the meeting. If the answer is yes can you please provide copies of this correspondence and communication including any emails.

6...Prior to the meeting taking place did The Prince of Wales write to Mr Javid about the meeting and the issues to be discussed at the meeting. If the answer is yes can you please provide copies of this correspondence and communication including emails.

7...During the course of the meeting did The Prince of Wales ask Mr Javid for any help or assistance with a particular issue or policy. If the answer is yes can you please provide details. Can you please provide copies of any written requests and or similar handed over by The Prince and or his staff at the meeting.

8...Following the meeting did the two aforementioned individuals exchange correspondence and communication about the meeting and or the discussions which took place at the meeting. If the answer is yes can you please provide copies of this correspondence and communication including emails. Please note that I would like to receive both sides of the correspondence and communication.

If information has been subsequently destroyed can you please provide the following details. In the case of each destroyed document can you state when and why it was destroyed. In the case of each destroyed piece of correspondence can you provide details of the correspondents, the dates sent and the contents. If the destroyed document is held in another form can you please provide copies.'

6. On 23 April 2018 the Ministry responded. It said it needed more time to process the request as it was considering it under section 36 of the FOIA - prejudice to the conduct of public affairs. This was again extended on 22 May 2018. On 20 June 2018 the Ministry responded to the request, providing information that it considered to fall under the EIR, but it withheld the remainder citing section 37(1)(aa) of the FOIA. At this stage it dropped its previous consideration of the request under section 36 of the FOIA.
7. The complainant requested an internal review on 21 June 2018 and the Ministry responded on 19 July 2018. It upheld its original position, but now also referenced the exception under 12(4)(e) of the EIR (internal communications) for some of the withheld information. It considered that the public interest in maintaining the exception outweighed the public interest in disclosure.

Scope of the case

8. The complainant contacted the Commissioner on 25 July 2018 to complain about the way his request for information had been handled. He was dissatisfied with the length of time the Ministry had taken to respond, he considered there to be more information within scope not supplied, believing the EIR should be the correct regime for consideration of all the withheld information.
9. The Commissioner considers the scope of the case to be whether the MHCLG:
 - is entitled to rely on section 37(1)(aa) of the FOIA, and regulation 12(4)(e) of the EIR;
 - has supplied all information held falling within the scope of the request, subject to any exemptions/exceptions;
 - has met the required time for compliance under both regimes.

Reasons for decision

Is any of the withheld information environmental information?

10. Regulation 2(1) of the EIR defines environmental information as:

"...any information in written, visual, aural, electronic or any other material form on—

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

(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;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);..."

11. The withheld information comprises:

- redactions from a letter sent from the Secretary of State (SoS) to the Prince of Wales after the meeting; and
- an internal Ministry briefing document concerning housing.

12. The letter redactions have been withheld under section 37(1)(aa) – communications with the heir to the throne. The Commissioner is satisfied that having looked carefully at these redactions, it is not environmental information and concurs with the Ministry in this respect. The letter also includes environmental information that is not redacted and has been released to the complainant.

13. The internal briefing document is solely concerned with housing. Having reviewed the contents of the briefing note, the Commissioner is satisfied that the information falls under one or more of the definitions in (a) to (f) above (primarily (c) and (d)) and therefore constitutes environmental information.

EIR Regulation 12(4)(e) – internal communications

14. Regulation 12(4)(e) states:

'12.—(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

(e) the request involves the disclosure of internal communications.

and Regulation 12(8) states:

12.—(8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

15. The information withheld under 12(4)(e) comprises an internal briefing document produced by the Ministry specifically for the meeting between the SoS and the Prince of Wales. The Commissioner has already established that this is environmental information, and as 12(4)(e) is a class-based exception (meaning there is no sensitivity or prejudice test), the Commissioner accepts that the withheld briefing document constitutes internal communications and therefore the exception is engaged.
16. As with all EIR exceptions, it is qualified. This means that even if the exception is engaged, public authorities must go on to apply the public interest test set out in regulation 12(1)(b). A public authority can only withhold the information if the public interest in maintaining the exception outweighs the public interest in disclosing the information. Regulation 12(2) specifically states that a public authority shall apply a presumption in favour of disclosure.
17. The purpose of exception 12(4)(e) is broadly to provide for the protection of internal deliberations and decision-making processes within public authorities. This reflects the underlying rationale for the exception: that it protects a public authority's need for a 'private thinking space'. This rationale was made clear in the proposal for the European Directive which the EIR are intended to implement.
18. However, there is no automatic public interest in withholding the information simply because the exception is engaged. Arguments for withholding or disclosing information should always relate to the content and sensitivity of the information in question and the circumstances surrounding the request.
19. In its representations to the Commissioner, the Ministry has stated:

'Where the exception at regulation 12(4)(e) of the EIR is engaged we have weighted the public interest in disclosure against the public interest in maintaining the exception. There is undoubtedly a great deal of public interest around any meeting between HRH The Prince of Wales and the then Secretary of State. There is also a stronger public interest in ensuring that Ministers can receive advice from their officials within an appropriate degree of private thinking space. Officials should be able to provide advice and information in confidence, without being constrained by the knowledge that this information may be made public. The consequence of releasing such information would be to inhibit the provision of free and frank advice in future, which would have a detrimental effect on the future quality of advice provided to Ministers.'

It is right that the Department applies transparency in order that the public can see and understand more about policy issues; however, to disclose related documentation could prevent future candid discussions with the heir to the Throne. We are therefore of the view that there is a compelling public interest in not releasing this information.'

20. In summary the Ministry considers that release of the briefing paper would both affect the private thinking space afforded by the exception, and result in the 'chilling effect', meaning it would hamper the candidness of future discussions.
21. The Commissioner is not convinced by this general application of 'safe space' and 'chilling effect arguments'. 'Safe space' arguments are generally time limited and will be strongest when the issue is still live. The request for information concerns a meeting held in March 2017 and was made a year after the event. Having closely examined the briefing paper the Commissioner can see no obvious or contentious links with housing issues at the time, and the Ministry has not furthered any specific links itself. The Ministry has therefore failed to explain why exactly the safe space is required in the context of the withheld information at the time of the request.
22. Turning to 'chilling effect arguments', again the Ministry has not provided any arguments or information that suggests the briefing paper contains live and contentious issues. The Commissioner accepts that in theory disclosure of internal briefing papers could have a detrimental effect on future discussions but this is only a credible argument where a public authority can link the specifics of the withheld information to likely consequences. The Ministry has failed to demonstrate this, and in any event the Commissioner notes that a significant amount of detail in the briefing paper is already publicly available and/or included in the information already disclosed to the complainant.
23. The Commissioner is therefore not persuaded that release of the withheld information in March 2018 would have had a detrimental impact on any 'safe space' required by the Ministry at the time concerning the matters in the briefing paper, nor would it have presented any real risk to the candidness of any similar briefing papers or related matters. Furthermore, the Commissioner considers that there is a strong public interest in the disclosure of information showing how the government relates to and communicates with the Heir to the Throne, particularly given the Prince of Wales' history of communicating directly with / lobbying government departments. Consequently the Commissioner concludes that the public interest in disclosure of the information held under 12(4)(e) of the EIR outweighs the public interest in maintain the exception.

FoI Section 37 – Communications with Her Majesty

24. Section 37(1)(aa) of the FOIA states:

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

(aa) communications with the heir to, or the person who is for the time being second in line of succession to, the Throne'

25. This is an absolute exemption and is therefore not subject to the public interest test.
26. The Ministry has redacted information sent in a letter from the SoS and the Prince of Wales following the meeting in question. Having reviewed the redactions, the Commissioner is satisfied that the information is caught by the exemption and therefore the Ministry is correct in application of 37(1)(aa). The Commissioner notes that some of the information in the letter has been released to the complainant as this is environmental information under the EIR.

FoI Section 10 – time for compliance

27. Section 10(1) of the FOIA states that a public authority must respond to a request promptly and *"not later than the twentieth working day following the date of receipt."*
28. The complainant made his request on 23 March 2017. The Ministry replied on 23 April saying it was considering the application of section 36 and required more time to consider the public interest test. This was extended again on 22 May 2018. The Ministry eventually made its substantive response on 20 June 2018, 60 days after the initial request was made.
29. The Ministry defended its late response by arguing that it was permissible to extend the 20 day statutory time for compliance due to consideration of the public interest test. The Commissioner considers a 20 working days to be a reasonable extension, which would take the response date to 22 May 2018.
30. However, the Ministry did not ultimately apply section 36 of the FOIA but rather section 37(1)(aa). As this is an absolute exemption no public interest test is required. The Ministry therefore breached section 10 of the FOIA by failing to respond within 20 working days. The Commissioner wishes the Ministry to note that the delay in this case was wholly unacceptable, and that the continued 'holding emails' were just a bid to buy time that essentially wasn't needed.

EIR Regulation 5(1) and (2) - duty to make information available and within 20 working days

31. The complainant expressed concern that the Ministry held more information under the EIR than that already disclosed to him. This was due to not knowing whether section 37(1)(aa) had been applied correctly – i.e. whether there was information that should be considered under the EIR which ought to be disclosed, and not withheld under the FOIA. The Commissioner has already concluded that the Ministry has classified the withheld information under the correct regimes.
32. Regulation 5(2) provides that a public authority should provide the information to which the applicant is entitled to within 20 working days of the request being received. Unlike the FOIA, there is no allowable extension for consideration of the public interest test. There is the possibility of extension to 40 working days if the information is complex or voluminous but the Commissioner does not consider two sides of a simple internal briefing paper to qualify as either complex or voluminous in nature.
33. The Commissioner therefore finds that the Ministry breached regulation (5)(2) by failing to respond to the complainant's request within 20 working days. The Commissioner wishes to emphasise to the Ministry that taking 60 working days to respond to the request, the same as its FOIA response, is wholly unacceptable.

Right of appeal

34. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.
36. 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

Andrew White
Group Manager

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