

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

Date: 27 January 2020

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information about a meeting between HRH The Prince of Wales and the Rt. Hon Amber Rudd, the then Home Secretary, in 2017. The Home Office would neither confirm nor deny whether or not it held the requested information, on the grounds that section 37(2) (Communications with Her Majesty, etc. and honours) of the FOIA applied.
2. The Commissioner's decision is that the Home Office was entitled to neither confirm nor deny whether it held the requested information under section 37(2) of the FOIA. No steps are required.

Request and response

3. On 22 March 2018, the complainant wrote to the Home Office 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).

...

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

Please note that my reference to the Rt Hon. Amber Rudd should include the Secretary of State and or her office.

My requests concerns [sic] the meeting between The Prince of Wales and the Rt Hon Amber Rudd 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 Amber Rudd 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 Amber Rudd and or any other departmental staff/representatives prior to the meeting taking place.

5... Prior to the meeting taking place did Amber Rudd write to the Prince about the meeting and the specific 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 Amber Rudd about the meeting on the specific 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.

7... During the course of the meeting did the Prince of Wales ask Amber Rudd for any help or assistance with a particular issue or policy or raise a particular issue of concern to him. 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 all his staff at the meeting.

8... Following the meeting did the Prince of Wales and Amber Rudd exchange correspondence and communications with each other about the meeting and all 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 I am interested in receiving 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 document can you please provide a brief outline of its contents. In the case of destroyed correspondence can you provide details of the correspondents, the dates of the correspondence and the contents of the correspondence. If the destroyed document continues to be held in another form can you please provide a copy."

4. The Home Office responded on 23 April 2018. It would neither confirm nor deny (NCND) whether it held the requested information, on the grounds that section 37(2) of the FOIA applied. It did not offer a response as regards the further consideration of the request under the EIR.
5. The complainant requested an internal review of the Home Office's decision on 23 April 2018. He asked the Home Office to "...examine the information held to see if any of it is environmental as defined by the EIRS". He also asked the Home Office to address the points about destroyed documentation.
6. The Home Office wrote to the complainant with the outcome of the internal review on 5 March 2019. It upheld its application of section 37(2) of the FOIA to issue a NCND response. It said it could not re-examine the information he had requested, to assess whether it fell within the scope of the EIR, because it had neither confirmed nor denied whether such information existed under section 37(2) of the FOIA, and it was satisfied that it had been correct to do so. It said it held no information regarding any destruction of documents falling within the scope of the request.

Scope of the case

7. The complainant contacted the Commissioner on 5 March 2019 to complain about the way his request for information had been handled. He explained that he was dissatisfied with the Home Office's decision to treat the request solely as a request for information under the FOIA, saying that the internal review suggested that it had not considered whether any of the relevant information held was environmental, as defined by the EIR. He was also dissatisfied with the Home Office's decision to NCND whether it held the information, and the excessive length of time that it took to conduct the internal review.
8. The Commissioner has therefore considered whether the request fell to be dealt with under the FOIA, or the EIR, or both. Having determined that the correct access regime was the FOIA, the Commissioner went on to consider whether the Home Office was entitled to rely on section

37(2) of the FOIA to NCND holding the requested information. She has addressed the time the Home Office took to conduct an internal review in the "Other matters" section at the end of this notice.

9. The Commissioner notes, from his comments, that the complainant assumes that information falling within the scope of his request is held by the Home Office. However, by its very nature, the Home Office's NCND response cannot be taken as evidence that the information is or is not held by the Home Office. It follows that nothing in this notice should be taken as indicating that the Home Office does, or does not, hold information falling within the scope of the request.

Reasons for decision

Applicable access regime

10. The complainant specified that his request should be considered under the EIR and the FOIA. The Commissioner has therefore considered whether the request should have been dealt with under the FOIA, or the EIR, or both.
11. "Environmental information" is defined at regulation 2(1) of the EIR¹.
12. The complainant explained in submissions to the Commissioner that, in view of The Prince of Wales' well publicised interest in environmental matters, information falling within the scope of the request (if held) might include environmental information within the meaning of the EIR. However, for the reasons set out in the confidential annex to this notice, which cannot be shared with the complainant and the wider public, the Commissioner has concluded that the Home Office was entitled to deal with the request only under the FOIA.

Section 37(2) - Communications with Her Majesty, etc. and honours

13. The Commissioner has gone on to consider whether the Home Office was entitled to NCND holding any information, under section 37(2) of the FOIA.
14. The Home Office's position is that the requested information, if it were held, would be exempt from disclosure under section 37(1)(aa) of the FOIA. It says that under section 37(2) of the FOIA, it is not obliged to

¹ <http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made>

confirm or deny whether it holds information which would itself be exempt under section 37(1)(aa).

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

"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".

16. It is a class based exemption which means that information falling within the description in section 37(1)(aa) automatically engages the exemption regardless of whether there would be any harm in disclosure. It is not subject to a public interest test.

17. Communications with the heir to the Throne need not necessarily be made directly by, or to, the heir to the Throne. The exemption will also include communications made, or received on his behalf, by officials. Furthermore, the communication need not be a written one; the exemption would apply equally to discussions with the heir to the Throne, in person or via telecommunications. The exemption covers any recorded information relating to such a communication.

18. Section 37(2) of the FOIA states:

"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)."

19. To engage section 37(2) of the FOIA, the requested information (if held) would therefore have to fall within the scope of one of the exemptions contained within section 37(1).

20. As the complainant has requested information relating to communications between the heir to the Throne and the then Home Secretary, the Commissioner is satisfied that if the Home Office held such information it would be exempt from disclosure on the basis of section 37(1)(aa) of the FOIA. She is therefore satisfied that section 37(2) is engaged, and that the Home Office was entitled to issue a NCND response to the request.

Other matters

21. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Internal review

22. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather, they are matters of good practice which are addressed in a code of practice issued under section 45 of the FOIA.
23. Part VI of the section 45 Code of Practice states that it is good practice for public authorities to offer an internal review. The Commissioner considers that where an internal review is offered, it should be completed as promptly as possible. While no timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer, but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
24. In this case, the Home Office took 220 working days to notify the complainant of the outcome of the internal review. The Home Office therefore did not comply with the section 45 Code of Practice.

Information Notice

25. As the Home Office failed to respond to the Commissioner's enquiries in a timely manner it was necessary for her to issue an Information Notice in this case, formally requiring a response in accordance with her powers under section 51(1) of the FOIA.
26. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This aligns with the goal in her draft "Openness by design"² strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity

² <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"³.

³ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

28. 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.

29. 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

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF