

Decision Notice



Decision 039/2011 Mr Dominic Kennedy of The Times and the Scottish Ministers

Representations made by the Prince of Wales on specified topics

Reference No: 201000570
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www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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Summary

Dominic Kennedy (Mr Kennedy) of The Times requested from the Scottish Ministers (the Ministers) environmental information concerning representations on specified topics made by HRH The Prince of Wales (the Prince of Wales) to the First Minister and the Chief Planner and associated responses. The Ministers responded by refusing (in line with regulation 11(2) and 11(6) of the EIRs) to reveal whether the information existed or was held by them on the grounds that providing such confirmation would breach the first data protection principle. Following a review, Mr Kennedy remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had failed to deal with Mr Kennedy's request for information in accordance with the EIRs. He concluded that revealing whether or not the information existed or was held would not breach the first data protection principle.

The Commissioner required the Ministers to reveal to Mr Kennedy whether the requested information exists or is held by them. If the information exists or is held, he required them either to provide the information to Mr Kennedy or issue a refusal notice explaining why it is judged to be excepted from disclosure.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) and 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – definitions (a) to (c) of “environmental information”); 5(1) and (2)(b) (Duty to make environmental information available on request) and 11(1), (2), (3)(a)(i) and (b) and (6) (Personal data)

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions – definition of “personal data”); Schedule 1 (The data protection principles – Part I: The principles (the first data protection principle)) and Schedule 2 (Conditions relevant for purposes of the first principle: processing of any personal data – condition 6)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.



Background

1. On 17 December 2009, Mr Kennedy, Investigations Editor with The Times newspaper, emailed the Ministers, requesting information concerning representations made by the Prince of Wales and/or the Prince's Foundation for the Built Environment to First Ministers and to the Chief Planner, and information concerning responses from the First Ministers and the Chief Planner on the subjects of:
 - developments at Ellon
 - developments at Ballater
 - developments at Nairn
 - developments at Cove
 - Scotia Homes
 - red squirrels
2. The Ministers responded by letter on 20 January 2010, having considered the request in terms of the EIRs. They advised Mr Kennedy that they did not hold any information in relation to representations received from the Prince's Foundation for the Built Environment, or any associated responses.
3. With respect to the parts of the request seeking information concerning any representations from the Prince of Wales and the associated responses, the Ministers refused to confirm or deny whether they held any relevant information. In so doing, the Ministers cited the provisions in regulation 11(2) and (6) of the EIRs, which together allow a public authority to refuse to reveal whether information exists or is held, where doing so would, for example, reveal personal data of a third party in contravention of any of the data protection principles.
4. On 25 January 2010, Mr Kennedy emailed the Ministers, requesting a review of their decision. In particular, Mr Kennedy indicated that he did not accept that confirming whether information was held in relation to any representations from the Prince of Wales would breach the EIRs. He asked the Ministers to confirm or deny the existence of the information requested, and then provide it to him, if it existed.
5. The Ministers notified Mr Kennedy of the outcome of their review, which was to uphold their previous decision without amendment, by letter on 24 February 2010.
6. On 15 March 2010, Mr Kennedy emailed the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.



7. In subsequent correspondence, Mr Kennedy confirmed that he accepted the Ministers' claim that they did not hold information relating to representations made by the Prince's Trust for the Built Environment. He explained that he was dissatisfied with the Ministers' handling of the parts of his request concerning representations from the Prince of Wales and associated responses. He disputed the Ministers' claim that the disclosure of such information, or the confirmation of whether or not it existed, would reveal personal data about the Prince of Wales.
8. The application was validated by establishing that Mr Kennedy had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

9. Given Mr Kennedy's comments (set out at paragraph 7 above), the Commissioner has not considered the Ministers' handling of Mr Kennedy's information request insofar as it related to any representations made by the Prince's Foundation for the Built Environment. The investigation and decision in this case has focussed solely on the Ministers' handling of the part of Mr Kennedy's information request concerning representations made by the Prince of Wales on the topics specified and any associated responses.
10. On 19 May 2010, the investigating officer contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to explain their reasons for concluding that they were entitled to refuse to confirm or deny whether any information regarding representations from the Prince of Wales was held.
11. The Ministers replied with their submissions on 17 June 2010. They provided details of the searches undertaken to establish whether any relevant information was held, and confirmed to the Commissioner whether or not any such information was held. The Ministers also provided submissions in support of their conclusion that revealing whether such information exists or is held in response to Mr Kennedy's information request would contravene the data protection principles.
12. Mr Kennedy was then provided with an update on the investigation thus far, and invited to comment on the case. He was asked in particular to provide submissions regarding his legitimate interest in understanding whether or not the information he had requested existed and was held by the Ministers. Mr Kennedy provided his submissions on 7 July 2010.
13. Further submissions were sought and received from both parties during the investigation. Both parties' submissions are summarised where relevant below.



Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all the submissions made to him by both Mr Kennedy and the Ministers and is satisfied that no matter of relevance has been overlooked.

Handling in terms of the EIRs

15. In this case, the Ministers dealt with Mr Kennedy's request for information solely in terms of the EIRs.
16. Environmental information is defined in regulation 2(1) of the EIRs. Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to the exceptions contained within regulation 10 and the provisions of regulation 11, and certain other restrictions set out in the EIRs.
17. Mr Kennedy's request sought information on representations and any responses to these representations concerning developments in particular locations, a particular species or a particular developer.
18. The Commissioner considers that any such representations, if held, would be likely to have a focus on the built or natural environment, changes thereto, or the environmental impact of such changes. Representations (or responses to representations) on such subjects would be information on measures affecting or likely to affect the elements in part (a) of the definition, or factors in part (b), and as such would be information falling within the scope of part (c) of the definition of environmental information. Any associated information that related directly to the state of the elements of the environment, or factors that affect these elements, would fall within the scope of parts (a) or (b) of the definition respectively.
19. The Commissioner is therefore satisfied that if the Ministers did hold any information regarding representations from the Prince of Wales made to First Ministers or the Chief Planner on the specified subjects, or responses to these representations, the information concerned would be environmental information as defined in the EIRs. The Commissioner therefore concludes that the Ministers acted correctly in considering Mr Kennedy's request in terms of the EIRs.
20. Mr Kennedy's request was also a valid information request for the purposes of FOISA. The Ministers confirmed that, when responding solely in terms of the EIRs, they wished to apply the exemption in section 39(2) of FOISA. This exemption provides that environmental information, as defined by regulation 2(1) of the EIRs, is exempt from disclosure under FOISA (thereby allowing any such information to be considered solely in terms of the EIRs).
21. Given that the Commissioner has found that Mr Kennedy's request sought environmental information in terms of the definition set out in regulation 2(1) of the EIRs, he is also satisfied that the exemption in section 39(2) of FOISA would apply to that information, if it were held.



22. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner's view is that where there is a separate statutory right of access to environmental information available, the public interest in maintaining this exemption and dealing with his request in line with the requirements of the EIRs outweighs any public interest in disclosure of information under FOISA.
23. In what follows, therefore, the Commissioner will make his decision solely in terms of the EIRs.

Regulation 11 of the EIRs

24. Regulation 11(6) of the EIRs allows a Scottish public authority to respond to a request for information which comprises personal data by not revealing whether the information exists or is held by it, whether or not it actually holds that information, if doing so would involve making information available in contravention of regulation 11.
25. Regulation 11 excepts personal data from disclosure under the EIRs subject to certain conditions. In this case, the Ministers have argued that revealing whether or not they hold information regarding representations from the Prince of Wales in response to Mr Kennedy's information request would contravene regulation 11(2), read in conjunction with regulation 11(3)(a)(i).
26. Regulation 11(2), read in conjunction with regulation 11(3)(a)(i) (or regulation 11(3)(b)) together provide that, to the extent that the environmental information requested includes personal data (as defined in section 1(1) of the DPA) of which the applicant is not the data subject, the data does not have to be made available if disclosure would breach any of the data protection principles contained in the DPA.
27. Where regulation 11(6) is read in conjunction with these provisions, the Commissioner must consider two separate matters:
- whether confirming whether or not the requested information exists or is held would make available personal data of a third party
 - whether that disclosure (i.e. confirmation as to whether or not the information exists or is held) would breach any of the data protection principles.
28. The Commissioner's decision in this case will focus on these questions in order to reach a conclusion as to whether the Ministers were entitled to refuse to reveal whether or not the information requested by Mr Kennedy concerning representations made by the Prince of Wales exists or is held.
29. In setting out his decision, the Commissioner must take great care to avoid confirming whether or not the information requested by Mr Kennedy exists or is held by the Ministers and the detail of the reasoning in the decision accordingly reflects that fact.



Would revealing whether the Ministers hold the information reveal personal data?

30. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller. (The definition is set out in full in the Appendix.)
31. Mr Kennedy has argued that the information he has requested is not personal data. He noted that the individual concerned is Heir to the Throne. He commented that the information requested relates to a public figure, and it does not relate to the private life of the Prince of Wales.
32. The Commissioner has noted the comments from both the Ministers and Mr Kennedy on the question of whether revealing whether the Ministers hold the requested information would make available personal data. In drawing his conclusions, however, he has noted that the definition of personal data does not distinguish between information about individuals acting in a public or private capacity. The definition simply refers to information which relates to any living individual. (In taking this view, the Commissioner has taken account of the comments of Auld LJ in the case of *Durant v Financial Services Authority* [2003] EWCA Civ 1746, to the effect that personal data is information that affects a data subject's privacy, whether in his personal or family life, business or professional capacity.)
33. The Commissioner considers that information about representations made by an individual will be information relating to that individual, regardless of whether those representations are made in a public or private capacity. Confirmation of whether or not an individual has made representations to a particular person (or to particular people) on a particular topic will also be information relating to that person.
34. In this case, revealing whether or not the information requested by Mr Kennedy exists or is held by the Ministers would provide insight into whether or not the relevant subjects are of interest to the Prince of Wales, and whether or not he has made representations to any First Minister or Chief Planner on these topics.
35. The Commissioner considers that either the confirmation or denial that the requested information exists or is held by the Ministers would thereby reveal information about the Prince of Wales and his activities, interests and communications. That information (the confirmation or denial) therefore relates to the Prince of Wales, who is identifiable from that information.
36. In all the circumstances, the Commissioner is satisfied that revealing whether or not the requested information exists or it held by the Ministers would involve making available personal data relating to the Prince of Wales.
37. The Commissioner has next gone on to consider whether doing so would breach any of the data protection principles. In this case, the Ministers have argued that revealing whether or not the information exists or is held by them would breach the first data protection principle.



Would revealing whether the information exists or is held breach the first data protection principle?

38. The first data protection principle requires that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 (to the DPA) is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 (again, to the DPA) is also met.
39. There are therefore three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the Schedules. However, these three aspects are interlinked. If there is a specific condition which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.
40. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA and is satisfied that revealing whether or not the information requested by Mr Kennedy exists or is held would not make available personal data falling into any of the relevant categories. It is therefore not necessary in this case to consider the conditions in Schedule 3 to the DPA.
41. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed. If any of these conditions can be met, he must then consider whether the disclosure of this personal data would be fair and lawful.

Can any of the conditions in Schedule 2 of the DPA be met?

42. The Ministers have argued that, of the conditions in Schedule 2 to the DPA, only condition 6 might be considered potentially to apply in this case, although they maintained that in practice it was not met.
43. Having considered all of the conditions in Schedule 2, the Commissioner agrees that, in the circumstances of this case, Condition 6 is the only one that might apply.
44. Condition 6 allows personal data to be processed (in this case, by revealing whether or not the information requested by Mr Kennedy exists or is held by the Ministers) if 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 (i.e. the person to whom the data relate).
45. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
 - Does Mr Kennedy have a legitimate interest in obtaining the personal data (the Ministers' confirmation as to whether the information requested exists or is held)?

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- If yes, is the disclosure of that personal data necessary to achieve these legitimate aims? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the Prince of Wales?
- Even if the processing is necessary for the legitimate purposes of Mr Kennedy, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the Prince of Wales? This will involve a balancing exercise between the legitimate interests of Mr Kennedy and those of the Prince of Wales. Only if (or to the extent that) the legitimate interests of the Mr Kennedy outweigh those of the Prince of Wales can the personal data be disclosed.

46. The Commissioner has considered these three tests in turn below.

Does Mr Kennedy have a legitimate interest?

47. When asked about his legitimate interests in receiving confirmation as to whether the relevant information existed or was held by the Ministers, Mr Kennedy highlighted that the Prince of Wales has entered the public arena on the issue of the environment, and that his opinions on this matter have not remained private. He argued that since the Prince of Wales is (in Mr Kennedy's words) prepared to make comment openly with "the intent of influencing public policy", it is fair that the public should know how he may seek to use his influence on policy when he is not speaking openly.
48. He went on to submit that the legitimate interest that would be served by revealing whether or not the information exists or is held is to enable the public to understand how decisions are made about important matters of environmental policy. He noted that it would also help people to understand, with reference to environmental policy, how the Heir to the Throne may seek to use his position to influence policy.
49. The Ministers conceded that Mr Kennedy, as a journalist, would have a legitimate interest in seeking information on whether the Prince of Wales is influencing Scottish planning decisions or has opinions on the plight of the red squirrel.
50. In the light of these submissions, the Commissioner is satisfied that Mr Kennedy has a legitimate interest in accessing information that would enable him (and the wider public, who share this legitimate interest) to understand whether the Heir to the Throne has made representations to particular issues and developments.

Is the disclosure of that personal data necessary to achieve these legitimate aims?

51. Mr Kennedy submitted that, in order to pursue the legitimate interest of understanding how decisions are made and how the Heir to the Throne seeks to influence policy, it is essential to understand what representations have been made, not only those views expressed on a public platform, but also behind closed doors, in meetings, telephone calls or correspondence.



52. The Ministers maintained, however, that disclosure of whether or not relevant information exists or is held by them was not necessary for any legitimate interest. However, they did not expand upon their reasoning in reaching this conclusion.
53. In all the circumstances, the Commissioner can identify no viable means of meeting the particular legitimate interests identified by Mr Kennedy in a way which would interfere less with the privacy of the Prince of Wales. He notes that he is here considering simply whether the Ministers should reveal whether or not the requested information exists or is held by the Ministers. Such confirmation would reveal nothing about the substance of any views expressed by the Prince of Wales, or the nature of any discussions or correspondence.
54. Consequently, the Commissioner accepts that disclosure of whether or not the information exists or is held is necessary for the purposes of the legitimate interests identified by Mr Kennedy.

Would disclosure cause unwarranted prejudice to the legitimate interests of the data subject?

55. The Commissioner must now consider whether revealing whether or not relevant information exists or is held by the Ministers would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the Prince of Wales. As noted above, this will involve a balancing exercise between the legitimate interests of Mr Kennedy and those of the Prince of Wales. Only if the legitimate interests of Mr Kennedy outweigh those of the Prince of Wales can the Ministers disclose whether or not the information exists or is held without breaching the first data protection principle.
56. As noted above, Mr Kennedy has highlighted his legitimate interest in understanding the role of the Prince of Wales in policy making, and he did not accept that his request intrudes into his private life.
57. The Ministers (having consulted the Royal Household about this matter) have highlighted that there is a strong expectation of confidentiality with respect to communications between members of the Royal Family and the Royal Household and government. They noted that there is a long-standing constitutional Convention that correspondence between the Sovereign and the government is confidential in nature, and explained that this Convention is an adjunct of the right of the Sovereign to be consulted by her Government, and to advise, encourage and to warn as the circumstances require. The Ministers indicated that the rights of the Sovereign could not be exercised effectively without this expectation of confidentiality, and that, if the content of these consultations became known, it would undermine the appearance of the political neutrality of the Sovereign.
58. The Ministers informed the Commissioner that it is also a well established constitutional doctrine that the Heir to the Throne has a right and duty to be instructed in the business of government in preparation for the time when he will be King. His instruction in the rights that he will exercise as Monarch, they maintained, also depends on the confidentiality and privacy of his communications with Government which are subject to an expectation of confidence analogous to the Convention of confidentiality that exists between the Sovereign and Government.



59. The Ministers recognised that the Prince of Wales has spoken publicly on a number of topics, and that it is publicly known that he occasionally corresponds with members of the Government. However, they noted that the Prince of Wales has not disclosed when and with whom he corresponds, or on which topics. They maintained that this is in keeping with the Convention, and that the Prince of Wales knows that the decisions he takes about whether to correspond on any topic and with which Ministers are protected, and that no unwarranted inference can be drawn from the existence or absence of correspondence with any individual member of the government or from the existence or absence of correspondence on a particular topic.
60. The Ministers maintained that removal of this protection would restrain the Prince of Wales from raising some matters for fear that his views, or even the knowledge that he had expressed his views to a member of the Government, would ignite controversy. They suggested that he would be prevented from discharging his duties as Heir to the Throne by the threat that publicity would undermine the perception of political neutrality which is a foundation of the constitution.
61. The Ministers argued that only a uniform approach of neither confirming nor denying whether the Prince of Wales had corresponded on particular topics could ensure that his data protection rights are upheld. In support of their position, they highlighted four decisions by the Information Commissioner¹ (responsible for the enforcement of the Freedom of Information Act 2000) which accepted such an approach in response to requests for information made to UK Government departments.

The Commissioner's conclusions

62. The Commissioner has considered the arguments submitted by both parties carefully in order to conduct the required balancing exercise, and has taken into account the guidance on this point in his own briefing on the section 38 exemption², which identifies relevant factors as including:
- whether the information relates to the individual's public or private life
 - the potential harm or distress that may be caused by disclosure
 - whether the individual has objected to disclosure
 - the reasonable expectations of the individual as to whether their information would be disclosed.
63. The Commissioner recognises that, for the Prince of Wales, public and private life overlap to a significant degree, given that his official role is defined by his family relationships. The Commissioner accepts the Ministers' point that there is no clear distinction between the Prince of Wales' official and personal roles, since his personal role is constitutionally defined.

¹ FER0183946 (Cabinet Office); FER0185237 (Cabinet Office); FER0185236 (Department for Environment, Food and Rural Affairs); FER0183947 (Department for Environment, Food and Rural Affairs)

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.asp>



64. However, the Commissioner does not accept that all information relating to the Prince of Wales should therefore be considered to be equally related to his private life. He considers that this will be a matter of degree. For example, representations on the topics specified by Mr Kennedy will relate less closely to the Prince of Wales' private life than would representations regarding matters that would affect his own private estate.
65. Nonetheless, the Commissioner accepts that the matters upon which the Prince of Wales chooses to correspond, although he does so within the context of his official role, will also reflect his private concerns and interests. The Commissioner therefore considers that confirmation of whether the information requested by Mr Kennedy exists or is held is information relating to the Prince of Wales' private life.
66. The Commissioner considers that any member of the public making representations to a public authority in a private capacity would quite reasonably hold the expectation that their communications would remain private. Article 8 of the European Convention on Human Rights explicitly provides protection for an individuals' private and family life, and their correspondence.
67. The Prince of Wales has the same rights to the protection of his personal data as any other data subject. However, his expectations differ from those of the general public by being formed within the context of the constitutional Convention described above. The Commissioner recognises that the Prince of Wales, within this context, will have a reasonable expectation that the nature or content of his correspondence with the Ministers would normally remain confidential. (However, since the coming into effect of FOISA in 2005, it would be unreasonable to believe that the fact of any correspondence would never be disclosed in any circumstances. The fact that correspondence between members of the Royal Family or Royal Household on a specific topic was held, has previously been confirmed by the Scottish Ministers, as recorded in a previous decision by the Commissioner³.)
68. In the light of the above, the Commissioner does accept that revealing whether or not the information requested by Mr Kennedy exists or is held would cause some intrusion into the privacy of the Prince of Wales and his communications. He recognises that revealing whether or not the Prince of Wales has corresponded on particular topics could lead to speculation as to his views, and whether and how he has sought to influence policy on these matters.
69. However, confirmation of whether or not information exists or is held relating to representations on the subjects specified by Mr Kennedy will not alert the public to matters on which the Prince has not previously expressed a view. Furthermore, such confirmation alone will reveal nothing of the nature, timing and extent of his communications with the Ministers on these topics. The Commissioner does not consider that the absence of any communications on any of these particular topics would reveal any reason for the Prince of Wales having not chosen to correspond on this topic.

³ Decision 051/2006 Mr Peter MacMahon, The Scotsman and the Scottish Executive



70. The Commissioner has noted that the Prince of Wales has spoken publicly over a number of years about his views on architecture, town planning and the environment, such that there is already considerable information available in the public domain which provides insights into the views of the Prince of Wales on a number of topics that interest and concern him. That might not be sufficient to warrant an authority having to disclose any communication with the Prince of Wales in response to a request on one or more of these matters of interest, but what is especially relevant to recognise in this case is that the Prince of Wales has chosen to speak publicly about the particular topics that are the subject of Mr Kennedy's request.
71. In the light of the above, the Commissioner has given due weight to the Ministers' submissions regarding the extent of harm that would follow from revealing whether the information under consideration exists or is held by the Ministers. While the Commissioner accepts there may be some intrusion into the privacy of the Prince of Wales' private life and communications, the limited nature of disclosure that is under consideration in this decision and on matters on which public comment has already been made prevents that intrusion from impacting upon the (perception of) political neutrality of the Heir to the Throne, or his ability to engage in communications with government in future.
72. The Commissioner must now weigh the legitimate interests of the Prince of Wales against those identified by Mr Kennedy. The Commissioner considers the legitimate interests identified by Mr Kennedy in this case to be weighty. Within his role as Heir to the Throne, the Prince of Wales has spoken publicly on a range of public policy issues over a number of years, influencing and at times shaping public debate. In doing so, his actions have raised legitimate questions about the role of the future monarch in public life.
73. So far as this particular case is concerned, the Prince of Wales' comments have been intentionally high profile and apparently made with a view to encourage action. He has highlighted the decline of the red squirrel at the launch of a charity of which is a patron to protect the species⁴. On the issue of sustainable places, the Prince of Wales has singled out the Enquiry by Design workshops conducted by his Foundation for the Built Environment in Ballater and Ellon sponsored by Scotia Homes and has expressed his gratitude for the visionary participation of the chairman of Scotia Homes in the work of his Foundation, in a conference speech in 2008⁵.
74. At that conference, held in the Place of Holyroodhouse, which was organised with the assistance of the Chief Planner, the Prince also expressed his gratitude for "the suggestion from the First Minister that a civil servant might possibly be seconded to work closely with my Foundation."

⁴ See e.g. <http://www.dailymail.co.uk/news/article-1167089/Red-squirrels-die-years-says-Prince-Charles.html>.

⁵ A speech by HRH The Prince Charles, Duke of Rothesay for 'Sustainable Places: a Scottish Futures Conference', the Palace of Holyroodhouse 4 June 2008



75. While the Commissioner recognises that the constitutional Convention regarding communications between the Sovereign or Heir to the Throne and Government creates expectations of confidentiality in this case, he considers there to be a weighty competing legitimate and public interest in understanding the role of the Prince of Wales, and topics on which he corresponds with government Ministers on matters of environmental policy, at least on those matters of public advocacy and expressed views.
76. Having balanced the legitimate interests identified by Mr Kennedy against those of the Prince of Wales, the Commissioner has concluded that those of Mr Kennedy do outweigh those of the Prince of Wales in all the circumstances of this case. The Commissioner therefore concludes that the processing under consideration in this case (i.e. revealing whether the information exists and is held by the Ministers) would not be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the Prince of Wales.
77. The Commissioner is therefore satisfied that revealing whether the information requested by Mr Kennedy exists or is held is permitted by condition 6 in Schedule 2 to the DPA. The Commissioner also considers that disclosure would be fair, for the reasons already outlined in relation to condition 6. The Ministers have not put forward any arguments as to why the disclosure of the information would be unlawful (other than in terms of a breach of the data protection principles) and, in any event, the Commissioner can identify no reason why disclosure should be considered unlawful.
78. Having found that revealing whether or not the information sought by Mr Kennedy exists or is held by the Ministers would be both fair and lawful, and in accordance with condition 6(1), the Commissioner therefore concludes that the provision of such confirmation would not breach the first data protection principle.
79. Accordingly, the Commissioner concludes that the Ministers were not entitled to refuse to reveal whether the relevant information exists or is held by them in terms of regulation 11(6) of the EIRs. He now requires the Ministers to reveal to Mr Kennedy whether or not the information exists or is held, and, if it is held, to either provide that information, or to provide a refusal notice in line with the requirements of regulation 13 of the EIRs.

Comment

80. The Commissioner would highlight that his decision in this case to require the Ministers to confirm whether or not the information requested by Mr Kennedy in this case exists or is held by them does not preclude the future use of the provisions in regulation 11(6) of the EIRs to refuse to reveal whether correspondence or submissions have been received on a different topic.
81. The Ministers have argued that only a uniform approach of neither confirming nor denying whether correspondence from the Prince of Wales on specified topics exists or is held can ensure that his data protection rights are upheld.

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82. However, that absolute assurance that the authority would neither confirm nor deny, no matter the circumstances, is not an appropriate one to give or require. The circumstances in which the Prince expresses his views and on which issues may have a bearing on the outcome.
83. Had the topics mentioned in Mr Kennedy's request not been ones on which the Prince of Wales has spoken publicly, or if they related to his family life, there would be considerably less weight to the legitimate interest in establishing whether correspondence had been exchanged on this subject.
84. The Commissioner considers that any such request should be considered on its merits, and has concluded that in some cases, it will be appropriate to refuse to reveal whether or not relevant information exists or is held, while in others, it will be possible to confirm whether or not the information is held without breaching the first data protection principle.
85. The Commissioner would also note that the question of whether or not relevant information is held would not be a relevant criterion for determining whether to apply regulation 11(6). He is therefore satisfied that such a case by case approach would not have the consequence of allowing a decision to refuse to reveal whether information exists or is held to be interpreted as confirmation as to the existence or otherwise of the information.

DECISION

The Commissioner finds that, in respect of the matters specified in the application, the Scottish Ministers (the Ministers) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Kennedy. The Commissioner has found that the Ministers breached the EIRs by applying regulation 11(6) and refusing to reveal whether the information under consideration above exists or is held.

The Commissioner requires the Ministers to reveal to Mr Kennedy whether or not the information he has requested concerning representations made by the Prince of Wales exists or is held. If the information is held, he requires the Ministers either to provide that information, or issue a refusal notice in line with the requirements of regulation 13 of the EIRs.

The Commissioner requires the Ministers to take these steps by 18 April 2011.



Appeal

Should either Mr Kennedy or the Ministers wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
3 March 2011



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

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...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
- (b) would be so obliged but for any exemption contained in the regulations.

...



The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely 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 paragraph (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 paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.



11 Personal data

- (1) To the extent that environmental information requested includes personal data of which the applicant is the data subject then the duty under regulation 5(1) to make it available shall not apply to those personal data.
- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.
- (3) The first condition is-
 - (a) in a case where the information falls within paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 that making the information available otherwise than under these Regulations would contravene-
 - (i) any of the data protection principles; or
 - ...
 - (b) in any other case, that making the information available otherwise than under these Regulations 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.
 - ...
- (6) For the purposes of this regulation, a Scottish public authority may respond to a request by not revealing whether information exists or is held by it, whether or not it holds such information, if to do so would involve making information available in contravention of this regulation.



Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

Schedule 1 – The data protection principles

Part I – The principles

1. 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.

...

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) 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.

...