Neutral Citation Number: [2013] EWHC 1960 (Admin)

Case No: CO/188/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2013

Before :

LORD JUDGE (THE LORD CHIEF JUSTICE OF ENGLAND AND WALES)
LORD JUSTICE DAVIS
MR JUSTICE GLOBE

- -

Between :

THE QUEEN ON THE APPLICATION OF ROB EVANS	**Claimant**
- and -	
HER MAJESTY'S ATTORNEY GENERAL	**Defendant**
- and -	
THE INFORMATION COMMISSIONER	**Interested Party**

- -
- -

Miss Dinah Rose QC and Mr Aidan Eardley (instructed by **Guardian News and Media Limited**) for the **Claimant.**
Mr Jonathan Swift QC and Mr Julian Milford (instructed by **Treasury Solicitors**) for the **Defendant.**
Mr Timothy Pitt-Payne QC (instructed by the **Information Commissioner's Office**) for the **Interested Party.**

Hearing dates: 8th, 9th and 10th May 2013

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Approved Judgment

Lord Chief Justice of England and Wales:

1. The judgment prepared by Davis LJ fully reflects my own approach to the issues which arise in this judicial review, and I agree with his conclusion and the reasons for it.

2. I shall nevertheless add some observations of my own in relation to one specific issue raised by the application for judicial review. The possibility that a minister of the Crown may lawfully override the decision of a superior court of record involves what appears to be a constitutional aberration. This problem is inherent in the statutory override or veto vested in ministers and the Attorney General by s.53 of the Freedom of Information Act 2000 (the Act).

3. Section 53 of the Act provides:

> "Exception from duty to comply with decision notice or enforcement notice
>
> (1) This section applies to a decision notice or enforcement notice which –
>
> (a) is served on -
>
> (i) a government department, … and
>
> (b) relates to a failure, in respect of one or more requests for information –
>
> …
>
> (ii) to comply with section 1(1)(b) in respect of exempt information.
>
> (2) A decision notice or enforcement notice to which this section applies shall cease to have effect if, not later than the twentieth working day following the effective date, the accountable person in relation to that authority gives the Commissioner a certificate signed by him stating that he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure falling within subsection (1)(b).
>
> (3) Where the accountable person gives a certificate to the Commissioner under subsection (2) he shall as soon as practicable thereafter lay a copy of the certificate before –
>
> (a) each House of Parliament
>
> (b) the Northern Ireland Assembly …
>
> (c) the National Assembly for Wales …

> (4) In subsection (2) "the effective date", in relation to a decision notice or enforcement notice, means –
>
> (a) the day on which the notice was given to the public authority, or
>
> (b) where an appeal under section 57 is brought, the day on which that appeal (or any further appeal arising out of it) is determined or withdrawn.
>
> (5) ...
>
> (6) Where the accountable person gives a certificate to the Commissioner under subsection (2) in relation to a decision notice, the accountable person shall, on doing so or as soon as reasonably practicable after doing so, inform the person who is the complainant for the purposes of section 50 of the reasons for his opinion.
>
> (7) The accountable person is not obliged to provide information under subsection (6) if, or to the extent that, compliance with that subsection would involve the disclosure of exempt information.
>
> (8) In this section "the accountable person" –
>
> (a) in relation to a Northern Ireland department or any Northern Ireland public authority …
>
> (b) in relation to the National Assembly for Wales or any Welsh public authority…, and
>
> (c) in relation to any other public authority, means –
>
> (i) a Minister of the Crown who is a member of the Cabinet, or
>
> (ii) the Attorney General, the Advocate General for Scotland or the Attorney General for Northern Ireland."

4. To the extent that it is not self evident from the provisions in s.53, they need to be seen in context. They form part of the overall legislative structure which governs the general right of citizens of access to information held by public authorities. The relevant legislation is fully set out in the judgment of Davis LJ and I shall not repeat it. Unsurprisingly not every item of information so held is available to the public on demand. Access to some information is expressly or, as it is sometimes stated, absolutely exempted. Since 19 January 2011, by statutory amendment, material communications with The Prince of Wales and ministers are now subject to the same absolute exemption which applies to the Queen. The present dispute relates to communications which took place as long ago as 2004. Before the Upper Tribunal it was common ground that the case had to be approached as if these communications

were subject to "qualified" rather than absolute exemptions, in accordance with the statutory provisions in force at the date when the communications occurred. By the time the Attorney General gave his certificate under s.53 the absolute exemption was in force, but the present application for judicial review has proceeded without reference to the current statutory arrangements.

5. Access to communications which fall outside the protection of absolute exemption may be refused by the relevant public authority if, dealing with it broadly, the principle of disclosure enshrined in the legislation is outweighed by the public interest in withholding disclosure. Statutory provision is also made for the issue of codes of practice, which offer guidance to public authorities on a variety of matters, including, for example, the arrangements for keeping and maintaining records, and the appropriate way to deal with requests for information. All such guidance is subject to parliamentary scrutiny; so are the reports of the Information Commissioner relating to the exercise of his responsibilities.

6. Where disputes arise, and are unresolved to the satisfaction of the applicant, the Information Commissioner may become involved. Assuming that the Commissioner takes the same view, against disclosure, as the relevant public authority, a right of appeal to a First-tier Tribunal which may, in some circumstances transfer the case to a superior court of record, the Upper Tribunal. Before this Tribunal, the issue is examined as in effect a full rehearing with oral and written evidence, from among others the public authority relying on the public interest exemption, explaining why it is doing so. In due course, a detailed judgment is provided.

7. No further full re-hearing is available. Errors of law by the Upper Tribunal may be questioned in the Court of Appeal, and ultimately the Supreme Court, but an appeal on the basis that the Upper Tribunal has reached the wrong conclusion when that conclusion was reasonably open to it would for all practical purposes be unarguable. Save in the rare case where an error of law arises, the final barrier to disclosure in accordance with the decision of the Upper Tribunal, is created by s.53. In this case no such error of law has been identified.

8. Section 53 has been described as an executive override: so it is. Notwithstanding the unchallenged judgment of the Upper Tribunal, following an examination of the claim for exemption based on the public interest, a member of the executive is empowered to set aside or nullify the decision. Accordingly, therefore, the disclosure obligation of the relevant public authority based on the decision of the court has been dispensed with by a member of the executive, or the Attorney General acting on behalf of a minister in the previous administration. The identical power is available for use even when the decision to be overridden was made by the Supreme Court of the United Kingdom.

9. It is an understatement to describe the situation as unusual. Indeed the researches of counsel suggest that it is a unique situation and that similar statutory arrangements cannot be found elsewhere in this jurisdiction. Like Davis LJ I do not believe that s.73(5) of the Mental Health Act 1983 is comparable. It has however also emerged that provision is made for ministerial override relating to freedom of information arrangements in a number of common law countries, including New Zealand, Australia and Canada.

10. We all understand that in our constitutional arrangements Parliament is sovereign. Decisions, even of the Supreme Court, may be set aside through the ordinary legislative processes. Thus, in the context of witness anonymity in the criminal courts, the Criminal Evidence (Witness Anonymity) Act 2008 in effect set aside the decision of the House of Lords to the contrary effect in *R v Davis* [2008] 1 AC 1128. That, however, is not what s.53 provides. It simply vests power in a cabinet minister to override the decision of a court without further recourse to the legislature. It is not quite a pernicious "Henry VIII clause", which enables a minister to override statute but, unconstrained, it would have the same damaging effect on the rule of law.

11. The provisions of s.53 must therefore be examined with these troublesome concerns in mind. Parliament created a right in members of the public to be granted a great deal of but not all the information held by public authorities. It provided, further, that the decisions of the public authorities adverse to disclosure should be subjected to a number of different methods of independent, and ultimately judicial, examination. Thereafter, on the basis that the final responsibility for deciding the public interest should remain with ministers, they were vested with the power to override the judicial decision. If that were the full extent of this legislative structure, then, while recognising that the relevant minister may have a particular insight into and a major contribution to make to the protection of the public interest, I should entertain the very gravest reservations whether this provision could fall within the constitutionality principle. Unconstrained by the internal legislative structure, rather than by reference to the much vaguer good sense of or wise discretion of any individual minister, we should be addressing a remarkable provision which empowered the minister to set aside the decision of a court after litigation in which the department for which he is responsible was the unsuccessful party.

12. It is fundamental to the constitutional separation of powers, the independence of the judiciary, and the rule of law itself that, although judicial decisions may be reversed by legislation (but very rarely with retrospective effect) ministers are bound by and cannot override judicial decisions: in our constitution that power is vested in Parliament. If ever the Government or any minister in the Cabinet could, without more, but in particular because of dissatisfaction with a judicial decision, not merely ignore it, but nullify it, the elementary entitlement of the citizen to *effective* recourse to independent courts would be extinguished.

13. That is the context in which the constraints on the power granted to ministers by the terms of the legislative provisions must be examined. These provide that the ministerial override will be ineffective unless reasonable grounds for its exercise are identified. These reasons must be laid before Parliament for scrutiny and, if appropriate, parliamentary action. Making the reasons public in this way ensures that they are also immediately available for press and public scrutiny and, if appropriate, critical comment. More important, perhaps, is that the override decision of the minister is not final. The exercise of the override is itself subject to judicial scrutiny. The person dissatisfied by it, or the Commissioner exercising his own statutory responsibilities, may challenge the override before the Administrative Court by way of judicial review. That is the judicial forum in which the minister's reasons can be examined and scrutinised, and the minister required to demonstrate that his decision was made on reasonable grounds. If not, the High Court will step in and set it aside. Thereafter, apart from the ordinary processes of appeal, the minister cannot interfere

any further. He remains bound by the decision of the court which, now, cannot be overridden. Thus the court's responsibility for ensuring independent oversight of the ministerial override is vindicated. This leads to consideration of the basis for judicial oversight.

14. The process is not confined or constrained by artificial rules; unless, before exercising the executive override, the minister has given full weight to the decision of the court, he will not have acted reasonably, and the override will be set aside. Beyond the language of s.53 itself, there are no inhibitions on the court's approach to the problem, and given the delicate constitutional circumstances in which the jurisdiction falls to be exercised, it is clear that the aggrieved applicant is not required to go so far as to demonstrate that the minister's decision is "unreasonable" in the familiar but narrow "Wednesbury" sense. Rather, the principle of constitutionality requires the minister to address the decision of the Upper Tribunal (or whichever court it may be) head on, and explain in clear and unequivocal terms the reasons why, notwithstanding the decision of the court, the executive override has been exercised on public interest grounds. That provides the essential context in which the reasonableness of the grounds for the minister's opinion must be examined. As this close judicial scrutiny is available the legislative provision in s.53(2) provides the necessary safeguard for the constitutionality of the process.

15. As indicated at the outset, for the reasons given by Davis LJ the decision of the Attorney General satisfied this critical reasonableness requirement.

Lord Justice Davis :

Introduction

16. These proceedings have arisen in consequence of a request made as long ago as April 2005 by the claimant, Mr Evans. Mr Evans is a journalist. He sought disclosure of communications passing between The Prince of Wales and various government departments in a period between 1 September 2004 and 1 April 2005. The government departments declined to make such disclosure. In due course the Information Commissioner ruled that such withholding of the requested information was not in breach of the Freedom of Information Act 2000 ("FOIA") or of the Environmental Information Regulations ("the 2004 Regulations"). But an appeal of Mr Evans to the tribunal was successful to the extent that it was held, by determination dated 18 September 2012, that a particular category of correspondence (styled "advocacy correspondence") could not lawfully be withheld.

17. The tribunal having so decided, neither the Information Commissioner (the respondent to the appeal before the tribunal) nor the government departments (who had been joined as additional parties) sought to appeal to the court. Instead, a certificate was issued by the Attorney General on 16 October 2012 under s.53 of FOIA stating that he had on reasonable grounds formed the opinion that there was no failure to comply with the relevant provisions of FOIA or of the 2004 Regulations. The ostensible consequence of such certificate, if lawful, is that the government departments would not be obliged to disclose the advocacy correspondence.

18. Mr Evans disputes the lawfulness of such certificate. He issued judicial review proceedings by claim form issued on 9 January 2013. The relief he seeks is a

quashing of the certificate. The arguments advanced in these judicial review proceedings, and as developed before us, have been many and wide-ranging. But the three principal questions, in summary, are these. First, what is the true meaning of s.53(2) of FOIA? Second, what is the effect of the application of s.53(2), on its true meaning, to the certificate given in the circumstances of the present case? Third, in so far as the request for advocacy correspondence extended to environmental information under the 2004 Regulations could such a certificate under s.53(2) validly be issued with regard to such environmental information at all?

19. The matter came before us as an application for permission, with substantive hearing to follow if permission was granted. Since the court was of the clear view that the matters raised were worthy of full argument and also were of some importance it indicated at the outset of the hearing that permission was granted. The matter thus proceeded as the substantive hearing of the claim for judicial review.

20. The claimant, Mr Evans, was represented before us by Miss Dinah Rose QC with Mr Aidan Eardley. The respondent Attorney General was represented by Mr Jonathan Swift QC with Mr Julian Milford. The Information Commissioner was represented by Mr Timothy Pitt-Payne QC. I would like to acknowledge the able, thorough and careful submissions, both written and oral, presented by all counsel.

The legislation

21. In order to make any sense of the course of the proceedings below and the nature of the issues before us it is necessary to turn straight away to the relevant provisions of FOIA and of the 2004 Regulations.

(1) The Freedom of Information Act 2000

22. FOIA was enacted in circumstances of considerable surrounding debate and discussion. No doubt it has in part some broad correspondence with the concepts set out in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. But it has its own scope. In addition it has, in its scheme, some degree of correspondence with the approach adopted in the Data Protection Act 1998 and the use of exceptions or exemptions. It also has to be read (and as its own provisions confirm) in the light of the 2004 Regulations in relation to environmental information.

23. FOIA, it should be noted, explicitly provides, by s.56, that no right of action in civil proceedings is conferred in respect of any failure to comply with any duty imposed by or under FOIA. Furthermore, to the extent that there has been argument as to whether various provisions of FOIA might interfere with rights arising under Article 10 of the Convention that has been disposed of, as the domestic law currently stands, by the decision of the Supreme Court in *British Broadcasting Corporation v Sugar (No. 2)* [2012] 1 WLR 439, [2012] UKSC 4: see in particular the judgment of Lord Brown at paragraphs 94 to 98.

24. Turning to the provisions of FOIA relevant for the purposes of this case, the general right of access to information held by public authorities (as defined) is conferred by s.1. In particular, s.1(1) provides as follows:

> "(1) Any person making a request for information to a public authority is entitled –
>
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
>
> (b) if that is the case, to have that information communicated to him.
>
> …"

Section 2 (in its unamended form as is relevant for the purpose of present proceedings) reads as follows:

> "2. Effect of the exemptions in Part II.
>
> (1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either —
>
> (a) the provision confers absolute exemption, or
>
> (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,
>
> section 1(1)(a) does not apply.
>
> (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that —
>
> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
>
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
>
> (3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption —
>
> (a) section 21,
>
> (b) section 23,
>
> (c) section 32,
>
> (d) section 34,

(e) section 36 so far as relating to information held by the House of Commons or the House of Lords,

(f) in section 40 —

(i) subsection (1), and

(ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,

(g) section 41, and

(h) section 44."

Thus the scheme of FOIA is to provide a general right of access to information held by public authorities and then to specify applicable exemptions. Further, the exemptions are themselves of two general kinds: first, an absolute exemption and second a qualified exemption: the qualified exemption arising where, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.

25. Part II of FOIA is entitled "Exempt Information". It confers, by its provisions, exemptions on matters such as national security, defence, law enforcement and so on. Of particular relevance for present purposes is s.37 which (in its unamended form) provides as follows:

"37. Communications with Her Majesty, etc. and honours
(1) Information is exempt information if it relates to –
(a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household, or
(b) the conferring by the Crown of any honour or dignity.
(2) 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)."

26. It is to be noted that s.37 is not included, by s.2 as it then stood, among the provisions to which absolute exemption applies. However, with effect from 19 January 2011 s.2 was amended so as to include s.37 as one of the provisions to which absolute exemption applies: moreover s.37 was itself significantly amended. Many of the problems arising in the present case therefore could not now replicate themselves in their present form. But all counsel were agreed that the original provisions are those applicable in this case. Moreover, in giving his certificate on 16 October 2012 the Attorney General did not seek to pray in aid of his opinion the intervening amendments to the legislation. Nor has Mr Swift sought to rely on them in his arguments supporting the certificate.

27. Section 39 (as amended with effect from 1 January 2005) relates to environmental information. It provides as follows:

> "39. Environmental information
>
> (1) Information is exempt information if the public authority holding it —
>
> (a) is obliged by environmental information regulations to make the information available to the public in accordance with the regulations, or
>
> (b) would be so obliged but for any exemption contained in the regulations.
>
> (1A) In subsections (1) "environmental information regulations " means –
>
> (a) regulations made under section 74, or
>
> (b) regulations made under section 2(2) of the European Communities Act 1972 for the purpose of implementing any EU obligation relating to public access to, and the dissemination of, information on the environment.
>
> (2) 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).
>
> (3) Subsection (1)(a) does not limit the generality of section 21(1)."

28. Also relevant for present purposes are s.40 which relates to personal information and s.41 which relates to information provided in confidence. Section 41, in particular, reads as follows:

> "41. Information provided in confidence
>
> (1) Information is exempt information if —
>
> (a) it was obtained by the public authority from any other person (including another public authority), and
>
> (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
>
> (2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence."

29. Part IV of FOIA deals with enforcement. Section 50 sets out the circumstances in which a decision notice (as defined) may be obtained from the Information

Commissioner. Section 52 sets out the circumstances in which an enforcement notice (as defined) may be served by the Information Commissioner. Each of these sections makes explicit that it is subject to s.53. Section 53 – which is at the very heart of these judicial review proceedings – is in its original form (it has since been amended, but not in a way material to the outcome of those proceedings) in the following terms:

> "53. Exception from duty to comply with decision notice or enforcement notice
>
> (1) This section applies to a decision notice or enforcement notice which —
>
> (a) is served on —
>
> (i) a government department,
>
> (ii) the National Assembly for Wales, or
>
> (iii) any public authority designated for the purposes of this section by an order made by the Secretary of State, and
>
> (b) relates to a failure, in respect of one or more requests for information —
>
> (i) to comply with section 1(1)(a) in respect of information which falls within any provision of Part II stating that the duty to confirm or deny does not arise, or
>
> (ii) to comply with section 1(1)(b) in respect of exempt information.
>
> (2) A decision notice or enforcement notice to which this section applies shall cease to have effect if, not later than the twentieth working day following the effective date, the accountable person in relation to that authority gives the Commissioner a certificate signed by him stating that he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure falling within subsection (1)(b).
>
> (3) Where the accountable person gives a certificate to the Commissioner under subsection (2) he shall as soon as practicable thereafter lay a copy of the certificate before—
>
> (a) each House of Parliament,
>
> (b) the Northern Ireland Assembly, in any case where the certificate relates to a decision notice or enforcement notice which has been served on a Northern Ireland department or any Northern Ireland public authority, or

(c) the National Assembly for Wales, in any case where the certificate relates to a decision notice or enforcement notice which has been served on the National Assembly for Wales or any Welsh public authority.

(4) In subsection (2) "the effective date", in relation to a decision notice or enforcement notice, means —

(a) the day on which the notice was given to the public authority, or

(b) where an appeal under section 57 is brought, the day on which that appeal (or any further appeal arising out of it) is determined or withdrawn.

(5) Before making an order under subsection (1)(a)(iii), the Secretary of State shall —

(a) if the order relates to a Welsh public authority, consult the National Assembly for Wales,

(b) if the order relates to the Northern Ireland Assembly, consult the Presiding Officer of that Assembly, and

(c) if the order relates to a Northern Ireland public authority, consult the First Minister and deputy First Minister in Northern Ireland.

(6) Where the accountable person gives a certificate to the Commissioner under subsection (2) in relation to a decision notice, the accountable person shall, on doing so or as soon as reasonably practicable after doing so, inform the person who is the complainant for the purposes of section 50 of the reasons for his opinion.

(7) The accountable person is not obliged to provide information under subsection (6) if, or to the extent that, compliance with that subsection would involve the disclosure of exempt information.

(8) In this section "the accountable person"—

(a) in relation to a Northern Ireland department or any Northern Ireland public authority, means the First Minister and deputy First Minister in Northern Ireland acting jointly,

(b) in relation to the National Assembly for Wales or any Welsh public authority, means the Assembly First Secretary, and

(c) in relation to any other public authority, means —

> (i) a Minister of the Crown who is a member of the Cabinet, or
>
> (ii) the Attorney General, the Advocate General for Scotland or the Attorney General for Northern Ireland.
>
> (9) In this section "working day" has the same meaning as in section 10."

30. Part V of FOIA relates to appeals. Sections 57 to 59 now have to be read in the light of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007. The overall scheme is that either a complainant or a public authority may appeal to the tribunal against a decision notice served by the Information Commissioner; and ultimately may with permission appeal to the court (now the Court of Appeal) on a point of law, with a further prospect of an appeal to the Supreme Court in an appropriate case. The provisions of s.58, relating to the determination of appeals by the tribunal, are in the following terms:

> "58. Determination of appeals
>
> (1) If on an appeal under section 57 the Tribunal considers —
>
> (a) that the notice against which the appeal is brought is not in accordance with the law, or
>
> (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
>
> the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
>
> (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

So while a hearing before the tribunal is not stated to be a complete rehearing in respect of what eventuated before the Information Commissioner, it is quite close to it – s.58 empowering the tribunal, among other things, to consider whether an exercise of discretion should have been made differently and to engage in a review of any findings of fact.

31. Finally, for present purposes, s.74 confers power to make provision by way of regulations relating to environmental information. Section 74(4)(e) expressly permits such regulations to provide for any of the provisions of Parts IV and V of FOIA to apply, with such modifications as may be specified in the regulations, in relation to compliance with any requirement of the regulations. That on the face of it, therefore, permits such regulations to include the power to certify contained in s.53, since that section is itself contained in Part IV of FOIA.

(2) The Environmental Information Regulations 2004

32. The 2004 Regulations were designed to implement Council Directive 2003/4/EC ("the Directive") on public access to environmental information. It is to be understood that the 2004 Regulations are to be so read as to be consistent with, and to fulfil the evident purposes of, the Directive.

33. The Directive was itself consequent on the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters signed on 25 June 1998 and commonly known as "the Aarhus Convention". Article 4 of the Aarhus Convention makes provision for disclosure by public authorities in response to a request for environmental information: setting out, in Article 4(4), circumstances in which such a request may be refused. Article 6 makes provision for public participation in decisions on certain specified activities.

34. Article 9 of the Aarhus Convention is headed "Access to Justice". In its opening paragraphs Article 9 provides as follows:

> "Article 9
>
> ACCESS TO JUSTICE
>
> 1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.
>
> In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.
>
> Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.
>
> 2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned
>
> (a) Having a sufficient interest
>
> or, alternatively,

> (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,
>
> have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention."

Article 9.4 then states that the procedures under such paragraphs shall provide adequate and effective remedies and be "fair, equitable, timely and not prohibitively expensive".

35. The Directive, as is customary, includes numerous recitals. Recitals (16) and (19), in particular, are in these terms:

> "(16) The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases. Grounds for refusal should be interpreted in a restrictive way, whereby the public interest served by disclosure should be weighed against the interest served by the refusal. The reasons for a refusal should be provided to the applicant within the time limit laid down in this Directive.
>
> ….
>
> (19) Applicants should be able to seek an administrative or judicial review of the acts or omissions of a public authority in relation to a request."

36. Article 1 of the Directive then sets out its general objectives. Article 2 contains definitions, including wide definitions of "environmental information" and "public authority". Article 3.1 provides as follows:

> "Article 3.1
>
> Access to environmental information upon request
>
> Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest."

37. Article 4 permits the making of exceptions by a member state. These include, by Article 4.2(f) and (g), the following:

> "……
>
> (f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law;
>
> (g) the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned;
>
> …."

It is further there stated:

> "The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. Member States may not, by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment."

38. Of central relevance to the third issue is Article 6 of the Directive. That reads as follows:

> "Article 6
>
> Access to justice
>
> 1. Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.
>
> 2. In addition to the review procedure referred to in paragraph 1, Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. Member States may

> furthermore provide that third parties incriminated by the disclosure of information may also have access to legal recourse.
>
> 3. Final decisions under paragraph 2 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this Article."

39. Turning then to the 2004 Regulations themselves, they came into force on 1 January 2005. Regulation 5 sets out the general duty to make available environmental information on request. Regulation 11, it may be noted, makes provision for reconsideration by a public authority, on representations made, where it is said that it has failed to comply with a requirement of the 2004 Regulations. Part 3 of the 2004 Regulations contains the exceptions to the general duty. In particular, Regulation 12 provides, among other things, as follows:

> "12.—(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if —
>
> (a) an exception to disclosure applies under paragraphs (4) or (5); and
>
> (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
>
> (2) A public authority shall apply a presumption in favour of disclosure.
>
> …..
>
> (5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect —
>
> (a) international relations, defence, national security or public safety;
>
> (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
>
> (c) intellectual property rights;
>
> (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

> (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
>
> (f) the interests of the person who provided the information where that person —
>
> > (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
> >
> > (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
> >
> > (iii) has not consented to its disclosure; or
>
> (g) the protection of the environment to which the information relates.
>
> (6) For the purposes of paragraph (1), 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, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).
>
> …."

40. Regulation 13 deals with personal data. Regulation 15 makes provision for certification by a Minister of the Crown in respect of a refusal to disclose information by reason of national security. In the light of the arguments addressed to us, I would observe that there perhaps could be a question as to how Regulation 15 is to be reconciled with Article 6 of the Directive. But that point did not itself need to be, and was not, debated before us. What was debated before us was the impact and effect of Regulation 18 contained in Part 5 of the 2004 Regulations and which relates to enforcement and appeal provisions. In the relevant respects Regulation 18 provides as follows:

> "18.— (1) The enforcement and appeals provisions of the Act shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in this regulation.
>
> (2) In this regulation, "the enforcement and appeals provisions of the Act" means —

> (a) Part IV of the Act (enforcement), including Schedule 3 (powers of entry and inspection) which has effect by virtue of section 55 of the Act; and
>
> (b) Part V of the Act (appeals).
>
> ….
>
> (6) Section 53 of the Act (exception from duty to comply with decision notice or enforcement notice) applies to a decision notice or enforcement notice served under Part IV of the Act as applied to these Regulations on any of the public authorities referred to in section 53(1)(a); and in section 53(7) for the reference to "exempt information" there shall be substituted a reference to "information which may be refused under these Regulations".
>
> …..”

It is therefore the case, as was common ground before us, that the 2004 Regulations incorporate, or purport to incorporate, the certification power contained in s.53 of FOIA into the regime applicable to requests for environmental information.

The factual and procedural background

41. Mr Evans, a journalist on the Guardian newspaper, made his requests, directed at seven government departments, by emails sent in April 2005. The requests focused on correspondence passing between the departments and The Prince of Wales over the previous seven month period. This request was made in the context of it being widely known that The Prince of Wales expresses views in correspondence with ministers on a number of issues which he considers merit attention. Initially, a "neither confirm nor deny" response was adopted as to whether such information was held: a response upheld by internal review by the Cabinet Office, communicated to the claimant on 12 April 2006.

(1) The proceedings before the Information Commissioner

42. Following intervention by the Information Commissioner, the government departments in due course stated that information was held falling within the terms of the requests. However the view was stated that all such information was exempt from disclosure by reason of s.37(1) of FOIA, and in some respects also on the basis of s.40(2) and s.41(1) of FOIA.

43. The ensuing proceedings before the Information Commissioner, both because of the complexity of the issues raised and because of the enormous workload pressure generally facing the Information Commissioner, became very protracted. The ultimate decision of the Information Commissioner was dated 15 December 2009. It extended to 192 paragraphs, together with annexes. On any view it was a thorough and carefully reasoned decision.

44. One initial point considered by the Information Commissioner was whether any of the requested information was "environmental information". It was decided that some was. In consequence, the Information Commissioner correctly directed himself (paragraph 38 of the decision) that, given that some of the withheld information was environmental information and some was not, the Information Commissioner must consider the exceptions contained in the 2004 Regulations as well as the exemptions contained in FOIA: albeit it was acknowledged that there inevitably was some "cross over" in the applicable reasoning.

45. The Information Commissioner considered, among other matters, the applicability of s.41(1) of FOIA at some length. For that purpose, he concluded, after detailed discussion, that disclosure of the withheld information would constitute an actionable breach of confidence, subject to a public interest defence. The conclusion (paragraph 113) under this head was that the public interest requirements in favour of disclosure were not sufficient to justify disclosure.

46. The Information Commissioner then turned to deal with the application of s.37 of FOIA with regard to information following outwith s.41. It was rightly noted that – as the law then stood – s.37 conferred a qualified exemption and was subject to the public interest test set out in s.2(2)(b) of FOIA.

47. Various arguments had been put forward by the government departments as to why the exemption should be maintained. One was by reference to the avoidance of undermining the constitutional convention (for these purposes styled "the education convention") to the effect that the heir to the throne required to be instructed in the business of government in preparation for kingship. Another was by reference to the convention that there be political neutrality on the part of the monarch; and disclosure of correspondence from and to The Prince of Wales (as heir to the throne) could, it was said, damage the perception of political neutrality. It was also argued that disclosure of the information as requested could have a "chilling effect" (a phrase also used in the *Sugar (No 2)* litigation) on free and frank exchange between The Prince of Wales and those with whom he corresponds, and perhaps also on a wider basis.

48. The Information Commissioner summarised the four public interest factors considered to be of particular relevance in this way (paragraph 129):

> "129. The Commissioner believes that the following four public interest factors can be said to be inherent in the maintaining the exemption and relevant in this case:
> • Protecting the ability of the Sovereign to exercise her right to consult, to encourage and to warn her Government and to preserve her position of political neutrality;
> • Protecting the ability of the Heir to the Throne to be instructed in the business of government in preparation for when he is King and in connection with existing constitutional duties, whilst preserving his own position of political neutrality and that of the Sovereign;
> • Preserving the political neutrality of the Royal Family and particularly the Sovereign and the Heir to the Throne to ensure the stability of the constitutional Monarchy; and
> • Protecting the privacy and dignity of the Royal Family."

49. The Information Commissioner considered these factors at some length. In this respect, he also had regard, among other things, to the authorised biography of The Prince of Wales written by Jonathan Dimbleby and published in 1994. A considerable amount of The Prince of Wales' papers and correspondence had been made available to Mr Dimbleby for this purpose, some of which (but by no means all) were included in the published book. Thus in some respects details of The Prince of Wales' communications with government had already, and with his consent, been placed in the public domain: and, so it was said, no "chilling effect" had resulted. This was considered by the Information Commissioner. His overall conclusion (paragraph 140) on this point was that disclosure of information falling within the convention would lead The Prince of Wales, and possibly government ministers, to feel constrained in taking, or more reluctant to take, part in the process of his being educated about the business of government.

50. Overall, after detailed examination of the four particular identified factors, the Information Commissioner expressed his conclusion in this way:

> "147. Again, in reaching a conclusion about where the balance of the public interest lies the Commissioner has to focus on the specific content of the information. In this case for the information which falls within the scope of the convention, the Commissioner believes that the public interest in maintaining the exemption is very strong because of weight that should be attributed to maintaining the convention – i.e. a confidential space in which the Heir to the Throne can communicate with Ministers - and the concepts which underpin it, i.e. political neutrality and confidentiality, along with the weight that should be given to the chilling effect arguments for such correspondence. Even when taken together the Commissioner does not feel that the public interest arguments in favour of disclosing the particular information which falls within the scope of this request overrides this weighty public interest in maintaining the exemption.
>
> 148. In relation to any of the information which may fall outside the Commissioner's definition of the convention, the Commissioner believes that the public interest is more finely balanced because the argument in favour of maintaining a constitutional convention attracts far less weight. (It should not be inferred that such information is indeed contained within the scope of this request.) Therefore, it would certainly be possible (and easier) to envisage a scenario where disclosure of the correspondence between The Prince of Wales and government Ministers would be in the public interest. However, as noted above just because information does not fall within the scope of the convention this does not mean that its disclosure would not undermine two key concepts inherent to it: political neutrality and the potential to have a chilling effect on future correspondence. Moreover, having once again considered the content of the withheld information in this case the Commissioner believes that the public interest favours maintaining the exemption."

51. The Information Commissioner then turned to deal with requests for information in so far as they related to environmental information. It was found that Regulation 12(5)(f) was engaged. For like public interest reasons it was concluded (paragraph 160) that the public interest in disclosure was outweighed by the public interest in maintaining the exception under Regulation 12(5)(f).

(2) The proceedings before the Upper Tribunal

52. Mr Evans appealed on 13 January 2010 against this decision of the Information Commissioner. By sensible agreement, it was directed that the appeal be heard not by the First-tier Tribunal but by the Upper Tribunal, under Regulation 19 of the Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009. By s.3(5) of the Tribunals, Courts and Enforcement Act 2007 the Upper Tribunal is a superior court of record.

53. The principal issues before the Upper Tribunal were essentially the same as those before the Information Commissioner. But there were significant differences in presentation. A very great deal more evidence, including oral evidence from expert and other witnesses, was now adduced: and the parties were represented by leading and junior counsel (at this stage Mr Evans was himself legally represented, he having not – we gather – made representations to the Information Commissioner). The Information Commissioner appeared before the Upper Tribunal through Mr Pitt-Payne QC, and advanced arguments seeking, in common with the seven government departments, to uphold the earlier decision of the Information Commissioner.

54. The appeal proceedings were also very protracted. There were hearings spread out on separate occasions over a number of months in 2010 and 2011 and a great deal of work had to be undertaken. Some of the requested information, it should be added, together with related arguments, were considered in closed session.

55. The decision of the Upper Tribunal (Walker J, Upper Tribunal Judge Angel and Ms Cosgrave) was promulgated on 18 September 2012. It is a most elaborate, thorough and fully reasoned determination comprising 251 paragraphs, together with substantial annexes (both open and closed). The citation reference, for those interested, is [2012] UKUT 313 (AAC).

56. The introductory paragraphs of the decision most helpfully summarise the essential basis for the decision. This was broadly to the effect that open correspondence styled by the Upper Tribunal as "advocacy correspondence" – in effect, correspondence on matters whereby The Prince of Wales was seeking to identify and promote certain charitable needs and also to promote or advance certain views of various kinds – fell to be disclosed.

57. In paragraphs 4 and 5 of the decision the Upper Tribunal said this:

> "4. For reasons which we explain below, we conclude that under relevant legislative provisions Mr Evans will, in the circumstances of the present case, generally be entitled to disclosure of "advocacy correspondence" falling within his requests. The essential reason is that it will generally be in the overall public interest for there to be transparency as to how and when Prince Charles seeks to influence

> government. The Departments have urged that it is important that Prince Charles should not be inhibited in encouraging or warning government as to what to do. We have not found it necessary to make a value judgment as to the desirability of Prince Charles encouraging or warning government as to what to do, for even assuming this to have the value claimed by the Departments we do not think the adverse consequences of disclosure will be as great as the Departments fear. In broad terms our ruling is that although there are cogent arguments for non-disclosure, the public interest benefits of disclosure of "advocacy correspondence" falling within Mr Evans's requests will generally outweigh the public interest benefits of non-disclosure.
>
> 5. It is important to understand the limits of this ruling. It does not entitle Mr Evans to disclosure of purely social or personal correspondence passing between Prince Charles and government ministers. It does not entitle Mr Evans to correspondence within the established constitutional convention that the heir to the throne is to be instructed in the business of government. Nor does it involve ruling on matters which do not arise in the present case. Thus, for example, it is conceivable that there may be correspondence which, although outside the established constitutional convention, can properly be described as preparation for kingship. Or it may be that correspondence concerns an aspect of policy which is fresh and time needs to be allowed for a "protected space" before disclosure would be in the public interest. While they do not in our view arise in the present case it is possible that for these or other reasons correspondence sought in other cases may arguably not be disclosable."

58. In paragraph 8 of the decision the Upper Tribunal pointed out that, in the light of the subsequent amendments to FOIA referred to above, after 19 January 2011 there would henceforth be "severe limitations" on the ability to obtain from public authorities information relating to communications with the heir to the throne.

59. The Upper Tribunal duly summarised the background and the relevant provisions of the applicable legislation (both FOIA and the 2004 Regulations) and the reasoning of the Information Commissioner. At paragraph 21 it had recorded eight assertions of fact made by the appellant, Mr Evans, as follows:

> "21. The skeleton argument for Mr Evans made 8 assertions of fact:
> (1) it is a matter of public record that Prince Charles holds and expresses strong views on matters of public policy and corresponds with ministers about them;
> (2) Prince Charles has repeatedly used public platforms to express his strongly held views;
> (3) the fact that Prince Charles corresponds regularly with ministers is well-documented and publicly admitted on Prince Charles's behalf as well as by some ministers or their advisers;
> (4) some of this advocacy correspondence has been published;

(5) Prince Charles's self-perceived role has been described on his behalf as representational, "drawing attention to issues on behalf of us all" and "representing views in danger of not being heard";
(6) the available materials indicate that Prince Charles has expressed strong views on matters of political controversy, including as to legislation being introduced;
(7) the high degree of publicity afforded to Prince Charles's dealings with government has not prevented his being educated in the ways and workings of government;
(8) nor has [this high degree of publicity] deterred him from corresponding frankly with ministers."

In due course it was to find all of these factual matters established.

60. At section G of the decision the Upper Tribunal addressed, at some length, the issue of constitutional conventions, on which it had heard evidence from (among others) Professor Tomkins and Professor Brazier, both experts in constitutional law, and two very senior civil servants. In addressing that issue, the Upper Tribunal stressed that constitutional conventions of the type under debate were not law. It said that it undertook "with circumspection" the task of deciding the applicable extent of the relevant conventions: and that in that regard "we are not deciding an issue of law" (paragraph 68).

61. The Upper Tribunal identified the following conventions in particular as in point:

i) The cardinal convention: this is to the effect that ordinarily the monarch is required to act on ministerial advice.

ii) The tripartite convention: this is to the effect that the monarch is entitled to be consulted; entitled to encourage; and entitled to warn. Ministers are required to take account of (although not, of course, necessarily to follow) what the monarch has said.

iii) The education convention: this (as already noted by the Information Commissioner) is to the effect that the heir to the throne is required to be instructed, on a continuing basis, in the business of government in preparation for kingship. In this regard, however, the Upper Tribunal noted what was styled a "new contention" on the part of the respondents, to the effect that the education convention did, or should, extend to the right of the heir to the throne to obtain information from ministers, to comment on their policies and to urge other policies on them: and so the education convention could prospectively apply to all correspondence between government and the heir to the throne.

62. On this last point, the Upper Tribunal rejected the argument that the education convention had an extended scope as argued for by the respondents (and in substance accepted by the Information Commissioner, albeit the Information Commissioner's approach was that any such extension should be modified so as not to extend to communications about charitable work or information of a particularly personal nature). The Upper Tribunal gave full reasons for its conclusions on all this. This necessarily involved an assessment of the expert evidence. It is not necessary to set out the full

reasoning here. One particular point emphasised, however, by the Upper Tribunal (and re-emphasised by Miss Rose before us) as, in its view, indicating that advocacy correspondence could not fall within such a convention was that it is the constitutional role of the monarch, not the heir to the throne, to encourage or warn government. In this context, Miss Rose also drew attention to The Prince of Wales' own public statements that he would not engage in advocacy correspondence of this kind when king.

63. Overall, it was held that the advocacy correspondence was not part of The Prince of Wales' preparation for kingship and was not within the proper limits of the established education convention.

64. At section J of its decision the Upper Tribunal went on to set out in its own formulation the various factors (reflecting those variously identified by the Information Commissioner) in favour of and against disclosure in assessing the public interest balance. They were (paragraph 123) identified as follows:

> "*Factors in favour of disclosure*
>
> IC(1) governmental accountability and transparency;
>
> IC(2) the increased understanding of the interaction between government and monarchy;
>
> IC(3) a public understanding of the influence, if any, of Prince Charles on matters of public policy;
>
> IC(4) a particular significance in the light of media stories focusing on Prince Charles's alleged inappropriate interference/lobbying;
>
> IC(5) furthering the public debate regarding the constitutional role of the monarchy and, in particular, the heir to the throne; and
>
> IC(6) informing the broader debate surrounding constitutional reform.
>
> *Factors against disclosure*
>
> IC(7) potential to undermine the operation of the education convention;
>
> IC(8) an inherent and weighty public interest in the maintenance of confidences;
>
> IC(9) potential to undermine Prince Charles's perceived political neutrality;
>
> IC(10) interference with Prince Charles's right to respect for private life under article 8; and
>
> IC(11) a resultant chilling effect on the frankness of communication between Prince Charles and government ministers."

65. It was pithily recorded that "the parties differ as to the weight to be given to those factors…."

66. The Upper Tribunal then made a full assessment of these varying factors. In a number of respects the Information Commissioner was criticised in that he "did not, in our view, afford the public interest in these respects the degree of strength which it warrants". On the application of the education convention, for example, it was among other things said:

> "165. …..To our mind recognition that advocacy communications will generally be disclosable if requested will benefit the operation of the education convention. It will focus the minds of the parties on the important principle that the education convention does not give constitutional status to advocacy communications.
>
> 166. It follows from our reasoning on this first aspect that Mr Evans is right to say that the Commissioner "overestimated the extent to which disclosure would undermine the [education] convention"."

At a later stage in this section, it was reiterated that what was known publicly about the advocacy interchanges "shows them to be very different from the function of the monarch when exercising the constitutional entitlement to encourage or to warn".

67. The Upper Tribunal went on carefully to review all the other identified factors concerning the public interest balance. As it said (paragraph 205) with regard to the overall balance: "The real question concerns the Information Commissioner's assessment of the comparative weight of the factors favouring disclosure and non-disclosure". It went on to assess the impact of the entitlements, exemptions and exceptions variously contained in FOIA and the 2004 Regulations: and in the result reached a conclusion in favour, generally, of disclosure of the advocacy correspondence.

68. The appeal was allowed by the Upper Tribunal accordingly.

<u>The Attorney General's certificate</u>

69. The government departments did not seek permission to appeal from the decision of the Upper Tribunal.

70. Instead, a certificate, with accompanying Statement of Reasons, was issued by the Attorney General on 16 October 2012 under s.53 of FOIA, stating that the Attorney General had on reasonable grounds formed the opinion that in respect of the requests there was no failure to comply with s.1(1)(b) of FOIA or Regulation 5(1) of the 2004 Regulations. It was accepted before us that such certificate was issued within the time limit prescribed by s.53(2).

71. Two initial points should be made about this certificate.

i) First, it is made by the Attorney General. That is because of the practice under published policy that where the relevant initial decision relates (as here) to papers of a previous government such a certificate should be made by a law

officer of the present government. However, I add that, in my view, for the purposes of s.53, there can be no difference in the approach to be adopted by the courts as to the meaning and application of that section in respect of a certificate issued under it where the certificate is issued by a law officer rather than a Minister of the Crown who is a Cabinet Member, as accountable person.

ii) Second, in the Statement of Reasons the Attorney General makes clear that he has applied the government's published policy on the use of the s.53 power applicable to cases falling under s.35(1) of FOIA (formulation of government policy). He stated that he had applied the principle that the power should be exercised only in exceptional circumstances. Such policy itself states explicitly that the government "will not routinely agree the use of the executive override simply because it considers the public interest in withholding the information outweighs the public interest in disclosure". (We were told that thus far a certificate under s.53 has in fact been issued on six occasions, including the present case).

72. In my opinion, in a case of this kind such a certificate, with Statement of Reasons, should receive as much light of day as possible. The Certificate and Statement of Reasons are therefore appended as Annex A to this judgment. In consequence, it is not necessary here to give any lengthy summary of the Statement of Reasons. It is, of course, elementary that the Statement of Reasons must be read as a whole.

73. Some observations can, all the same, at this stage be made on the Statement of Reasons.

i) First, the Attorney General expressly has had regard to and has engaged with the decision of the Upper Tribunal.

ii) Second, the Attorney General has expressly approached the matter by reference to both FOIA and (with regard to correspondence consisting of environmental information) the 2004 Regulations.

iii) Third, the Attorney General has plainly attributed very great weight to maintenance of the education convention and the preparation of The Prince of Wales for kingship, and has in terms disagreed with the Upper Tribunal's conclusion that the advocacy correspondence formed no part of The Prince of Wales' preparation for kingship (see in particular paragraph 9 of the Statement of Reasons). The Attorney General there says "I therefore consider that, whether or not it falls within the strict definition of the education convention, 'advocacy correspondence' is an important means whereby The Prince of Wales prepares for kingship. It serves the very same underlying and important public interests which the education convention reflects". Other matters to which the Statement of Reasons give prominence, as can be seen, are (a) the maintenance of confidentiality to minimise serious inhibition (or "chilling effect") on a frank exchange of views between The Prince of Wales and ministers; (b) the free-standing interest in the preservation of confidence; and (c) the avoidance of damage to the *perception* of perceived political neutrality (it being common ground that The Prince of Wales has a position of political neutrality).

74. The Attorney General in the Statement of Reasons summarised the public interest factors in favour of disclosure (paragraph 13). The view was, however, recorded (paragraph 14) that if they were decisive in the present case it would have to be at the expense of the strong public interest arguments against disclosure "centred upon The Prince of Wales' preparation for kingship and the importance of not undermining his future role as sovereign".

75. Thus the Statement of Reasons differs from the reasons advanced by the Upper Tribunal in its allowing the appeal. Indeed, the Statement of Reasons substantially accords in a number of respects with the reasons previously advanced by the Information Commissioner: and certainly corresponds with the arguments advanced, unsuccessfully, before the Upper Tribunal by the government departments.

Section 53 of FOIA

76. Initially, the claimant's written grounds had unequivocally stated that, for the purpose of the application of s.53, equivalent issues arising under the 2004 Regulations "give rise to no material distinction for the ultimate analysis".

77. In the event, this was not maintained by Miss Rose (who had not previously been instructed). On the contrary, by amended grounds of which ample notice had been given to the parties, she argued that s.53 of FOIA was, so far as concerns environmental information, not compatible with the Directive or with Article 47 of the EU Charter of Fundamental Rights; and that an unqualified executive override as ostensibly conferred by s.53 was not permissible with regard to environmental information. In fact, in her oral argument to us that was the first ground which she advanced (being a ground on which she had the support of Mr Pitt-Payne who had also formulated this point in his own written grounds).

78. However I think it convenient first to deal generally with the meaning and effect of s.53 as it stands.

79. Mr Swift, in his written and oral submissions, was not prepared to accept that the power conferred by s.53 was unusual. I do not agree. To my mind, in fact, it is a remarkable provision. The general scheme of FOIA is for disputed decisions of a public authority to be scrutinised by a (specialist) body in the form of the Information Commissioner and then, if there is an appeal, by a (specialist) tribunal: with further potential resort, by way of appeal, to the courts – up to the Supreme Court, in an appropriate case – on a point of law. Yet at any of these stages the relevant minister potentially may intervene by deployment of the power conferred by s.53: an executive override or veto of what (in the case of tribunal and court conclusions) will have been a judicial decision.

80. That this is remarkable is confirmed by a lack of comparable provisions in any other domestic statute. At the conclusion of the hearing we asked the parties if such a power of executive override could be found elsewhere in domestic statutes. By helpful written note subsequently provided, no example was identified: the only candidate put forward was s.73(5) of the Mental Health Act 1983, which in truth is not really comparable. We were, however, informed that broadly analogous executive override provisions have, from time to time, been included in comparable freedom of

information statutes in jurisdictions such as New Zealand, Australia and Canada. Scotland, of course, has its own comparable Act.

81. This kind of provision, and any exercise of the power conferred by it, in my view by its very nature calls for close scrutiny. But it is right to say that the implications of such an executive override, and an acknowledgement of the principle of separation of powers, seem to have been appreciated by Parliament in enacting s.53. This is borne out by a number of considerations.

i) First, there is a tight time limit for the issue of any such certificate.

ii) Second, such a certificate may only be issued, in England, by a minister who is a member of the Cabinet or the Attorney General; or, in Northern Ireland, by the First Minister and Deputy First Minister; or, in Wales, by (now) the First Minister.

iii) Third, such a certificate may only be issued in respect of decision or enforcement notices served on those bodies designated in s.53(1)(a). It does not apply to all public authorities.

iv) Fourth, where such a certificate is issued it must be laid before the relevant Assembly or each House of Parliament, as the case may be: so the availability of public scrutiny and accountability is provided in respect of any such certificate.

v) Fifth, with regard to a decision notice reasons must be given.

vi) Sixth, the express reference to "on reasonable grounds" clearly imports beyond argument the availability of challenge by way of judicial review proceedings in the courts. Thus the jurisdiction of the courts does not even purport to be ousted. The parties rightly agreed that judicial review is in principle available in this context. That feature is, in my view, of the greatest importance.

82. It should be noted that Miss Rose did not seek to say (subject always to her argument with regard to environmental information, to which I will come) that s.53 was in itself unlawful or constitutionally objectionable. She conceded in the light of the decision of the Supreme Court in *British Broadcasting Corporation v Sugar (No 2)* (supra) that the claimant could not as the law currently stands argue that the use of the executive override conferred by s.53(2) amounted to an interference with any rights of his under Article 10 or Article 6 of the Convention.

83. Nor can it be said, in my view, that s.53 is objectionable as conferring a power on the executive which, if exercised, could defeat the objective of the statute. On the contrary, part of the very scheme of FOIA is to construct a series of available exemptions – whether absolute or qualified – to modify the general requirement of disclosure. As Mr Swift submitted, and I agree, the conferring of the power contained in s.53 is to be taken itself as one of the further checks and balances which Parliament has thought necessary to provide, by primary legislation, in FOIA. Thus it could not be said that the exercise of the power conferred by s.53 of itself would infringe the principles established by such well-known cases as *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 977.

84. But equally, and as part of those checks and balances, Parliament has imposed a requirement of "reasonable grounds" in respect of any such certificate.

85. One linguistic point may be noted. Section 53(2) has, on one view, not in terms been so drafted, by the strict order of the wording, as explicitly to require the existence of "reasonable grounds" as a jurisdictional condition precedent before a certificate may be given. Rather, the requirement is worded to the effect that the accountable person, in certifying, must state that he has on reasonable grounds formed the relevant opinion. However, this cannot, in my view, mean that the accountable person can, as it were, self-certify as to the availability of reasonable grounds. In my view, the language chosen clearly is sufficient to connote that an objective test is to be applied: albeit, as is also clear, in the context of an expression of opinion on what, ultimately, is a matter of judgment. Thus reasonable grounds for the certificate must exist; and if reasonable grounds do not exist the certificate is invalid and of no effect.

Reasonable grounds – meaning

86. So what, then, does "on reasonable grounds" connote for this purpose?

87. We received a lot of argument on this. With respect, I found much of it rather arid. I would take the simple view – although I suspect Miss Rose and Mr Swift might regard it as a simplistic view – that the words chosen by Parliament mean what they say and are to be applied without any further gloss or other refinement. The court is well used, both in public law and in private law contexts, to assessing and applying a yardstick of reasonableness.

88. Mr Swift submitted that in a context such as the present what was connoted was "*Wednesbury* unreasonableness" (*Associated Provincial Picture Houses v Wednesbury Corp* [1948] 1 KB 223 at p.229 per Lord Greene MR). But that, notoriously, has shades of meaning depending on the particular context. Is it here to connote "not perverse" or "not irrational" or "not unreasonable", for instance? Indeed, as is elementary, the intensity of review required can, of course, govern the degree of scrutiny needed; and the intensity of review required can depend, in each case, on the context and on the particular statutory provisions concerned.

89. In the present statutory context, I can see no reason why the court should be required to consider anything less than (albeit no more than) the existence of reasonable grounds. I do not think that requirement should be glossed by invocation of the *Wednesbury* "principle" so as to introduce some lesser (let alone vaguer) requirement. There is also this consideration. The exercise of the override power would not involve any interference with any civil right personal to Mr Evans himself. That might tend to support a lower intensity of review by the court. But that is, in my opinion, completely overtaken by the fact that the executive is, ex hypothesi, interfering with the decision of a specialist body or tribunal or court. That is a very sensitive situation, calling for appropriately close scrutiny by the courts on a judicial review challenge. At the same time, however, nothing in the language of the section either requires or entitles the reviewing court to substitute its own opinion as to where the balance of the public interest lies.

90. In the circumstances, I was altogether more receptive to Miss Rose's submission to the effect that the reasons given in a certificate under s.53(2) must be "cogent". In

saying that, I would not go so far as notionally to write in any such requirement as a gloss to what Parliament has in terms provided – viz "on reasonable grounds". Nevertheless that submission, in my view, reflects the remarkable nature of the power conferred. As I see it, if an accountable person is to interfere, by way of exercise of the power of executive override, with the decision of an independent judicial body then that accountable person must be prepared and able to justify doing so. I am reluctant to talk in terms of burden of proof. But in terms of burden of argument the burden is in practice on the accountable person to show that the grounds for certifying are reasonable. He seeks to do so, as expressly required by s.53(6) with regard to a decision notice, by the giving of reasons for his opinion. Thereafter he must expect those reasons, in any subsequent judicial review proceedings, to be the subject of appropriately close scrutiny by the court.

Reasonable grounds – application

91. Did reasonable grounds exist in the present case sufficient to justify the exercise of the executive override?

92. Miss Rose – while not in general terms challenging the lawfulness of the existence of the power conferred by s.53 – submitted that the exercise of such power in this case was not justified and that there were no reasonable grounds for departing from the closely reasoned and careful decision of the specialist tribunal. She submitted that, in effect, all the Attorney General has done is to state a preference for his own (and the government departments') view of the matter over that of the Upper Tribunal. She sought to illustrate this by analysing a number of aspects of the Statement of Reasons and comparing them with the reasons given by the Upper Tribunal. By way of example, the Upper Tribunal had rejected the notion of any extension to what was generally perceived to be the established education convention and had rejected the view of the government departments' witnesses seeking so to argue. Yet, in his Statement of Reasons, the Attorney General had reverted to the notion (which the Information Commissioner had also broadly been prepared to accept) that the advocacy correspondence related to preparation for kingship and served the same public interests as the education convention on a wide basis. Moreover, in so doing, she observed, the Attorney General had in some respects put the heir to the throne in a like position with the monarch: yet it was only the monarch, not the heir, to whom the tripartite convention applied, as the Upper Tribunal had also pointed out. She made a number of other such observations (as do the written grounds) by way of comparison of the Statement of Reasons with the decision of the Upper Tribunal, which I do not think it necessary specifically further to rehearse here. Such analysis was, in essence, designed to extol the reasoning of the Upper Tribunal and to depreciate the reasoning of the Statement of Reasons.

93. Miss Rose went on to submit that matters placed under consideration by a judicial body such as a tribunal or court were to be categorised either as matters of fact; or as matters of law; or as matters of mixed fact and law. She in effect said that matters of fact were for the tribunal: and the accountable person could not thereafter have reasonable grounds for interfering with such findings of fact absent some particular reason such as the emergence of fresh evidence. As to matters of law, she said that the executive could not on reasonable grounds interfere with a holding of law by a judicial body: to do so, indeed, would subvert the entire doctrine of the rule of law. The same approach, she said, likewise applied to matters of mixed fact and law.

94. In support of the claimant's argument on these aspects there were cited to us a number of authorities: although it was accepted that none was entirely on all fours with the present case.

95. The first was *R v Warwickshire County Council ex parte Powergen plc* (1998) 96 LGR 617. The context of that case was a refusal by a County Council to enter into an agreement under s.278 of the Highways Act 1980. Previously, on the planning application, the District Council had decided that the access would be unsafe. On appeal, however, an inspector had adjudged the arrangements not to be unsafe and so had granted planning permission, subject to completion of the necessary works. The County Council then, as highway authority, refused to agree to complete the necessary works on the footing that the access arrangements were not safe. It was held that the highway authority could not reasonably maintain the original view as to the lack of safety of the access in the light of the inspector's independent factual judgment to the contrary on that very issue. To do so would effectively defeat the entire statutory planning process.

96. In *R v Secretary of State for the Home Department ex parte Danaei* [1998] INLR 124, the context was asylum. One claim advanced by the Iranian asylum seeker was that he was at risk of persecution in Iran because he had been discovered there in an adulterous relationship. The Secretary of State did not accept that. The special adjudicator found on the facts, however, that the applicant had been discovered in an adulterous relationship: albeit his appeal was dismissed for other reasons. When the applicant subsequently applied for discretionary exceptional leave to remain, the Secretary of State again maintained the view that he had not been discovered in an adulterous relationship: in other words, the Secretary of State did not accept the special adjudicator's finding of fact on this issue.

97. The Court of Appeal upheld a decision that the Secretary of State was not entitled to do so. It was held that, on an issue of primary fact such as that, it was not reasonable for the Secretary of State to disagree unless the special adjudicator's factual conclusion was demonstrably flawed or irrational or failed to have regard to material considerations; or if fresh material had become available bearing on the outcome; or (perhaps) if the decision had owed nothing to the assessment of the oral evidence. None of that was so in that case: see at p.133 B-E per Simon Brown LJ.

98. It may be noted that in the same case Judge LJ, as he then was, said this at pp 134-135:

> "I agree with Simon Brown LJ's conclusion and the reasons for it. His judgment demonstrates the essential independence of the special adjudicator within the statutory scheme governing applications for asylum without undermining the ultimate responsibility of the Secretary of State for deciding whether to grant an asylum-seeker exceptional leave to remain. The desirable objective of an independent scrutiny of decisions in this field would be negated if the Secretary of State were entitled to act merely on his own assertions and reassertions about relevant facts contrary to express findings made at an oral hearing by a special adjudicator who had seen and heard the relevant witnesses. That would approach uncomfortably close to decision-making by executive or administrative diktat. If therefore the Secretary of State is to set aside or ignore a finding on a factual issue which has

> been considered and evaluated at an oral hearing by the special adjudicator he should explain why he has done so, and he should not do so unless the relevant factual conclusion could itself be impugned on *Wednesbury* principles, or has been reconsidered in the light of further evidence, or is of limited or negligible significance to the ultimate decision for which he is responsible."

The reference to "decision-making by executive or administrative diktat" has at least some resonance with the present case.

99. *Danaei* was, of course, in no way concerned with a provision such as s.53 of FOIA. But Miss Rose submits that the same approach as adopted there should be adopted here. And she emphasises that the Attorney General has never suggested that the decision of the Upper Tribunal was flawed in any of the public law ways outlined by Simon Brown LJ in *Danaei*. Nor has the Attorney General sought to rely on any fresh evidence or new materials. All he has done, she says, is to disagree with the specialist tribunal's conclusions and to reassert the government departments' original viewpoint and reasoning.

100. To like effect, reliance was also placed on the decision of the Court of Appeal in *R (Bradley) v Secretary of State for Work and Pensions* [2009] QB 114; [2008] EWCA Civ 36. In that case, the Parliamentary Commissioner had made certain findings of maladministration and had made certain recommendations. The Secretary of State rejected the findings and recommendations. It was held that the Secretary of State, under the applicable statutory scheme, was entitled to reject the findings, provided the rejection was not irrational having regard to the underlying legislative intention.

101. After considering cases such as *ex parte Powergen* and *Danaei*, Sir John Chadwick said this in the course of paragraph 71 of his judgment:

> "It is not, I think, a general rule that facts found in the course of a statutory investigation can only be impugned on *Wednesbury* grounds: although, plainly, if the investigator can be shown to have acted irrationally, that will be a powerful reason for rejecting his findings. The true rule, as it seems to me, is that the party seeking to reject the findings must himself avoid irrationality: the focus of the court must be on his decision to reject, rather than on the decision of the fact-finder."

A little later on at paragraph 91 of his judgment he said this:

> "91. For my part, I am not persuaded that that is the correct approach: I am not persuaded that the Secretary of State was entitled to reject the ombudsman's finding merely because he preferred another view which could not be characterised as irrational. As I have said earlier in this judgment, it is not enough that the Secretary of State has reached his own view on rational grounds: it is necessary that his decision to reject the ombudsman's findings in favour of his own view is, itself, not irrational having regard to the legislative intention which underlies the 1967 Act: he must have a reason (other than

> simply a preference for his own view) for rejecting a finding which the ombudsman has made after an investigation under the powers conferred by the Act. It is, to my mind, a striking feature of the history which I have set out that the Secretary of State has not, even in this court, sought to meet the ombudsman's finding that the assurances given on p.15 of leaflet PEC3 were incompatible with the government's intentions."

102. We were also referred to the decision of the Divisional Court in *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495 Admin. That also related to a finding of maladministration, in this case by the ombudsman relating to the regulation of the Equitable Life Assurance Society. In the course of its judgment, the court indicated that for the Secretary of State to reject the finding of maladministration he needed to have "cogent reasons" (which indeed, as noted above, Miss Rose said was required to be the case here).

103. So far as questions of law are concerned, and the importance of upholding the rule of law, we were referred to passages from the judgment of Laws LJ in the Divisional Court in *R (Cart) v Upper Tribunal* [2011] QB 120; [2009] EWHC 3052 (Admin): passages not in any way affected by the later decision of the Supreme Court in the case. Laws LJ trenchantly stated (in paragraph 36 of his judgment) that the sense of the rule of law:

> "…rests on this principle, that statute law has to be mediated by an authoritative judicial source, independent both of the legislature which made the statute, the executive government which (in the usual case) procured its making and the public body by which the statute is administered."

At paragraph 37 of his judgment Laws LJ went on to say:

> "37. The principle I have suggested has its genesis in the self-evident fact that legislation consists in texts. Often – and in every case of dispute or difficulty – the texts cannot speak for themselves. Unless their meaning is mediated to the public, they are only letters on a page. They have to be interpreted. The interpreter's role cannot be filled by the legislature or the executive: for in that case they or either of them would be judge in their own cause, with the ills of arbitrary government which that would entail. Nor, generally, can the interpreter be constituted by the public body which has to administer the relevant law: for in that case the decision-makers would write their own laws. The interpreter must be impartial, independent both of the legislature and of the persons affected by the texts' application, and authoritative – accepted as the last word, subject only to any appeal. Only a court can fulfil the role."

A little later on he also noted (at paragraph 40):

> "None of this, of course, is to say that Parliament may not modify, sometimes radically, the procedures by which statute law is mediated…. The breadth of its power is subject only to the principle I have stated."

104. I can see where Miss Rose is coming from in all this. But I do not think she can arrive, by these ways, at the destination for which she is aiming.

105. This is for quite a few, albeit related, reasons.

106. The first is that, for the purposes of s.53 of FOIA, Parliament *has* provided the procedure by which this statutory provision is to be mediated. It is to be mediated, on challenge by way of judicial review, by the courts assessing whether the Secretary of State has certified "on reasonable grounds". That involves no derogation from the fundamental principle of the rule of law: on the contrary, it is an affirmation of it.

107. Second, I regard, with all respect, as altogether too schematic for present purposes (cf. the discussion, in a different context, in *R (o/a Jones) v First-tier Tribunal* [2013] UKSC 19; [2013] 2 All ER 625) the bright-line classification of the issues as either issues of fact or issues of law or issues of mixed fact and law. That does not reflect the reality of the present case. What is being disputed here is not a challenge to a primary finding of fact such as in *Danaei*. Nor is it a challenge to a ruling of law. Nor is the issuing of a certificate here a potential subversion of the legislative scheme of the kind exemplified in *Powergen*: just because in the present case the very legislative scheme includes the entitlement to certify "on reasonable grounds".

108. In truth, what was in issue here – as I hope the summary of the Information Commissioner's decision and the summary of the Upper Tribunal's decision set out above illustrates – was a difficult exercise in *evaluation*. (It certainly was not simply a matter of discretion, which also – as s.58 of FOIA connotes – may be present in any decision.) The judgment here called for was a *value* judgment as to where the balance of the public interest lies. As the Upper Tribunal itself recognised, it ultimately depends on the *weight* to be accorded to the various competing factors.

109. To style all this as simply comprehending questions of fact and law therefore does not meet the actuality of the situation. In the present case, the Attorney General has not purported to depart, without any justification, from the Upper Tribunal on any finding of primary fact. Nor has he purported to pronounce by way of disagreement on a pure issue of law on any legal point determined by the Upper Tribunal. Indeed, major questions arose in this case from the extent of, and application of, constitutional conventions – which (as the Upper Tribunal itself noted) are not matters of law, as such, at all. At the same time, issues of the public interest of the kind arising here and of the applicability and extent of conventions can, I think, given their constitutional and political overtones fairly be said to lie, in practical terms, at least within the domain of government ministers: albeit of course not to the exclusion of review by the courts.

110. The third point is that, if the argument is right, it greatly narrows the ostensible ambit of s.53. As a matter of statutory interpretation I can see no justification for such a limitation, either on linguistic grounds or on purposive grounds.

111. The fourth point, following on from the previous points, is this. The underlying submission on behalf of the claimant is, in effect, that the accountable person is not entitled simply to prefer his own view to that of the tribunal (reflecting, perhaps, the comments of Sir John Chadwick at paragraph 91 of *Bradley*). But I would ask in the present statutory context: why not? It is inherent in the whole operation of s.53 that the accountable person will have formed his own opinion which departs from the previous decision (be it of Information Commissioner, tribunal or court) and may certify without recourse to an appeal. As it seems to me, therefore, disagreement with the prior decision (be it of Information Commissioner, tribunal or court) is precisely what s.53 contemplates, without any explicit or implicit requirement for the existence of fresh evidence or of irrationality etc. in the original decision which the certificate is designed to override. Of course the accountable person both must have and must articulate reasons for that view. And as I have said, it is for the accountable person in practice to justify the certification. But if he does so, and that justification comprises "reasonable grounds", then the power under s.53(2) is validly exercised. Accordingly, the fact the certificate involves, in this case, in effect reasserting the arguments that had not prevailed before the Upper Tribunal does not of itself mean that it is thereby vitiated.

112. Given the meaning of s.53, and the approach which in my view it requires, it remains to consider whether the Attorney General has shown in the present case reasonable grounds for certifying as he did.

113. In my view the Statement of Reasons appended to the certificate, once carefully read and analysed, does indeed demonstrate such "reasonable grounds". The views and reasons expressed as to where the balance of public interest lies are proper and rational. They make *sense*. In fact, I have no difficulty in holding them to be "cogent". Indeed – especially given that the Attorney General's reasons and conclusions are in many respects to the like effect as those previously provided by the Information Commissioner – it will be recalled that the Upper Tribunal had itself, in paragraph 4 of its decision, acknowledged that there are "cogent arguments for non-disclosure".

114. Miss Rose also complained that an impermissible "blanket" approach had been adopted by the Attorney General in certifying. It was said that – presumably within the 20 working days available – he should have applied individual consideration to each individual piece of correspondence separately. But in my view the nature of the reasons given shows that was not called for; and the Attorney General was entitled to consider the correspondence as a whole.

115. As will be gathered, the running thread in the argument for the claimant was that just because the Upper Tribunal had reached a rational decision, on grounds properly open to it and after a full consideration of all relevant matters, there could not be reasonable grounds for the Attorney General – at all events in the absence of fresh materials – to issue a certificate expressing effective disagreement with the Upper Tribunal's conclusions. But it is perfectly possible – indeed it is the experience of every judge – for each of two diametrically opposed arguments and conclusions in a particular case properly to be styled as cogent. That one conclusion may be proper and reasonable does not mean that the contrary conclusion is improper and unreasonable. It does no harm to remember that in *Secretary of State for Education and Science v Tameside BC* [1977] AC 1014, Lord Denning MR in the Court of Appeal had famously

cautioned against the error of a decision maker thinking that anyone with whom he disagrees is being unreasonable (p.1026B). In any event, the scheme and language of s.53 of FOIA is not such as to require the accountable person, before he may properly certify, to form the view on reasonable grounds that the decision (whether of Information Commissioner, tribunal or court) proposed to be overridden was itself unreasonable or otherwise flawed in a public law sense. The position is demonstrably put on an altogether more open basis by the wording of s.53: even if the accountable person does himself have to be able to justify, on reasonable grounds, his departure from the earlier decision.

116. Miss Rose did at one stage also seem to advance arguments criticising the Statement of Reasons as providing insufficient reasons for the conclusion. That is not so formulated in the written grounds. In any event, it is not reasonable to expect a certificate, with accompanying reasons, of the present kind to run to the length of a court judgment. In my view, the Statement of Reasons made abundantly clear the essential reasons for the opinion expressed in the certificate and for the exercise of the executive override.

Environmental Information – the 2004 Regulations

117. The next point – albeit advanced first on behalf of the claimant in the oral arguments to us – is as to whether a different approach and conclusion is called for with regard to communications passing between The Prince of Wales and ministers comprising environmental information. We were told that this is quite a significant category of the information requested.

118. The argument for the claimant was that the certificate, in so far as it related to the environmental information, was unlawful. It was unlawful because s.53 of FOIA (as purportedly applied to environmental information requests by Regulation 18 of the 2004 Regulations) was not compatible with the Directive or with Article 47 of the EU Charter of Fundamental Rights. Nothing in the Directive, it is said, permits a right of executive override with regard to environmental information. This particular argument was supported by the Information Commissioner.

119. For this purpose Miss Rose focused in particular on Article 6 of the Directive. She submitted that that Article not only mandates the availability of a review procedure by Article 6.1 (which is in fact conferred by Regulation 11 of the 2004 Regulations, if not also by the statutory access to the Information Commissioner) but in addition by Article 6.2 mandates ("shall ensure") access to a court of law (or independent body established by law) where the acts and omissions of the public authority can be reviewed. Further, such decision on such a review is required to be "final" and to be "binding" on the public authority. She goes on to submit that the availability of the executive override under s.53 with regard to environmental information flouts such requirements of Article 6 of the Directive and is contrary to the principle of effectiveness.

120. The wording of Article 6.2 of the Directive, as I see it, is wide. It leaves it to the Member State to provide for a "review" procedure. But, that said, the obvious point is that, on the face of it, what is required to be reviewed under Article 6.2 of the Directive is the act or omission of the public authority. But then, in a case falling under s.53, as Miss Rose powerfully objects, the courts are only empowered to review

the grounds for the decision of the accountable person to give the certificate: a *different* decision by a *different* public authority decision maker, she says. There is force in that submission.

121. Miss Rose relied on various other matters in support of her argument.

122. First, she drew attention to the purpose behind the Directive, as evidenced in the Aarhus Convention and the recitals to the Directive itself. She highlighted the requirement in Article 9.1 of the Aarhus Convention for access to a review procedure with regard to a request for information falling under Article 4 of the Convention. She particularly emphasised the provisions of Article 9.2 requiring access to an independent review procedure "to challenge the substantive and procedural legality" of any act or decision falling under Article 6 of that Convention.

123. Second, she drew attention to the Implementation Guide to the Aarhus Convention; and to the recommendations of the Aarhus Convention Compliance Committee (ACCC/C/2008/33) published in 2011 relating to compliance by the United Kingdom with the Aarhus Convention in respect of a licence issued concerning the Port of Tyne. In the course of such recommendations the Committee queried whether judicial review met the standards required for review by the Aarhus Convention with regard to "substantive legality".

124. Third, she referred to the decision of the European Court of Human Rights in *Van de Hurk v The Netherlands* (1994) 18 EHRR 481, which (at paragraph 45) emphasises the general principle that the power of an independent body established by law to give a binding decision is not to be altered by a non-judicial authority. She placed reliance also on the decision of the European Court of Human Rights in *Ryabykh v Russia* (application 52854/99) [2005] 40 EHRR 25. That was a case on rather special facts. But what was there stated was to the effect that the entrenched rights of a litigant would be illusory if a judicial decision by an independent body which had become final and binding could thereafter be quashed by a higher court on the application of a state official (see in particular paragraph 56). The importance of maintaining finality and legal certainty was also emphasised by the European Court of Human Rights in *Sutyazhnik v Russia* (application 8269/02). Miss Rose submitted that such principle was infringed by the issue of a certificate by a government minister under s.53.

125. Fourth, she drew attention to the decision of the Court of Appeal in the case of *Birkett v Department for the Environment, Food and Rural Affairs* [2011] EWCA Civ 1606; [2012] Env LR 24. That was a decision relating to the 2004 Regulations: the particular point being whether a public authority which had initially relied on one particular exception under the 2004 Regulations when refusing to release environmental information could subsequently, before the Information Commissioner, rely upon a different exception or exceptions. It was held that it could. In the course of his judgment (with which Lloyd LJ and Carnwath LJ agreed) Sullivan LJ considered the provisions of Article 6 of the Directive. At paragraph 23 of his judgment he said this:

> "23. Notwithstanding the need for a speedy decision as to whether or not, and if not why not, environmental information is to be released, it is to be noted that the Directive does not set a precise time limit for reconsideration and/or administrative review under Article 6. Although

> that stage of the procedure must be "expeditious", there is no such requirement for the next stage: legal review under Article 6(2). This reflects the, inevitable, tension between the need for a speedy answer, and the need to obtain a correct answer which properly balances the important public interests which may be in conflict. Article 6 recognises the potential importance of these issues by providing for a thorough review process in which the merits, both factual and legal, of a decision to refuse to release environmental information will be reconsidered afresh by independent and impartial bodies, both administrative and legal. The Court or other legal body conducting the review under Article 6(2) is not reviewing the decision made by the administrative reviewer under Article 6(1), it is reviewing "the acts or omissions of the public body concerned." Thus, the court must consider de novo the propriety of releasing the information. Such a process is bound to discover errors and omissions in the exceptions relied upon in initial decisions, and it would be surprising, given the balancing exercise required by the Directive, if those errors were incapable of subsequent correction."

Miss Rose submitted: precisely so. And here, she says, judicial review by the courts of the Attorney General's reasons for the decision to issue the certificate under s.53 is not a reconsideration, let alone "afresh" or "de novo", of the factual and legal merits of the decision of the public authorities concerned – the government departments – to refuse to release the environmental information.

126. I am, however, ultimately not persuaded by these arguments.

127. As I see it, Article 6.2 of the Directive certainly imposed an additional requirement on Member States following a review procedure consistent with Article 6.1. But *how* that requirement is met is, as I read it, left to national law. Article 6.2 is put in broad terms: the access required is to a "review procedure" by an impartial and independent body established in law "in which the acts and omissions of the public authority concerned can be reviewed". The manner in which such review is to be undertaken is not prescribed by Article 6.2.

128. I agree that Article 6.2 requires review of the act or omission of the public authority concerned. Is that capable of being satisfied in a case under s.53 by the courts having the power to review the reasonableness of the grounds given by the accountable person in issuing a certificate? In my view, it is. I think, agreeing with Mr Swift's submission on this point, that to conclude otherwise would be to put form over substance. It seems to me that it will inevitably be an integral part of a review by the court of the reasonableness of the grounds given by an accountable person that there be included a review of the decision to withhold the information in the first place: the act or omission of the public authority concerned. After all, the certificate itself is required, by the very terms of s.53(2) and Regulation 18, to direct itself as to whether there has been a failure to comply with s.1(1)(b) or Regulation 5(1) of the 2004 Regulations. Inevitably, therefore, the reasons for the certificate will have to engage with the substance of the original decision of the public authority to withhold. The court will thus review that; and that is so even where the court is not required to replicate the entire exercise undertaken by the decision maker. It may be that such a review of the act or omission of the public authority will have been at one remove, as

it were. But there will still, in my view, have been a substantive review of that act or omission of the public authority.

129. Such an approach, I add, is at least consistent with the overall scheme of the enforcement provisions contained in FOIA relating to appeals, which no-one suggests are contrary to Article 6 of the Directive. Thus an appeal to the tribunal from a decision of the Information Commissioner is required in form to be directed at the decision of the Information Commissioner: not of the underlying decision of the public authority. But this reflects the reality that, in considering whether the appeal should be allowed, it is inevitable that the original decision by the public authority to withhold will itself in substance be reviewed.

130. I do not think the provisions of Article 9 of the Aarhus Convention really tell against that conclusion. On the contrary, Article 9.1 in general terms, so far as concerns requests under Article 4 (access to environmental information), requires "access to a review procedure" by an independent and impartial body established by law. That generality of approach is reflected in Article 6.2 of the Directive itself.

131. It is true that Article 9.2 of the Aarhus Convention requires access to such a body "to challenge the substantive and procedural legality of any decision": albeit that is dealing specifically with requests under Article 6 (public participation in decisions on specific activities) and such language is not in fact deployed in Article 9.1 of the Aarhus Convention. It is also true that the Implementation Guide to the Aarhus Convention (2013 ed. at p.199) asserts that the entitlement to challenge the "substantive and procedural legality" is "implicit" in Article 9.1 also; and the 2011 Recommendations of the Implementation Committee had indicated concern as to whether a judicial review procedure, of the model adopted under the law of England and Wales, meet the standards of review said to be required by the Aarhus Convention with regard to substantive legality. But the point was tentatively put by the Implementation Committee: and there was, at all events, no finding that the United Kingdom was in non-compliance with Article 9 of the Aarhus Convention (see paragraph 127). Moreover, while the Implementation Guide itself may properly be taken into account, it is not binding: any more than are the views of the Implementation Committee.

132. Mr Swift cited the case of *R (Evans) v Secretary of State for Local Government* [2013] EWCA Civ 114 – a case on the 1999 Environmental Impact Assessment Regulations. Among other things, in that case, Article 9 of the Aarhus Convention fell to be considered, including the suggested need for assessment by a court of the substantive and procedural legality of an environmental decision (paragraph 33). It was observed by Beatson LJ at paragraph 37 of his judgment (with which Sir Stanley Burnton and Patten LJ agreed) that the expressed concerns of the Aarhus Convention Compliance Committee did not bind the English courts and in any event did not "identify the variations in the intensity of *Wednesbury* review that reflect the nature of the interests affected".

133. As may be gathered from what I have previously said, I attach considerable importance to the principle reaffirmed by Beatson LJ in this last sentence. Judicial review is a procedure consistent with the requirements of Article 9.4 of the Aarhus Convention. It is a flexible procedure, enabling an appropriate intensity of review where such intensity of review is called for: see also the analogous reasoning of the

Court of Appeal in *T-Mobile (UK) Ltd v Office of Communications* [2009] 1 WLR 1565; [2008] EWCA Civ 1373 (a competition case dealing with Directive 2002/21/EC). In the present kind of case, close scrutiny by the court is called for: and such close scrutiny of the reasons given for the accountable person's opinion must require – and has here required – a close scrutiny by the court of the initial decision to withhold. Indeed, if there were substantive or procedural illegality or irregularity in the original decision such a review by the court, under section 53, should reveal it. In my view, that amply complies with the requirements of Article 6.2 of the Directive.

134. Nor, in my view, do the *Russia* cases really assist the claimant's argument. The present case is quite different from those cases. In the present case, Parliament has by primary legislation conferred the right of executive override, exercisable within a tightly confined time limit, and subject to review by the court of the reasonableness of the grounds relied on.

135. It is, as I see it, the availability of judicial review which renders the procedures applicable to a certificate issued under section 53 compliant with the requirement of a "final" and "binding" decision: see, for example, paragraph 52 of *Van de Hurk*. I can see the potential force in the objection, by reference to Articles 6.2 and 6.3 of the Directive (and Article 47 of the EU Charter of Fundamental Rights) if such a certificate were not capable of judicial challenge. But it is. "Within the framework of its national legislation" (in the words of Article 9.1 of the Aarhus Convention) an appropriate review procedure has thus been provided. Accordingly, an appeal to the tribunal or court (compatibly with Article 6.2 of the Directive) will result in a decision "which may become final". It will, absent any further appeal, become final on the lapse of twenty working days thereafter. If a certificate is issued under s.53 within those twenty working days, the complainant then has "access" to a judicial procedure which, on disposal, will itself result in a final and binding decision.

136. That leaves *Birkett*. Of course weight must be given to the views expressed by Sullivan LJ as to the operation of Article 6 of the Directive, as set out in paragraph 26 of his judgment. These views are, however, given what was at issue in that case, to be regarded as obiter. In any event, while they may be broadly descriptive of the paradigm situation, I do not think they are to be taken as laying down any legal test applicable in all such contexts. As I have said, the wording of Article 6.2 of the Directive itself is put in broad terms. There is, at all events, nothing in the actual wording of Article 6.2 which requires a reconsideration of the factual and legal merits "afresh" or "de novo". Sullivan LJ was, with respect, right to note that under Article 6.2 the decision to be reviewed is that of the public authority concerned, not the decision of the administrative reviewer under Article 6.1. But he was not directly concerned – as this court *is* concerned – with the *manner* in which the particular review may lawfully be undertaken for these purposes. Indeed there is perhaps, in general terms, a potential tension between aspects of the remarks of Sullivan LJ and of the remarks of Beatson LJ in *Evans*.

137. I would also, incidentally, note – although it is not in any way a part of my reasoning – that I thought that there was a degree of force in Mr Swift's comment to the effect that, through the prism of European law (cf. s.81 of FOIA) a sharp differentiation between the original decision of a government department as a public authority and a subsequent certificate under s.53 by a minister as a public authority to the same effect would seem very refined.

138. My conclusion therefore is that s.53 of FOIA, as applied by s.39 and Regulation 18 to environmental information, is not incompatible with the Directive or inconsistent with the Aarhus Convention. Since, as I have concluded, the Attorney General had reasonable grounds for certifying as he did, the challenge in so far as it relates to requests for disclosure of environmental information likewise fails.

Other matters

139. Miss Rose (although not Mr Pitt-Payne) argued that, if the certificate was unlawful with regard to environmental information, then that tainted the entire decision. I would briefly say that, had I accepted the argument on environmental information (and I have not), I would in any case have rejected this particular argument. The Statement of Reasons of the Attorney General gives consideration to the request for environmental information under the 2004 Regulations further to and separately from that given to non-environmental information: and that remains so even if ultimately the same underlying reasons for withholding disclosure on public interest grounds as advanced by the Attorney General were the same for each category.

140. Further, although the argument with regard to environmental information was that the power to certify under s.53 was incompatible with the Directive, I should record that no declaration of incompatibility was sought (nor was any request for a reference made to us). The sole relief sought was a quashing order. In my view, that was a pragmatic approach: especially where, as Mr Pitt-Payne also pointed out, what was at issue here was the exercise of a statutory power, not a statutory duty.

141. It should perhaps be made clear that this court was not asked to examine, and has not examined, any of the underlying requested information, whether open or closed.

Conclusion

142. I would dismiss this claim for judicial review.

143. Since preparing this judgment I have seen in draft the judgment of the Lord Chief Justice. I entirely agree with his observations about executive override provisions.

Mr Justice Globe:

144. I agree with both judgments.

ANNEX A

October 2012

CERTIFICATE OF THE ATTORNEY GENERAL, MADE IN ACCORDANCE WITH SECTION 53(2) OF THE FREEDOM OF INFORMATION ACT 2000 AND REGULATION 18(6) OF THE ENVIRONMENTAL INFORMATION REGULATIONS 2004

In a judgment dated 18 September 2012 (Neutral Citation: [2012] UKUT 313 (AAC)), the Upper Tribunal, Administrative Appeals Chamber considered requests relating to information held by the Department for Business, Innovation and Skills, the Department of Health, the Department for Education**,** the Department for Environment, Food and Rural Affairs, the Department for Culture Media and Sport, the Northern Ireland Office and the Cabinet Office ('the Departments') contained in correspondence between His Royal Highness, The Prince of Wales and Ministers in the Departments between 1 September 2004 and 1 April 2005. It concluded that the Departments, in accordance with their obligations under the Freedom of Information Act 2000 ("the Act") and the Environmental Information Regulations 2004 ("the Regulations"), should have disclosed the majority of the information comprising that correspondence.

As an accountable person within the definition in section 53(8) of the Freedom of Information Act ("the Act"), I have on reasonable grounds formed the opinion that, in respect of the requests concerned, there was no failure to comply with section 1(1)(b) of the Act or regulation 5(1) of the Environmental Information Regulations 2004.

Therefore I make this certificate in accordance with section 53(2) of the Act and regulation 18(6) of the Environmental Information Regulations 2004.

RT HON DOMINIC GRIEVE QC MP

ATTORNEY GENERAL

EXERCISE OF THE EXECUTIVE OVERRIDE UNDER SECTION 53 OF THE FREEDOM OF INFORMATION ACT 2000

IN RESPECT OF A JUDGMENT OF THE UPPER TRIBUNAL DATED 18 SEPTEMBER 2012 (EVANS v (1) INFORMATION COMMISSIONER (2) SEVEN GOVERNMENT DEPARTMENTS [2012] UKUT 313 (AAC))

STATEMENT OF REASONS
(under section 53(6) of the Freedom of Information Act)

INTRODUCTION

1. Pursuant to section 53 of the Freedom of Information Act 2000 ("the Act") and regulation 18(6) of the Environmental Information Regulations 2004, I have today signed a certificate in respect of the Upper Tribunal's decision contained in a judgment dated 18 September 2012, and the conditionally suspended annex to that judgment dated 12 October 2012 (*Evans v (1) Information Commissioner (2) Seven Government Departments* [2012] UKUT 313 (AAC), "*Evans*"). That judgment found that the government departments had failed to comply with their obligations under the Act and Regulations in refusing to disclose various letters between The Prince of Wales and Ministers in seven government departments ("the Departments"). In reaching this decision, I have taken account of the views of Cabinet, former Ministers and the Information Commissioner**.**

2. It is my opinion as the accountable person in this case, that the decisions taken by the Departments not to disclose those letters in response to the relevant requests were fully in accordance with the provisions of the Freedom of Information Act and the Environmental Information Regulations 2004. Disclosure of any part of those letters was not required having regard to the balance of the public interests in disclosure and those against. I also believe that this is an exceptional case warranting my use, as a Cabinet Minister, of the power in section 53(2) of the Act. Accordingly, I have today given the certificate required by section 53(2) to the Information Commissioner.

3. In accordance with section 53(3)(a) of the Act, I am also today laying a copy of that certificate before both Houses of Parliament, together with a copy of this statement of reasons.

ANALYSIS

The Upper Tribunal's judgment

4. The Upper Tribunal's judgment concerned requests under the Act, and the Environmental Information Regulations for disclosure of correspondence between The Prince of Wales and Ministers in the Departments for the period between 1 September 2004 and 1 April 2005. The Departments turned down

the requests, and the Information Commissioner upheld the Departments' decisions. In broad terms, the Upper Tribunal allowed appeals against those decisions. It ordered the Departments to disclose 27 of the 30 items of correspondence which it found to be within the scope of the requests. Those 27 items of correspondence fell into a category which the Tribunal described as "advocacy correspondence".

5. In summary, the Upper Tribunal concluded as follows.

(1) All of the non-environmental information in the correspondence fell within the qualified exemption in section 37(1)(a) of the Act (information relating to communications with members of the Royal Family). However, the bulk of that information consisted of correspondence in which The Prince of Wales was urging a particular view upon Ministers (which the Tribunal called "advocacy correspondence"). The Tribunal concluded that the public interest was strongly in favour of the disclosure of such correspondence.

(2) Most of the non-environmental information also fell within the exemption in section 41 of the Act (information provided in confidence). Section 41 provides an absolute exemption from the duty to disclose, but does not apply where there would be a public interest defence to any action for breach of confidence. The Upper Tribunal found that in this case, there would be a public interest defence to disclosure of "advocacy correspondence", because of a strong public interest in its disclosure.

(3) The Tribunal did not need to consider whether the correspondence was covered by section 40 of the Act (exemption for personal data), because (it concluded) given the strong public interest in disclosure of "advocacy correspondence" it would not be contrary to data protection principles to disclose it.

(4) Significant parts of the correspondence consisted of environmental information (as defined for the purposes of the Environmental Information Regulations 2004 – the "EIR"), and were accordingly properly dealt with under the EIR rather than the Act. For those parts of the correspondence, the Tribunal proceeded on the basis that regulation 12(5)(f) EIR was engaged (the equivalent exemption for environmental information to section 41 of the Act for non-environmental information). However, for the same reasons as the Tribunal gave in respect of section 41 of the Act regulation. 12(5)(f) EIR could not be relied upon to withhold "advocacy correspondence". The Tribunal did not go on to consider whether regulation 13 EIR was engaged (the equivalent exemption for environmental information to section 40 of the Act for non-environmental information).

The public interests in not disclosing and maintaining the exemptions

6. Within a constitutional monarchy, where the Sovereign is Head of State but political power is exercised through a democratically elected government, it is a vital feature of the constitutional settlement that the Sovereign cannot be seen to favour one political party above another, or to engage in political controversy. Without that preservation of political neutrality, the constitutional balance that allows for governments to be elected within the framework of inherited monarchy could not be preserved. Nor would it be possible for the Sovereign to fulfil his or her symbolic function as representative of the State.

7. In the United Kingdom, that constitutional balance is preserved by the constitutional convention that the Monarch acts on, and uses prerogative powers consistently with, Ministerial advice ("the cardinal convention"). The corollary to the cardinal convention is the convention that the Monarch has the right, and indeed the duty, to be consulted, to encourage, and to warn the government (the "tripartite convention"). The tripartite convention ensures that a measure of influence is retained for the Monarch within the constitution. The tripartite convention is most obviously, though not solely, expressed through the Prime Minister's weekly audience with the Monarch.

8. In order to prepare for the exercise of the tripartite convention, the heir to the Throne has the right to be instructed in the business of government: a right described by the Tribunal in this case as the "education convention". The Tribunal in this case accepted the importance of the education convention; and accepted that it carried with it a duty of confidentiality. However, the Tribunal concluded both that "advocacy correspondence" was outside the education convention; and that such correspondence formed no part of The Prince of Wales' preparations for kingship, because it was not undertaken as part of preparation for kingship, and was not the type of activity in which the Monarch would engage.

9. In my view, it is of very considerable practical benefit to The Prince of Wales' preparations for kingship that he should engage in correspondence and engage in dialogue with Ministers about matters falling within the business of their departments, because such correspondence and dialogue will assist him in fulfilling his duties under the tripartite convention as King. Discussing matters of policy with Ministers, and urging views upon them, falls within the ambit of "advising" or "warning" about the Government's actions. It thus entails actions which would (if done by the Monarch) fall squarely within the tripartite convention. I therefore respectfully disagree with the Tribunal's conclusion that "advocacy correspondence" forms no part of The Prince of Wales' preparations for kingship. I consider that such correspondence enables The Prince of Wales better to understand the business of government; strengthens his relations with Ministers; and enables him to make points which he would have a right (and indeed arguably a duty) to make as Monarch. It is inherent in such exchanges that one person may express views and urge them upon another. I therefore consider that, whether or not it falls within the strict definition of the education convention, "advocacy correspondence" is an important means whereby The Prince of Wales prepares for kingship. It serves the very same underlying and important public interests which the education convention reflects.

10. If such correspondence is to take place at all, it must be under conditions of confidentiality. Without such confidentiality, both The Prince of Wales and Ministers will feel seriously inhibited from exchanging views candidly and frankly, and this would damage The Prince of Wales' preparation for kingship. Indeed, it is difficult to see how the exchange of views in correspondence could continue at all without confidentiality. Also, The Prince of Wales is party-political neutral. Moreover, it is highly important that he is not considered by the public to favour one political party or another. This risk will arise if, through these letters, The Prince of Wales was viewed by others as disagreeing with government policy. Any such perception would be seriously damaging to his role as future Monarch, because if he forfeits his position of political neutrality as heir to the Throne, he cannot easily recover it when he is King. Thus in this context, confidentiality serves and promotes important public interests.

11. I also consider that the disclosure of "advocacy correspondence" engages the important freestanding interest in the preservation of confidences. Both The Prince of Wales, and Ministers, correspond on the basis that their exchanges are strictly confidential. Furthermore, I consider that the public interest in maintaining confidentiality will be buttressed where The Prince of Wales's letters reflect his personal and deeply held views and convictions, given under impress of confidentiality.

12. In my view, these are important public interests in non-disclosure, which will generally apply to "advocacy correspondence" between The Prince of Wales and Ministers. Of course, I recognise that each case must be decided on its own particular facts, so I have gone on to examine how those public interests apply in this case. I take the view that they apply with particular force, in circumstances where:

    (1) The requests were made in April 2005. Thus, at the time when the requests fell to be responded to, the correspondence was very recent; and it is still relatively recent.
    (2) Much of the correspondence does indeed reflect The Prince of Wales' most deeply held personal views and beliefs.
    (3) The letters in this case are in many cases particularly frank. They also contain remarks about public affairs which would in my view, if revealed, have had a material effect upon the willingness of the government to engage in correspondence with The Prince of Wales, and would potentially have undermined his position of political neutrality.
    (4) There is nothing improper in the nature or content of the letters.

The public interests in disclosure

13. I recognise, and take account of, the public interests in disclosure identified in the Upper Tribunal's judgment, namely governmental accountability and transparency; the increased understanding of the interaction between government and Monarchy; a public understanding of the influence, if any, of The Prince of Wales on matters of public policy; an interest in disclosure in

light of media stories focusing on The Prince of Wales' alleged inappropriate interference, or lobbying; furthering the public debate regarding the constitutional role of the Monarchy, and in particular the heir to the Throne; and informing broader debate surrounding constitutional reform.

14. In my view, the factors in favour of disclosure identified by the Tribunal in this case are good generic arguments for disclosure of the information. However, if they were decisive in the present case it would have to be at the expense of the strong public interest arguments against disclosure, centred upon The Prince of Wales' preparation for kingship and the importance of not undermining his future role as Sovereign.

15. I also consider that the very high public interest that the Tribunal identified in the public knowing what The Prince of Wales said to Ministers was at least in part dependent upon the Tribunal's assumption that The Prince of Wales was in no different position from any other lobbyist, when making representations to Ministers, save that he did so from a position where his representations would be accorded special weight. I do not consider that The Prince of Wales's correspondence is properly viewed in that light, in circumstances where it is part of his preparation for kingship. I take the view that the correspondence has a constitutional function, which makes any analogy between it and correspondence between a private individual and a Minister inapposite.

How those public interests relate to applicable exemptions in the Act and the EIR

16. I take the view that, for the reasons I have set out above, the public interests in non-disclosure of the disputed information in this case substantially outweigh the public interests in its disclosure.

17. In those circumstances, I conclude that all the non-environmental information in the correspondence falls within the exemption in section 37(1) of the Act for information relating to members of the Royal Family (as it applies to requests made prior to 19 January 2011); and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

18. I also conclude (to the extent necessary) that the non-environmental information in the correspondence is exempt from disclosure under the absolute exemptions in sections 40 and 41 of the Act. In particular:

    (1) The information is personal data relating to The Prince of Wales for the purposes of section 40 of the Act. Its disclosure would breach data protection principles, because it would be unwarranted by reason of prejudice to The Prince of Wales's rights, freedoms and legitimate interests, for the same reasons I have set out above. In those circumstances, the information is exempt from disclosure under section 40; and

(2) The information consists of confidential information obtained from The Prince of Wales. The disclosure of the information otherwise than under the Act would constitute an actionable breach of confidence, because against the public interests I have outlined above, there would be no public interest defence to such an action. Accordingly, the information also falls within the absolute exemption for confidential information in section 41 of the Act.

19. For the same reasons, I have concluded that the environmental information within the disputed correspondence is exempt from disclosure under regulation 12(5)(f) and regulation 13 EIR:

(1) Disclosure of the information would adversely affect the interests of its provider (The Prince of Wales) for the purposes of regulation12(5)(f); the information satisfies the other conditions in the regulation; and the public interest is in favour of maintaining the exemption; and

(2) The information is exempt from disclosure under regulation 13 EIR (personal data) for the same reasons that non-environmental information within the correspondence is exempt from disclosure under section 40 of the Act.

Application of the criteria for use of the section 53 power

20. I have had regard to the Government's policy on use of the section 53 power in cases falling under section 35(1) of the Act, and I have applied to the present circumstances the principle within the policy that the power should be exercised only in exceptional cases. I am satisfied that this is such an exceptional case; and therefore merits the exercise of the power to make a certificate.

21. In my view, the criterion of exceptionality is properly satisfied in this case, in light of the following matters.

- The fact that the information in question consisted of private and confidential letters between The Prince of Wales and Ministers.
- The fact that the request in this case was for recent correspondence.
- The fact that the letters in this case formed part of The Prince of Wales' preparation for kingship.
- The potential damage that disclosure would do to the principle of The Prince of Wales' political neutrality, which could seriously undermine the Prince's ability to fulfil his duties when he becomes King.
- The ability of the Monarch to engage with the Government of the day whatever its political colour, and maintain political neutrality is a cornerstone of the UK's constitutional framework.

CONCLUSION

22. Having therefore taken into account all the circumstances of the case, I am satisfied that the public interest, at the time of the requests (and also at the present time) fell (and falls) in favour of non-disclosure. I am also satisfied that this is an exceptional case meriting use of the Ministerial veto to prevent disclosure and to safeguard the public interest.

23. The certificate I have signed has been provided to the Information Commissioner and copies will be laid before both Houses of Parliament. I have also provided a copy of this statement of reasons to the Information Commissioner and both Libraries of the Houses of Parliament, and copies will be available in the Vote Office.

A copy of the Government's policy in relation to the use of the power under section 53 of the Act as it relates to section 35(1) of the Act is annexed to this document.

RT HON DOMINIC GRIEVE QC MP
ATTORNEY GENERAL
16 October 2012