Upper Tribunal (Administrative Appeals Chamber)
Appeal Number: GI/2146/20101; Neutral Citation Number [2012] UKUT 313 (AAC)
Comprising 7 transfers by the First-tier Tribunal of appeals from
decision notices issued by the Information Commissioner (see Open Annex 1)

INFORMATION RIGHTS:

OPEN ANNEX 3:

Supplemental material to accompany the
Decision and reasons of the Upper Tribunal, 18 September 2012

Before
Mr Justice Walker
Upper Tribunal Judge John Angel
Ms Suzanne Cosgrave

Between
Rob Evans (Appellant)
-and-
Information Commissioner (Respondent)
Concerning correspondence with Prince Charles in 2004 and 2005

Additional Parties:
(1) Department for Business, Innovation and Skills,
(2) Department of Health
(3) Department for Children, Schools and Families
(4) Department for Environment, Food and Rural Affairs
(5) Department for Culture, Media and Sport
(6) Northern Ireland Office
(7) Cabinet Office

Upper Tribunal (AAC):
Evans v *Information Commissioner (Correspondence with Prince Charles in 2004 and 2005)*

Open Annex 3: Supplemental material to accompany the Decision and reasons dated 18 September 2012 and Open Annexes 1 and 2.

[OA3] A. Introduction to Open Annex 3

[OA3] 1. In this open annex we set out supplemental material, using similar headings to those in our main judgment. The matters we deal with are:

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[OA3] B. The requests, refusals and decision notices

[OA3] 2. This section gives an account of the Commissioner's reasons for his conclusions as set out in the decision notices. It should be read only after reading section E of the main judgment.

[OA3] 3. As regards DBIS and DCSF the Commissioner considered that none of the disputed information was environmental information. He considered that some of the correspondence fell within section 41(1)(a) of the Act, and that insofar as it did so it also satisfied the condition in section 41(1)(b) and was therefore exempt from disclosure. The correspondence that did not fall within section 41(1)(a) was exempt under section 37(1)(a).

[OA3] 4. By contrast, as regards DEFRA and DCMS the Commissioner considered that all of the disputed information was environmental information, and was exempt under regulation 12(5)(f). The disputed information held by DEFRA was additionally exempt under regulation 13.

[OA3] 5. As regards DH, NIO and the Cabinet Office the Commissioner considered that some, but not all, of the disputed information was environmental information, and that in all three cases the environmental information was exempt under regulation 12(5)(f). The environmental information held by DH and the Cabinet Office was additionally exempt under regulation 13. In all three cases his analysis of the non-environmental information resulted in the same principal findings as he made in relation to DBIS and DCSF.

[OA3] 6. For convenience we have referred to the DBIS decision notice ("DBIS DN") when setting out the Commissioner's conclusions under the Act and to the DH decision notice ("DH DN") when setting out the Commissioner's conclusions under the Regulations. We begin by setting out the Commissioner's conclusions under the Act, adopting the order used in the relevant decision notices. We then turn to the Commissioner's conclusions under the Regulations, again adopting the order used in the relevant decision notices.

[OA3] B1. Information provided in confidence: scope of section 41

[OA3] 7. Section 41 only applies to information 'obtained from another person'. At paragraphs 27 to 34 of DBIS DN the Commissioner stated:

> 27. The public authority has argued that correspondence sent by The Prince of Wales to it meets the first limb of section 41 because it is clearly

information it received from another person. On this basis the Commissioner accepts that such information meets the requirements of section 41(1)(a).

28. However, the public authority has also argued that the requirement of section 41(1)(a) of the Act that information be 'obtained from another person' is sufficiently broad to include information about a person, as well as information actually provided by a person. To support this approach the public authority made the point that the modern law of breach of confidence (which is discussed in detail below) covers information not only obtained from a person, but also information about a person, for example a photograph. On this basis the public authority has argued that correspondence to The Prince of Wales from the public authority also falls within the scope of section 41(1)(a) because the content of the correspondence clearly indicates what matters His Royal Highness has raised with ministers.

29. The Commissioner recognises that deciding whether information has been 'obtained from any other person' requires an assessment of the content of information not simply of the mechanism by which it was imparted and recorded. However, the Commissioner does not agree with the public authority's assertion that simply because information it holds is about an identifiable individual it constitutes information obtained from that person. In the Commissioner's view such an interpretation of section 41(1)(a) is too broad for two reasons.

30. Firstly, although the Commissioner accepts – for the reasons set out below – that the modern law of breach of confidence needs to be taken into account when considering whether disclosure of information would constitute an actionable breach and thus engage section 41(1)(b), he does not believe that the case law referenced by the public authority is directly relevant to the engagement of section 41(1)(a). This is because the way in which section 41 of the Act is drafted means that information is not exempt simply if its disclosure would constitute an actionable breach of confidence as in common law. Rather the inclusion of section 41(1)(a) means that the public authority also has to have received that information from a third party. In effect section 41 of the Act creates an additional requirement for withholding information which is confidential under the common law concept of confidentiality and it would be inappropriate to simply to apply the common law test to lower the threshold of engaging section 41 of the Act.

31. Secondly, the Commissioner's believes that the approach suggested by the public authority effectively represents an attempt to broaden out the basis upon which section 41 is engaged to also ensure that it offers protection to an individual's privacy regardless of whether a public authority had 'obtained' information about that individual from a third party. However, in the Commissioner's view such an interpretation of section 41 is not necessary; whilst this exemption may not always protect an individual's privacy in the way in which the public authority is arguing that it should, the Act clearly offers weighty protection to an individual's privacy in the form of the exemption contained at section 40 of the Act.

> 32. Therefore although the Commissioner accepts that it is possible for correspondence which was created by the public authority and sent **to** The Prince of Wales to meet the requirements of section 41(1)(a), whether it does in any case will depend upon the content of the information which was communicated.
>
> 33. In the Commissioner's opinion there has to be a significant degree of similarity to the information which the public authority is sending to The Prince of Wales to the information which His Royal Highness originally provided to the public authority. In the Commissioner's opinion it is not sufficient, for the purposes of section 41(1)(a) that the information is simply on the same topic; the correspondence being sent to The Prince of Wales has to reflect the actual views or opinions His Royal Highness may have raised on a particular topic.
>
> 34. Having looked at the content of the correspondence falling within the scope of this case that the public authority sent to the Prince of Wales, the Commissioner does not accept that it reflects the views of the Prince of Wales sufficiently closely such that this correspondence can be said to have been obtained from another person. Rather the focus of the correspondence is the views and opinions of the public authority and/or sender of the letter and thus such correspondence cannot therefore be exempt from disclosure by virtue of section 41(1). The Commissioner has set out in the confidential annex which particular pieces of correspondence do not in his opinion meet the requirements of section 41(1)(a)…

[OA3] B2. What types of information are protected by section 41?

[OA3] 8. Not all information 'obtained from another person' is protected by section 41. The section only applies to such information if disclosure of that information would be an actionable breach of confidence. The Commissioner dealt first with the types of information protected by an action for breach of confidence. He distinguished between information of a commercial character and that which is of a personal and private nature. The decision notice was concerned with the latter category, and at paragraph 65 of DBIS DN the Commissioner summarised the relevant legal principles as requiring consideration of two criteria:

> 65. … for information which is of personal and private nature, such as the information which is the focus of this request, … the Commissioner will consider:
>
> - [first criterion] Whether information was imparted with an expectation that it would be kept confidential (be that an explicit or implicit expectation); and
>
> - [second criterion] Whether disclosure of the information would infringe the confider's right of privacy as protected by Article 8(1) ECHR.

[OA3] 9. The Commissioner then turned to the convention on educating the heir to the throne. At paragraphs 66-70 of DBIS DN the Commissioner stated:

> 66. In relation to the first criteria the Commissioner accepts that the constitutional convention which provides that the heir to the throne should be educated in the way and workings of government means that both the Prince of Wales, and those he corresponded with, will have had an explicit (and weighty) expectation that such communications would be confidential.
>
> 67. In reaching this conclusion the Commissioner wishes to clarify his position in relation to the scope of the constitutional convention provided to the heir to the throne. In the Commissioner's opinion given that the purpose of this convention is to allow the heir to the throne to be educated in the ways and workings of government, the only information which will attract the protective confidentiality of this convention is information which relates to the Prince of Wales being educated in the ways and workings of government. In the Commissioner's opinion this convention cannot be interpreted so widely as to encompass **all** of the Prince of Wales' communication with the government, for example, it does not cover correspondence in which His Royal Highness may be discussing his charitable work or indeed information of a particularly personal nature (this is not to say of course that the withheld information in this case includes examples of either class of information.)
>
> 68. Nevertheless, the Commissioner accepts that for communications between the parties that do not fall within his interpretation of the convention, there is still a weighty expectation that such correspondences will be kept confidential. The Commissioner finds support for such a conclusion given the established practice that communications between the Prince of Wales and government ministers have not been disclosed or commented on by either party, regardless of the content of the correspondence. Moreover, it is the Commissioner's understanding that the public authority's position is that all correspondence the Prince of Wales exchanges with government ministers falls within the scope of the convention and thus the individuals involved in exchanging this correspondence will have had a weighty and explicit expectation that such information will not be disclosed.
>
> 69. In relation to the second criteria, the Commissioner agrees with the public authority that in respect of Article 8(1) the term 'private' should be interpreted broadly to ensure that a person's relationships with others are free from interference. The Commissioner also accepts that matters of a business and professional nature are covered by the protection afforded by Article 8(1). Furthermore, in the quoted case reference to 'correspondence' confirms that Article 8(1) can apply to information contained within the format which is the focus of this request.
>
> 70. In light of this broad reading of Article 8(1) the Commissioner accepts that disclosure of information which is the focus of this case would place in the public domain details of the Prince of Wales' views and opinions on a number of issues and such an action would amount to an invasion of his privacy. Thus the Commissioner accepts that disclosure of the information

would constitute an infringement of Article 8(1) and would constitute an actionable breach of confidence.

[OA3] B3. Information provided in confidence: the public interest

[OA3] 10. The Commissioner noted, however that an action for breach of confidence would not succeed if the defendant established that disclosure was in the public interest. The decision notices identified specific public interests in disclosure of the information and in its non-disclosure. In considering whether there would be a public interest defence to an action for breach of confidence, the Commissioner began with a general discussion. At paragraphs 72 to 84 of the DBIS DN he said:

> 72. However, before it can be concluded that this information is exempt from disclosure by virtue of section 41, the Commissioner has to consider whether there is a public interest defence to disclosing the information, which includes an assessment of the weight that should be attributed to Article 10 ECHR.
>
> 73. As explained above the public authority identified only a very general and limited public interest in disclosure of the withheld information. In the Commissioner's opinion there are a number of further public interest arguments in favour of disclosing this information than have been identified by the public authority and he has set out below what he believes these interests are. The Commissioner has then gone on to consider whether such arguments provide a sufficient public interest defence.
>
> Additional arguments in favour of disclosing the information
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> 74. There is a public interest in disclosure of information to ensure that the government is accountable for, and transparent in its decision making processes.
>
> 75. Moreover, there is a specific public interest in disclosure of information that would increase the public's understanding of how the Government interacts with the Royal Family and the Royal Household, and in particular in the circumstances of this case, the heir to the throne. This is because the Monarchy has a central role in the British constitution and the public is entitled to know how the various mechanisms of the constitution operate. This includes, in the Commissioner's opinion, how the heir to the throne is educated in the ways of government in preparation for his role as Sovereign. In the Commissioner's opinion such an interest is clearly distinct from the prurient public interest alluded to by the public authority.
>
> 76. Disclosure of the information may allow the public to understand the influence (if any) exerted by the Prince of Wales on matters of public policy. If the withheld information demonstrated that the public authority or government in general had placed undue weight on the preferences of the Prince of Wales then it could add to the public interest in disclosing the information.

77. Conversely, if the withheld information actually revealed that the Prince of Wales did not have undue influence on the direction of public policy, then there would be a public interest in disclosing the information in order to reassure the public that no inappropriate weight had been placed on the views and preferences of the heir to throne. In essence disclosure could enhance public confidence in respect of how the government deals with the Prince of Wales.

78. These two arguments could be seen as particularly relevant in light of media stories which focus on the Prince of Wales' alleged inappropriate interference in matters of government and political lobbying.

79. Linked to this argument, is the fact that disclosure of the withheld information could further the public debate regarding the constitutional role of the Monarchy and particularly the heir to the throne. Similarly, disclosure of the information could inform the broader debate surrounding constitutional reform.

Can disclosure of the information be justified on public interest grounds?

80. Before turning to the balance of the public interest in respect of this case, the Commissioner wishes to highlight that the public interest test inherent within section 41 differs from the public interest test contained in the qualified exemptions contained within the Act; the default position for the public interest test in the qualified exemptions is that the information should be disclosed unless the public interest in withholding the information outweighs the public interest in disclosing the information. With regard to the public interest test inherent within section 41, this position is reversed; the default position being that information should not be disclosed because of the duty of confidence unless the public interest in disclosure outweighs the interest in upholding the duty of confidence and therefore withholding the information.

81. In the Commissioner's opinion the introduction of the concept of privacy and the impact of ECHR into the law of confidence has not affected this balancing exercise; Sedley LJ expressed such a view in *LRT v Mayor of London:* 'the human rights highway leads to exactly the same outcome as the older road of equity and common law'. [Footnote 6: Quoted by the Information Tribunal in Derry City Council v Information Commissioner, (EA/2006/0014)].

82. Therefore in conducting this balancing exercise as well as taking into account the protection afforded by Article 8(1), consideration must also be given to Article 10 ECHR …

83. The Commissioner notes that recent European Court of Human Rights judgments have highlighted the relationship between Article 10 and access to public information. In particular, the Court has recognised that individuals involved in the legitimate process of gathering information on a matter of public importance can rely on Article 10(1) as a basis upon which

> to argue that public authorities interfered with this process by restricting access to information. [Footnote 7: See *Kenedi v Hungary* 37374/05]
>
> 84. Turning to the various factors identified by the public authority the Commissioner does not entirely accept the argument that for there to be a successful public interest defence against a breach of confidence there would always have to be an exceptional public interest in disclosure. The Commissioner's reasoning is as follows: The Information Tribunal in *Derry City Council v Information Commissioner* in discussing the case of *LRT v The Mayor of London* noted that in the first instance the judge said that an exceptional case had to be shown to justify a disclosure which would otherwise breach a contractual obligation of confidence. When hearing the case, the Court of Appeal although not expressly overturning this view, did leave this question open and its final decision was that the information should be disclosed. The Tribunal in *Derry* interpreted this to mean that:
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> - No exceptional case has to be made to override the duty of confidence that would otherwise exist;
>
> - All that was required is balancing of the public interest in putting the information into the public domain and the public interest in maintaining the confidence.

[OA3] 11. The Commissioner also referred to the distinction mentioned in section B1 above between information of a commercial nature and information of a private and personal nature. Thus in paragraphs 85 and 86 of the DBIS DN the Commissioner said:

> 85. Consequently in cases where the information is of a commercial nature, the Commissioner's approach is to follow the lead of the Tribunal in that no exceptional case has to be made for disclosure, albeit the balancing exercise will still be of an inverse nature.
>
> 86. However, in cases where the information is of a private and personal nature, the Commissioner accepts that in light of the case law referenced by the public authority, disclosure of such information require a very strong set of public interest arguments. The difference in the Commissioner's approach to such cases can be explained by the weighty protection that Article 8 offers to private information; in other words the Commissioner accepts that there will always be an inherent and strong public interest in protecting an individual's privacy. The Commissioner's believes that a potential deviation to this approach may be appropriate where the personal information relates to the individual's public and professional life, as opposed to their intimate personal or family life, and in such a scenario such a strong set of public interest arguments may not be needed because the interests of the individual may not be paramount.

[OA3] 12. This distinction played an important part in the Commissioner's conclusions: see paragraph 87 of the same decision notice:

> 87. In determining whether the information which is the focus of the case relates more to the Prince of Wales' professional or public life, rather than his private life, the Commissioner faces a particularly difficult dilemma given the unique position which His Royal Highness occupies. There is clearly significant overlap between the Prince of Wales' public role as heir to the throne and a senior member of the Royal Family and his private life; he only occupies such positions because of the family into which he was born. In the Commissioner's opinion the Prince of Wales' public and private lives can be said to be inextricably linked. Therefore for the purposes of this case, and the consideration of Article 8, the Commissioner believes that he has to adopt the position that the information which is the focus of this case can be said to be more private in nature than public and thus a very strong set of public interest arguments would be needed to be cited in order for there to be a valid public interest defence.

[OA3] 13. Drawing the threads together, the Commissioner concluded at paragraphs 89 to 92:

> 89. As implied by the comments above, the Commissioner accepts the argument that there is weighty public interest in maintaining confidences. Furthermore, the Commissioner agrees that there is a significant public interest in the ensuring the convention that the heir to the throne can be instructed in the business of government is not undermined; it would clearly not be in the public interest if the heir to the throne and future Monarch appeared to be politically partisan. The Commissioner of course also agrees that there is a clear and important distinction between disclosure of information which the public would be interested in and disclosure of information which is genuinely in the public interest.
>
> 90. However, given the number of public interest arguments in favour of disclosure that the Commissioner has identified, he is of the perhaps unsurprising opinion that the benefit of disclosing this information should not be summarily dismissed in the fashion implied by the public authority. Rather the arguments identified by the Commissioner touch directly on many, if not all, of the central public interest arguments underpinning the Act, namely ensuring that public authorities are accountable for and transparent in their actions; furthering public debate; improving confidence in decisions taken by public authorities. Furthermore, the specific arguments relevant to this case in relation to the Prince of Wales relationship with government Ministers deserves to be given particular weight.
>
> 91. Nevertheless, the Commissioner has to remember that disclosure of such information would require an exceptional set of public interest arguments and disclosure would have to be justified by the content of the withheld information itself not simply on the basis of generic or abstract public interest arguments.

> 92. The Commissioner has reviewed the content of the withheld information carefully and he has reached the conclusion that despite the weight of the public interest arguments in favour of disclosure, the content does not present an exceptional reason or reasons for the information to be disclosed. Consequently, the Commissioner has concluded that there would not be a public interest defence if the information that falls within the scope of section 41 were disclosed.

[OA3] B4. Section 37: the royal family, honours and dignities

[OA3] 14. As regards information which the Commissioner held to be outside the scope of section 41, he went on to consider whether such information was exempt from disclosure under section 37. His conclusion was that it fell within the broad ambit of section 37(1)(a) and that the exemption was engaged. The exemption being a qualified exemption, he went on to consider the balance of the public interest.

[OA3] 15. At paragraphs 107-115 of the DBIS DN the Commissioner stated:

> 107. In the Commissioner's opinion given the broad reading of the term 'relates to' the subject matter of information which can fall within the scope of section 37(1)(a) can be very broad because communications, and information relating to such communications, could potentially cover a huge variety of different issues. Therefore establishing what the inherent public interest is in maintaining the exemption contained at section 37(1)(a) is more difficult than identifying the public interest inherent in a more narrowly defined exemption, for example section 42, which clearly provides a protection for legally privileged information.
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> 108. 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.
>
> 109. As noted above in his analysis of the application of section 41, the Commissioner believes that the scope of the constitutional convention in

respect of the heir to the throne is relatively narrow. That is to say it will only cover correspondence in which the Prince of Wales is in fact being educated in the ways and workings of government; it cannot be interpreted so widely as to encompass **all** of the Prince of Wales' communications with the government, i.e. it does not cover correspondence in which His Royal Highness may be discussing his charitable work or indeed information of particularly personal nature (this is not to say of course that the withheld information in this case includes examples of either class of information).

110. However, where the information does fall within the Commissioner's definition of this convention, he accepts that there is a significant and weighty public interest in preserving the operation of this convention, i.e. it would not be in the public interest that the operation of the established confidential convention would be undermined. This is particularly so given that the convention is designed to protect communications at the heart of government, i.e. the heir to the throne and government Ministers. The significant weight which protecting the convention attracts can be … correctly seen as akin to the strong weight applied to maintaining the exemption in … section 42 as it will always be strongly in the public interest to protect legal professional privilege.

111. The Commissioner also accepts that it is logical to argue that disclosure of the information covered by the convention could undermine the Prince of Wales' political neutrality for the reasons advanced by the public authority. The Commissioner believes that significant weight should be attributed to the argument that disclosure would undermine the Prince of Wales' political neutrality: it is clearly in the public interest that the Prince of Wales, either as heir to the throne or when Monarch is not perceived to be politically biased in order to protect his position as Sovereign in a constitutional democracy.

112. Vitally, the Commissioner believes that arguments concerning political neutrality are still relevant, and indeed attract similar weight, even when the information being withheld does not fall within the scope of the constitutional convention relating to the heir to the throne. In other words disclosure of correspondence not strictly on issues related to the business of government could still lead to the Prince of Wales being perceived as having particular political views or preferences and thus could undermine his political neutrality. As noted above, the Commissioner accepts that it is inherent in the exemption contained at section 37(1)(a) that it is in the public interest for the political neutrality of all members of the Royal Family to be preserved.

113. Turning to the chilling effect arguments, as the public authority correctly suggest such arguments are directly concerned with the loss of frankness and candour in debate and advice which would flow from the disclosure of information. Such arguments can encompass a number of related scenarios:

- Disclosing information about a given policy or decision making process, whilst that particular process is ongoing, will be likely to affect the frankness

and candour with which relevant parties will make future contributions to that policy/decision making;

- The idea that disclosing information about a given policy or decision making process, whilst that process is ongoing, will be likely to affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates and decision making processes; and

- Finally an even broader scenario where disclosing information relating to the formulation and development of a given policy or decision making process (even after the process is complete), will be likely to affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates and decision making processes.

114. In the Commissioner's opinion all three scenarios are potentially relevant here: some of the withheld information can be seen to relate to discussions on issues where the policy debate or decision making can still be seen as 'live', e.g. where a government position has yet to finalised and some of the information can be said to relate to decisions which have been taken.

115. With regard to attributing weight to the argument that disclosure of the withheld information would have a chilling effect on the way in which the Prince of Wales and/or government Ministers would correspond, the Commissioner believes that it is difficult to make an assessment of such an argument given the unique nature of this relationship and thus the lack of any clear precedents; e.g. previous disclosures under the Act of similar information.

[OA3] 16. The Commissioner noted that for the purposes of his biography of Prince Charles published in 1994 Mr Jonathan Dimbleby had access not only to Prince Charles's journals and papers but also to correspondence between Prince Charles and government, and that as regards inclusion of such information in the book the author explained:

> I have been persuaded that the verbatim publication of the material might have a deleterious effect either on the conduct of British diplomacy or on the confidential nature of communications between the monarchy and Whitehall or Westminster; in these cases I have either withheld information or paraphrased the relevant documents or correspondence. However, when it was obvious that only the culture of secrecy which pervades Whitehall was under threat and not the conduct of good governance, I have not complied with requests to delete pertinent material.

[OA3] 17. As to the impact of the biography, the Commissioner said at paras 117-118:

117. Therefore, it would clearly be incorrect to argue that details of Prince of Wales' communications with government have never been placed in the public domain. To take but two examples from *The Prince of Wales: A*

> *Biography*, at page 582 Dimbleby quotes from a letter sent by His Royal Highness in 1985 to the then Prime Minister Margaret Thatcher, in addition to quoting from a draft section of the letter which did not make the final version. And at page 809 Dimbleby notes that the Prince of Wales wrote to the then Secretary of State for Defence, Malcolm Rifkind, about the implications of cutting the Army's manpower and quotes from the this letter. Although the quote is not particularly lengthy in nature it clearly shows the Prince of Wales' strong views on this issue. The Commissioner has not been provided with any evidence by the public authority that the inclusion of details of the Prince of Wales' correspondence in this book has resulted in any sort of the chilling effect.
>
> 118. However, the Commissioner accepts that a direct parallel cannot be drawn between the disclosure of the withheld information which is the focus of this case and the previous disclosures such as the biography. To some extent, as Dimbleby himself acknowledges, his book was been 'self-censored': extracts have not been included that would undermine the confidential nature of communications between the monarchy. In contrast, disclosure of the withheld information in this case would be without the consent of the Prince of Wales and would result in complete copies, as opposed to extracts or paraphrased sections, of correspondence being revealed.

[OA3] 18. Turning to the convention about educating the heir to the throne, the Commissioner said at paras 119-120

> 119. Furthermore the Commissioner believes that an inherent part of the convention is the ability of both the heir to the throne and government ministers to be free and frank when discussing matters of government business. This is to ensure that the heir to the throne is instructed in the business of government in the most effective and efficient way possible. In the Commissioner's opinion, disclosure of information falling within the scope of convention would lead the Prince of Wales, and possibly the government minister with whom he corresponds, to feel constrained or more reluctant to take part in the process of being educated about the business of government. Therefore, given the protection which the Commissioner believes should be provided to the convention itself, it follows that notable weight should be given to the argument that disclosure of information which falls within the scope of the convention would result in a chilling effect.
>
> 120. In reaching this conclusion the Commissioner wishes to note that he believes that in the context of section 37(1)(a) the protection afforded to communications **from** government ministers only extends to their contribution to educating the heir to the throne; it would be incorrect to argue that section 37(1)(a) provides a protection for government ministers to discuss more widely matters of policy formulation or development – protection for such information is offered by, and inherent in, the exemption contained at section 35(1)(a) of the Act not in section 37(1)(a).

[OA3] 19. On the chilling effect of disclosure, the Commissioner said at paras 121-123:

> 121. With regard to attributing weight to the chilling effect arguments for correspondence which does not fall within the scope of the convention, the Commissioner does not believe that such arguments automatically attract weight in the way in which correspondence falling within the convention does. Rather, the assessment as to whether a chilling effect will occur will be based upon factors considered in other cases involving an assessment of the chilling effect, most notably the content of the information itself. This because in the Commissioner's opinion in order for a chilling effect argument to be convincing the information which is disclosed has to be more than anodyne in nature otherwise disclosure of such information is unlikely to dissuade individuals from making frank and candid comments in the future. In the circumstances of this case the Commissioner accepts that the correspondence which is not covered by the chilling effect is of a relatively frank and candid nature and thus some weight should be attributed to the argument that disclosure of this information would result in a chilling effect in the way in which the Prince of Wales drafts his correspondence.
>
> 122. Again, as with the concept of political neutrality, the Commissioner accepts that a chilling effect on the nature of correspondence falling within the convention could occur even if the withheld information does fall within the scope of the convention. That is too say, disclosure of information on topics not associated with the business of government, would still be likely to affect future correspondence not simply on similar topics but also on topics falling within the scope of the convention.
>
> 123. However, the Commissioner is not prepared to accept that disclosure of this information would have a chilling effect on the way in which other individuals contact the government. In the Commissioner's opinion it is not logical to suggest that because some of the Prince of Wales' correspondence with government is disclosed, private individuals would fear that their correspondence would also be disclosed. Clearly, if the Prince of Wales' correspondence was disclosed in response to a request submitted under the Act, despite the strong protection afforded to it by sections 41 and 37 (and by implication the effect of the constitutional convention and Article 8 ECHR) it would be obvious that disclosure would be necessary to satisfy a significant and distinct public interest. This interest would almost inevitably be related to the position that His Royal Highness holds rather than simply the content of the information itself. Consequently, the Commissioner believes that the public would be perfectly capable of distinguishing between the government disclosing specific pieces of correspondence with the Prince of Wales (and moreover only disclosing such information after a request under the Act and/or in response to a section 50 Notice) and the potential disclosure of information which they may send to the government in their role as private citizens. Without any evidence to the contrary, and bearing in mind the comments of the Tribunal referenced above, the Commissioner believes that such an argument does not attract any particular weight.

[OA3] 20. As regards "the privacy considerations contained within section 37" the Commissioner noted a clear public interest at paras 124 and 125:

> 124. With regard to the final argument, i.e. the privacy considerations contained within section 37, the Commissioner believes that these should not be dismissed lightly. There is a clear public interest in protecting the dignity of the Royal Family so as to preserve their position and ability to fulfil their constitutional role as a unifying symbol for the nation. To the extent that disclosure of the withheld information would undermine His Royal Highness' dignity by invasion of his privacy, the Commissioner accepts that this adds further weight to maintaining the exemption.
>
> 125. The Commissioner believes that his position in relation to the weight that should be attributed to the public interest arguments in favour of disclosing this information is clearly set out in relation to the comments above in section 41.

[OA3] 21. The Commissioner's conclusions as to section 37 were set out in paragraphs 126 and 127. Here he explained why his view was, both as regards information which in the view of the Commissioner fell within the constitutional convention concerning the heir to the throne, and as regards information which did not, that the refusal to disclose was justified:

> 126. 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 and Ministers can communicate, 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.
>
> 127. 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.

[OA3] B5. Lists and Schedules sought under the Act

[OA3] 22. The Commissioner noted that lists and schedules had been sought by Mr Evans. As regards their disclosure under the Act, the Commissioner said at paragraphs 134 and 135 of the DBIS DN:

> 134. Having considered the arguments advanced by the public authority very carefully the Commissioner has concluded that the list and schedule information in relation to correspondence sent by the Prince of Wales is exempt from disclosure on the basis of section 41(1). The Commissioner accepts that disclosure of this information would constitute an actionable breach of confidence broadly for the reasons the Commissioner has set out above with regard to the application of section 41(1) to the correspondence itself. Although the Commissioner acknowledges that disclosure simply of a list and/or schedule of information would result in less information being placed into the public domain, the Commissioner still believes that this would constitute an infringement of the Prince of Wales' right of privacy under Article 8 ECHR. For the reasons set out above the Commissioner does not believe that there is a sufficient public interest defence to warrant disclosure of this information.
>
> 135. In relation to the application of section 37(1)(a) to the lists and schedules detailing the correspondence sent to the Prince of Wales, the Commissioner also accepts that balance of the public interest favours non-disclosure of such details. In reaching this conclusion the Commissioner again broadly adopts his logic with regard to why the public interest favours maintaining section 37(1)(a) in relation to the correspondence itself. Furthermore, the Commissioner placed some weight on the example provided to him by the public authority where disclosure of some information arguably lead to a negative impact on the Prince of Wales' position of political neutrality. In reaching this conclusion the Commissioner has also placed particular weight on the fact that the time period specified by the complainant in this request is a narrow one, eight months, and the requests seek details of correspondence between the Prince of Wales and Ministers – as opposed to a broader request seeking for example correspondence between any individuals acting on behalf of His Royal Highness and any individual at the public authority.

[OA3] B6. Scope of the Regulations

[OA3] 23. The Commissioner considered that all correspondence which had been produced to him by DEFRA and DCMS constituted environmental information within the meaning of the Regulations. He also considered that some of the correspondence produced to him by NIO, the Cabinet Office, and the DH was environmental information within the meaning of the Regulations. As regards the requests for lists and schedules, however, he concluded that a list or schedule of such correspondence would not itself fall within the definition of environmental information. By contrast, the request for schedules included a request for a description of relevant documents, any description, and in that regard he concluded that any description of the environmental information contained in the document would in itself constitute environmental information.

[OA3] 24. We set out below extracts from the Decision Notice in the case of the DH, which was largely mirrored in other Decision Notices dealing with the Regulations.

[OA3] 25. The Commissioner explained his approach to the scope of the Regulations – i.e. the test for determining whether something constituted "environmental information" – in this way:

> 25. The Commissioner considers that the phrase 'any information… on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor etc in question. In other words, information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
>
> 26. The Commissioner also finds support for this approach in two decisions issued by the Information Tribunal. The first being *The Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth* (EA/2007/0072). In this case the Tribunal found:
>
> > '…that the Decision Notice [in which the Commissioner has concluded that none of the requested information was environmental information] fails to recognise that information on 'energy policy' in respect of 'supply, demand and pricing' will often fall within the definition of 'environmental information' under Regulation 2(1) EIR. In relation to the Disputed Information we find that where there is information relating to energy policy then that information is covered by the definition of environmental information under EIR. Also we find that meetings held to consider 'climate change' are also covered by the definition.' (Tribunal at paragraph 27)
>
> 27. In reaching this conclusion the Tribunal placed weight on two arguments advanced by Friends of the Earth (FoE), the first being that information on energy policy, including the supply, demand and pricing issues, will often affect or be likely to affect the environment and the second that term 'environmental information' should be interpreted broadly:

> '23. Mr Michaels on behalf of FoE contends that policies (sub-para (c)) on 'energy supply, demand and pricing' often will (and are often expressly designed to) affect factors (sub-para (b)) such as energy, waste and emissions which themselves affect, or are likely to affect, elements of the environment (sub-para (a)) including, in particular and directly, the air and atmosphere and indirectly (in respect of climate change) the other elements.
>
> 24. He provides by way of simple and practical example, national policy on supply, demand and pricing of different energy sources (e.g. nuclear, renewable, coal, gas) has potentially major climate change implications and is at the heart of the debate on climate change. Similarly, national policy on land use planning or nuclear power has significant effect on the elements of the environment or on factors (e.g. radiation or waste) affecting those elements.
>
> 25. Mr Michaels further argues that the term 'environmental information' is required to be construed 'very broadly' so as to give effect to the purpose of the Directive. Recognition of the breadth of meaning to be applied has been recognised by the European Court of Justice, by the High Court and by this Tribunal in *Kirkaldie v Information Commissioner & Thanet District Council* EA/2006/001. The breadth is also recognised in the DEFRA guidance 'What is covered by the regulations'. It does not appear, Mr Michaels argues, that the Commissioner has adopted such an approach.'

28. Moreover in reaching this conclusion the Tribunal appeared to reject BERR's arguments that there must be a sufficiently close connection between the information and a probable impact on the environment before it can be said that the information is 'environmental information'.

29. The second Tribunal decision is *Ofcom v Information Commissioner and T-Mobile* (EA/2006/0078) which involved a request for the location, ownership and technical attributes of mobile phone cellular base stations. Ofcom had argued that the names of Mobile Network Operators were not environmental information as they did not constitute information 'about either the state of the elements of the environment… or the factors… that may affect those elements.'

30. The Tribunal disagreed, stating at para 31 that:

> 'The name of a person or organisation responsible for an installation that emits electromagnetic waves falls comfortably within the meaning of the words "any information… on… radiation". In our view it would create unacceptable artificiality to interpret those words as referring to the nature and affect of radiation, but not to its producer. Such an interpretation would also be inconsistent with the purpose of the Directive, as expressed in the first recital, to achieve "… a greater awareness of environmental matters, a free exchange of views [and] more effective participation by the public in environmental decision making…" It is difficult to see how, in

> particular, the public might participate if information on those creating emissions does not fall within the environmental information regime.'

31. The Commissioner has reviewed the withheld information and has concluded that some of the information constitutes environmental information because it falls within the scope of the definition in regulation 2(1) of the EIR. Therefore the information which the Commissioner believes is environmental information must be dealt with under the EIR rather than under the Act. The information that does not fall within the definition in regulation 2(1) must be considered under the Act.

32. However, the Commissioner is not able to explain which sections of the withheld information he considers to be environmental, and why, in the body of this Notice without potentially revealing the content of this information. Therefore the Commissioner has included in the confidential annex, which will be provided to Department of Health but not the complainant, an explanation as to which parts of the withheld information he has concluded is environmental information and why.

33. In reaching this conclusion the Commissioner has taken into account the following arguments advanced by the Department Health to support its position that none of the withheld information constitutes environmental information:

34. Firstly, the Department of Health argued that environmental information for the purposes of the EIR comprises information on the elements, factors and measures etc set out in regulation 2(1). It does not extend to, for example, expressions of public opinion, questions or information which records aspirations covering the subject matter under discussion.

35. Secondly, the Department of Health noted that the European Court of Justice made it clear in the *Glawischnig* case [*Glawischnig v Bundesminister fur Sozaile Sicheheit und Generationen* C-316/01] that the intention of the previous Directive on environmental information was not to give a general and unlimited right of access to all information held which has a connection, however minimal, with one of the specified environmental factors. The Department of Health argued that the judgment remained accurate in relation to the current Directive.

36. In relation to the first point advanced by the Department of Health, in the Commissioner's opinion the key to determining whether information is environmental information for the purposes of the EIR is whether that information can be said to be 'information… on' one of the elements, factors or a measure affecting those elements etc listed in 2(1) – remembering of course the broad interpretation of this phrase. In other words, it is the content of information that determines whether it is environmental information and not the format in which that information is recorded or expressed. For example the Commissioner accepts that a comment in which a particular individual stated 'that climate change was irreversible' will not constitute environmental information because it cannot be sufficiently linked back to

the definition in regulation 2(1). However, a comment attributed to an individual which read 'that climate change was irreversible but I believe that policy X can slow down the effects of change' could be environmental information if policy X could be linked to the definition in regulation 2(1).

37. In relation to the second point advanced by the Department of Health, the Commissioner notes that as the *Glawischnig* case related to the previous Directive in 1990 this decision is not binding in relation to the current Directive. Moreover as the judgment actually notes at paragraph 5 the current Directive 'contains a definition of environmental information which is wider and more detailed' than in the previous Directive. Therefore the Commissioner does not believe that it is necessarily useful to rely on the *Glawischnig* case to interpret how the current Directive and thus the EIR should be interpreted.

[OA3] B7. Adverse effect on the provider's interests

[OA3] 26. As regards environmental information the Commissioner discussed the application of regulation 12(5)(f) by beginning with what he described as "the threshold":

> 153. The Commissioner is conscious that the threshold to engage an exception under regulation 12(5) of the EIR is a high one compared to the threshold needed to engage a prejudice based exemption under the Act:
>
> - Under regulation 12(5) for information to be exempt it is not enough that disclosure of information will have an effect, that effect must be 'adverse'.
> - Refusal to disclose information is only permitted to the extent of that adverse effect – i.e. if an adverse effect would not result from disclosure of part of a particular document or piece of information, then that information should be disclosed.
> - It is necessary for the public authority to show that disclosure 'would' have an adverse effect, not that it may or simply could have an effect. With regard to the interpretation of the phrase 'would' the Commissioner has been influenced by the Tribunal's comments in the case *Hogan v Oxford City Council & Information Commissioner* (EA/2005/0026 & 0030) in which the Tribunal suggested that although it was not necessary for the public authority to prove that prejudice would occur beyond any doubt whatsoever, prejudice must be at least more probable than not … .
>
> 154. Furthermore, the wording of the exception at regulation 12(5)(f) makes it clear that the adverse effect has to be on the person who provided the information rather than the public authority that holds the information.
>
> 155. As with section 41, correspondence sent to the public authority clearly falls within the scope of regulation 12(5)(f) because it was information

'provided' to it by a third party, i.e. The Prince of Wales. Again, as with section 41, the Commissioner accepts that correspondence which the public authority sends to The Prince of Wales can potentially fall within the scope of the regulation 12(5)(f) if it sufficiently closely replicates the content of the information originally provided to it by His Royal Highness.

156. The Commissioner has carefully considered the environmental information which falls within the scope of this request and he is satisfied that it is contained within communications sent to the Department for Health by The Prince of Wales and/or is contained within correspondence sent by the Department of Health to The Prince of Wales and is sufficiently focused on information His Royal Highness originally provided.

157. Before considering the nature of the adverse effect, the Commissioner has considered whether the three limbs of 12(5)(f) are met. With regard to the first limb, the Commissioner accepts that The Prince of Wales was not under any legal obligation to supply the information; although it is an established tradition, and one protected by the convention discussed above, that the heir to the throne will communicate with government Ministers, he is under no legally binding obligation to do so. The Commissioner believes that the second limb will be met where there is no specific statutory power to disclose the information in question. It is clear that there is no such power in this case and thus the second limb is met. Finally, with regard to the third limb the Commissioner understands that The Prince of Wales has not consented to disclosure of the withheld information.

158. The nature of the adverse effect which the Department of Health has argued would occur if the withheld information was disclosed effectively mirrors that discussed above in relation to the application of sections 41 and 37. In essence, if the information were disclosed this would adversely harm The Prince of Wales because not only would it undermine his political neutrality but it would also have a chilling effect on the way in which he corresponds with government Ministers and thus impinge upon the established convention that he is able to confidentially correspond with government Ministers. Moreover, disclosure would impinge upon The Prince of Wales' privacy. For the reasons set about above the Commissioner accepts that disclosure of the withheld information could potentially have these effects.

159. In relation to the likelihood of such effects occurring, the Commissioner believes that the higher threshold of 'would occur' is met. This is because there a number of ways in which the adverse effect could manifest itself: it could be to his privacy, dignity, political neutrality and/or the practical way in which he actually corresponds with government Ministers. Furthermore, it is clear that The Prince of Wales communicates with Ministers across government, rather than simply to one or two departments, thus the likelihood of the adverse effect occurring is increased.

160. The Commissioner therefore accepts that regulation 12(5)(f) is engaged. However all exceptions contained within the EIR are qualified and therefore the Commissioner must consider the public interest test set out a regulation

> 12(1)(b). This test is effectively the same as the test set out in section 2 of the Act and states that information may only be withheld if the public interest in maintaining the exception outweighs the public interest in disclosing the information and regulation 12(2) states explicitly that a public authority must apply a presumption in favour of disclosure.
>
> 161. In the Commissioner's opinion the public interest arguments in favour of maintaining regulation 12(5)(f) in this case are very similar to the public interest arguments in favour of maintaining section 37(1)(a). The public interest arguments in favour of disclosing the information are also very similar. Therefore the Commissioner does not … set out in full his public interest considerations in respect of 12(5)(f). Rather he is satisfied that, for the reasons set out above, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exception contained at regulation 12(5)(f).

[OA3] B8. Personal data

[OA3] 27. As regards environmental information which did not fall within regulation 12(5)(f), the Commissioner turned to consider the prohibition in regulation 13:

> 163. The elements of regulation 13 relevant to this request are as follows:
>
> > '13(2) The first condition is –
> >
> > > in a case where the information falls within any paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –
> > >
> > > (i) any of the data protection principles'
>
> 164. Section 1(1) of the Data Protection Act 1998 (DPA) defines personal data as:
>
> > 'data which relate to a living individual who can be identified –
> >
> > > (a) from those data, or
> > >
> > > (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
> >
> > and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'
>
> 165. The Department of Health has argued that the withheld information constitutes The Prince of Wales' personal data because it sets out his opinions and views on the various matters discussed in the correspondence.

166. The Commissioner has reviewed remaining withheld information and accepts that it falls within the definition of personal data as defined by the DPA for the reason set out above.

167. The Department of Health has also argued that disclosure of this information would breach the first data protection principle which states that:

1. Personal data must be processed fairly and lawfully; and

2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

168. The Department of Health has argued that disclosure would breach the first data protection principle for reasons which overlap and buttress the reasoning why the withheld information is exempt from disclosure on the basis of section 37(1)(a). Disclosure would be unfair because:

- The parties exchanged the correspondence with the clear expectation that the contents would not be disclosed;

- For information of a particularly personal nature, this would infringe The Prince of Wales' right to private life under Article 8 ECHR; and

- More widely, disclosure would harm The Prince of Wales' ability to carry out his public duties and detract from His Royal Highness' political neutrality and the appearance of such neutrality.

169. In assessing whether disclosure of personal data would be unfair the Commissioner takes into account a range of factors including:

- The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:

    - Whether information of the nature requested is already in the public domain;

    - If so the source of such a disclosure; and

    - Even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:

    - What the public authority may have told them about what would happen to their personal data;

    - Their general expectations of privacy, including the effect of Article 8 ECHR;

- The nature or content of the information itself;
- The circumstances in which the personal data was obtained;
- Particular circumstances of the case, e.g. established custom or practice within the public authority; and
- Whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.

170. With regard to the reasonable expectations of The Prince of Wales, as discussed above in relation to section 41(1)(b), the Commissioner accepts that the correspondence which is the focus of this case was clearly exchanged on the basis that all parties believed that it should be kept private. Both the operation of the convention to educate the heir to the throne and general way in which correspondence between the Royal Family and government has been historically handled give rise to this expectation. Given the respect and recognition that the Commissioner has accepted should be attributed to this constitutional convention, he believes that the expectations of the Prince of Wales when shaped by the convention are ones that are objectively reasonable. That is to say, the Department of Health has not created an unrealistic or unreasonable expectation under which The Prince of Wales may assume his personal data will not be disclosed.

171. With regard to the consequences of disclosure, the Commissioner accepts that disclosure of the correspondence has the potential to harm The Prince of Wales in a more than one way. It could impact on The Prince of Wales's position of political neutrality and thus his ability to carry out his public duties both as heir to the throne and when he becomes Monarch. Furthermore, it could harm The Prince of Wales' privacy and dignity as protected by Article 8 ECHR.

172. Consequently, in light of the weighty expectations and the likely impact on The Prince of Wales if the correspondence were disclosed, the Commissioner accepts that such a disclosure would be unfair and therefore the Commissioner is satisfied that the Department of Health can rely on regulation 13(1) to withhold the remaining environmental information which is not exempt under regulation 12(5)(f).

[OA3] B9. Lists and Schedules under the Regulations

[OA3] 28. As explained in section B6 above the Commissioner's decision notices proceeded on the basis that lists and schedules did not in themselves fall within the Regulations. In each case the decision notice explained the Commissioner's conclusion that lists and schedules were exempt from disclosure under the Act (see section B5 above). In those cases where some or all of the disputed correspondence constituted environmental information he went on to consider the impact of the Regulations:

181. The Commissioner notes that with regard to the part of the schedule requested by the complainant which would include a brief description of each document, if the documents contained environmental information, as some of

> the correspondence in this case does, any description of the environmental information contained within the documents would in itself constitute environmental information. However, the Commissioner believes that those parts of such a schedule would be exempt from disclosure either on the basis of regulation 12(5)(f) or regulation 13(1) for the reasons set out above.

[OA3] C. The Appeals and the Legislation

[OA3] 29. No supplemental material is required on this section.

[OA3] D. Our task, and how we go about it

[OA3] 30. No supplemental material is required on this section.

[OA3] E. The Act, the Regulations and the decisions

[OA3] 31. No supplemental material is required on this section.

[OA3] F. The date at which the position must be tested

[OA3] 32. We quote in this section of the main judgment what was said at paragraph 10 of the Departments' initial skeleton argument. We add here that this was in response to paragraphs 104 and 105 of the initial skeleton argument for Mr Evans:

> 104. … The public interest balance is a matter for the Tribunal, under the Act as presently applicable. It could not conceivably be right to allow its application to be influenced or dictated by a provision of a fundamentally different character which is not the law and, if anything, serves to emphasise a contrast with what is the law. Nor in any event can the view of Parliament, in removing for the future a public interest balance from those who apply the FOIA, be equated with the true ambit of a constitutional convention. In the context of a qualified exemption, the Commissioner correctly held s.37(1)(a) to be tailored in its proper application to the scope of the relevant constitutional convention … . Indeed, if the constitutional principle were so clear, protective and all-encompassing, it could be left to the Tribunal faithfully to apply it. In fact, it is a convention limited in scope and part of an overall balance.
>
> 105. … The Tribunal applies the Act, as it is in force. In asking the question whether Parliament see fit to provide an absolute exemption, there is only one answer: no, it has not. An absolute exemption is indeed a powerful answer against disclosure. But the Tribunal is applying no such thing. Statutory amendments, and their implementation dates, exist for a reason: to change the law from the date that they are in force; not before.

[OA3] 33. The main judgment deals briefly with the occasion when we referred to what we called for each of the Departments its "final response." This was at the start of the hearing on 14 January 2011. We explained what we meant by "final response" in this way:

> … the Information Commissioner here started with a response from the department which refused to confirm or deny. But subsequently, there was what we might call a "final response" by the public authority to Mr Evans. As regards the Department of Health, that final response was in March 2009. As regards DEFRA, it was on 23 April 2009, and without having checked them, we believe that there were dates around that period as regards the other public authorities.

[OA3] 34. We then formulated 5 questions for the parties, which in summary were as follows:

> (1) As regards the Commissioner's function of deciding whether the public authority has failed to communicate information where required to do so, does anyone contend that the IC could or should take account of any circumstance arising after the public authority's final response?
>
> (2) If the Commissioner were to exercise a discretion under section 50(4), does any party suggest that there is any circumstance arising after the public authority's final response relevant to that discretion?
>
> (3) In deciding whether or not the Commissioner's decision notices are or are not in accordance with the law, does any party suggest that there is any circumstance arising after the public authority's final response relevant to our task?
>
> (4) Do the parties agree that if the tribunal concluded that there had been a failure, having regard to circumstances at the time of the final response, to comply with the requirements of Section 1(1), then the tribunal would have to consider what steps ought to be substituted in a relevant decision notice, and within what time?
>
> (5) Does any party suggest that there is any circumstance arising after the public authority's final response, relevant to that task?

[OA3] 35. At the conclusion of the hearing Mr Pitt-Payne gave answers to the 5 questions, with which the other parties concurred. The answers were (1) no, (2), no, (3), no, (4), yes, (5), no.

[OA3] 36. Mr Fordham then drew the tribunal's attention to the line of authority which recognises that in some circumstances it is permissible to have regard to later-occurring matters if they cast light on the balance of public interest at the time when the question fell to be decided.

[OA3] 37. We indicated that we understood it to be agreed that the fact that Parliament changed the law in 2010 is not a matter which has relevance to any of the questions which arise in this case. Mr Fordham made it clear that this was, indeed Mr Evans's position. No dissent was indicated by Mr Pitt-Payne for the Commissioner. Mr Swift for the Departments said this:

> … the authority that Mr Fordham cited in reply is spot on. It is the *BERR* decision … [where] Mr Pitt-Payne's submission in that case accepted that you could take into account matters that came to light later, after the date of the request, if they cast light on the balance of public interest at the time the

question fell to be decided. And that is precisely the principle we pray in aid at paragraph 10 … of our opening skeleton argument.

[OA3] 38. Mr Fordham responded:

> Well, if Parliament has made the choice that the new provision does not bite on a pipeline case, then it cannot be right to invoke that principle to seek to elevate in effect into an absolute exemption something which is deliberately a qualified one.

[OA3] G. Constitutional conventions

[OA3] 39. This section of our main judgment refers to evidence from Professor Tomkins and Professor Brazier. Here we summarise the main points of the evidence of each of these witnesses.

[OA3] Professor Adam Tomkins[1]

[OA3] 40. Adam Tomkins holds the Chair of Public Law in the School of Law at the University of Glasgow. His area of expertise is the constitutional law of the United Kingdom. Professor Tomkins has written and lectured widely on the subject. Since 2009 he has been legal adviser to the House of Lords Select Committee on the Constitution.

[OA3] 41. Professor Tomkins explained that a leading source on the contemporary constitutional law and practice as regards the monarchy is Vernon Bogdanor, *The Monarchy and the Constitution*[2]. Chapter 3 is entitled "The Basic Constitutional Rules: Influence and Prerogative". In this chapter Professor Bogdanor makes three important points, which are relevant to this appeal.

[OA3] 42. First, he writes at page 62 that "It is easier for a head of state to fulfill [a] 'dignified' function if the 'efficient' functions are located elsewhere, for any exercise of the efficient functions is almost bound to be controversial. Thus, when he or she exercises the 'efficient' functions, the head of state will cease to be able to represent all of the people; he or she will be representing only the particular cross-section who agree with his or her activities." In making this remark, Professor Tomkins explained that Professor Bogdanor is relying on the famous distinction between the dignified and the efficient elements of the constitution which Walter Bagehot made in *The English Constitution* (1867). It is axiomatic that as a matter of the contemporary constitution, the monarchy falls on the dignified side of the line. While it continues to be the case that great legal and constitutional powers are vested in the Crown, it has been clear since at least Bagehot's era (and in some cases for far longer than that) that the exercise of these powers falls largely to ministers. This is because ministers are responsible to Parliament, whereas Her Majesty is not. Moreover, even in respect of those few prerogative powers whose exercise remains a matter for the Queen (rather than for ministers) it is clear that the Queen must act only and always on ministerial advice (dissolving Parliament and granting Royal Assent to legislation are good examples). In this respect, what goes for the Crown goes for

[1] Witness statement dated 23/07/10 bundle 3 pp 12 – 25.

[2] Oxford University Press, 1995; Professor Bogdanor is Professor of Government at the University of Oxford.

the heir to the Crown: the monarchy belongs firmly on the dignified side of the dignified/efficient line. Professor Tomkins considers that persistent trespassing onto the efficient side of the line would be *prima facie* unconstitutional; and there must be (at the least) a very strong presumption that it is in the public interest for unconstitutional behaviour not to be covered up.

[OA3] 43. Secondly, writing specifically of the monarch, Bogdanor states (at page 67) that there is a constitutional requirement that "any private comments are made discreetly and cautiously so that relations with ministers are not compromised". He adds: "This applies also to other members of the royal family …". Professor Bogdanor cites as an example Lloyd George's view that, because of comments he had made as Prince of Wales, King George V "had the reputation of being very Tory in his views".[3] While his subsequent behaviour as king was entirely correct, in Bogdanor's judgment this did not efface the impression left by his earlier remarks as Prince of Wales. To quote from Lloyd George again: "In those days he was frank to the point of indiscretion in his talk, and his sayings were repeated in wider circles. There is no use concealing the fact that they gave offence to Liberals and his succession to the throne for that reason was viewed with some misgivings".[4] These misgivings were such that the Prime Minister (Asquith) "did not … trust the King to do his constitutional duty" .[5] As king, George V evidently greatly regretted some of the things he had said as Prince of Wales: "it was a damned stupid thing to say" his biographer records him as having said of one such remark. [6]

[OA3] 44. Thirdly, Professor Bogdanor cites (at page 71) Sir William Heseltine's letter to the *Times*, of 28 July 1986 (when Sir William was the Queen's Private Secretary). Three propositions were contained in this famous and important letter: that the Queen enjoys the right, indeed the duty, to express her opinions on government policy to the Prime Minister; that the Queen must always act on ministerial advice; and that communications between the Queen and the Prime Minister are entirely confidential. Professor Bogdanor's analysis of this is noteworthy: "It is important to notice that the Sovereign's right to express his or her opinions on Government policy, Sir William's first proposition, *entails* his third proposition, that communications between the Prime Minister and the Sovereign remain confidential. <u>The Sovereign, therefore, is not entitled to make it known that he or she holds different views on some matter of public policy from those of the Government. It is a fundamental condition of royal influence that it remains private. It follows, therefore, that the Sovereign must observe a strict neutrality in public, and great discretion in private conversation</u>" (Professor Tomkins added the emphasis).

[OA3] 45. In cross-examination Professor Tomkins accepted that Professor Brazier's tripartite convention expressed more simply what Professors Bogdanor and Bagehot had been saying, namely that the sovereign had the right to be consulted principally by her Prime Minister and she had the right to encourage and warn him in private and in circumstances of confidentiality both on matters of substance and lesser matters some of which might involve government policy and be politically controversial. The reason for

[3] *News Chronicle*, 22 Jan. 1936

[4] *News Chronicle*, 22 Jan. 1936

[5] Bogdanor, page 70

[6] Bodganor, page 70

confidentiality is so that the sovereign is dissociated from ventilating such matters in the public sphere. As he said in cross-examination " It's a constitutional imperative, it seems to me, that the constitutional position of the monarchy is not jeopardised by the appearance of an engagement by Her Majesty in matters of controversy and public policy."[7]

[OA3] 46. He accepted that the tripartite convention might not be restricted to communications between the Prime Minister and the sovereign but to communications between other cabinet ministers and the sovereign.

[OA3] 47. Professor Tomkins then explained that Professor Bogdanor goes on to make the familiar but nonetheless extremely important point that, with regard to the present Queen, we know *nothing* of her relations with any of the eleven Prime Ministers who have served under her, and we know *nothing* of any influence which she may have had over any aspect of Government policy. In cross-examination he further clarified the position "of the Queen, as I understand it, is that she must be seen to be -- she must be understood to be ………. 'above the fray', and above the fray doesn't mean only above the fray of what happens to be an issue between the political parties for the time being, but it means something much more -- much broader than that, which is to say above public policy".[8] He pointed out that with the current sovereign we do not know anything about her policy preferences with regard to any matter of public policy, except perhaps her statements in support of the Commonwealth.

[OA3] 48. Professor Tomkins then contends that the contrast with Prince Charles could hardly be greater. He says that it is thoroughly documented in both the press cuttings and the extracts from the Dimbleby biography assembled in the appellant's bundle, since as long ago as the early 1970s, and throughout the period since then, that Prince Charles has aired in public his opinions on a wide range of matters of public policy, often using forthright language. Professor Tomkins continues that the matters of public policy on which Prince Charles has gone public include: the perceived merits of holistic medicine, the perceived evils of genetically modified crops, the apparent dangers of making cuts in the armed forces, his strong dislike of certain forms of modern architecture (leading him to make high profile interventions in a number of contested planning developments), a range of issues relating to agricultural policy, as well as other matters. He gives examples from the Dimbleby biography where there is reproduction in full Prince Charles's correspondence with ministers on such matters.[9] Professor Tomkins considers that such quotations and reproductions were sanctioned by Prince Charles himself: as Professor Brazier writes, "we are entitled to take the factual information given in that book as authoritative, because the Prince co-operated fully in its production … and provided access to his diaries and correspondence …; he also checked the [manuscript] for factual accuracy".[10] However Professor Tomkins was not clear whether the relevant ministers were asked whether they objected to the correspondence being quoted from or reproduced.

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[7] This did not mean she could not speak publically on any matters as is demonstrated by the annual Christmas message to the Commonwealth where she might speak on natural disasters, but this is extremely rare.

[8] Transcript 15/09/10 page 20.

[9] Exhibit 2 e.g., pp. 370-1, p. 431, p. 434, pp. 520-1, as well as many other instances.

[10] R. Brazier, "The Constitutional Position of the Prince of Wales" [1995] *Public Law* 401, at 403, n. 12) (see Exhibit 3.

[OA3] 49. Professor Tomkins then contends that it is incredibly important to note that the obligation of confidentiality pertains because of the need, and to the extent necessary, to maintain our ignorance of the Queen's political views, and not the other way around. The purpose of the confidentiality is not to *create* an *appearance* of political neutrality: rather, it is to *preserve* the *reality* of political neutrality. He says you cannot preserve the reality of something that does not exist. If the Queen's political neutrality were to be voluntarily surrendered by Her Majesty, then the purpose of the confidentiality would be lost, and any constitutional obligation to maintain confidentiality would fall away. He then says the same applies to Prince Charles.

[OA3] 50. In cross-examination he clarified what he meant by "political neutrality" as not being publicly identified with a particular policy position.[11] So that if the Queen expressed a view critical of government policy in private which remained confidential that would not compromise her political neutrality. The same could apply to Prince Charles. So his understanding of the constitutional position is largely based on the proposition that Prince Charles has, in effect, voluntarily surrendered political neutrality by his conduct, although he admits that the understanding of the apprenticeship convention is not as clear or as well established as the tripartite convention.[12]

[OA3] 51. In re-examination Prof Tomkins considered that if the Queen had made public pronouncements on the sort of subjects that Prince Charles has already made, then she would have lost her political neutrality.[13]

[OA3] 52. Professor Tomkins explains that none of this is set out in law: the relevant rules are constitutional conventions. Unlike constitutional laws (whether deriving from statute or case law), constitutional conventions exist only where there is a good constitutional reason for the rule. Absent such a reason, even a long-standing practice that is generally accepted and followed by constitutional actors will not qualify as a constitutional convention. This proposition was argued by Sir Ivor Jennings in his book *The Law and the Constitution.*[14] Professor Tomkins considers that Jennings is absolutely correct, as has been recognised by constitutional lawyers for nearly 80 years now.

[OA3] 53. Professor Tomkins goes on to explain that the reason for attaching constitutional obligations of confidence to correspondence between ministers and members of the Royal Family is to preserve the latter's political neutrality. If that political neutrality has already been surrendered, as he maintains is the case with regard to Prince Charles, the "good constitutional reason" for the rule disappears. He therefore concludes that in the case of Prince Charles – wholly unlike in the case of the Queen – there can be no grounds in constitutional convention for insisting that his correspondence with ministers must remain confidential. However, in cross-examination, he explained that confidentiality could still be maintained on a non-constitutional basis, for example under the law of confidence.[15]

[11] Transcript 15/09/10 page 95.

[12] Ibid 102.

[13] Ibid 110.

[14] First published in 1933; 5th edn 1959.

[15] Transcript 15/09/10 page 65.

[OA3] 54. Professor Tomkins continues that there is a good constitutional reason that the contrary position should be adopted. It is clear from a range of sources that Prince Charles's correspondence with ministers is a form of lobbying. He says this is clear not only from the Dimbleby biography of Prince Charles and from numerous of the press cuttings included in the appellant's bundle, but also from such legal sources as the judgment of High Court in *CPC Group Ltd v. Qatari Diar Real Estate Investment Co.* [2010] EWHC 1535 (Ch). In this case Prince Charles made clear to one of the parties his disapproval of the plans as to the redevelopment of the Chelsea Barracks site in London; – he lobbied to have the plans substantially changed; the plans were changed and a substantial amount of money was lost; the judge (Vos J.) described the intervention of Prince Charles as "no doubt, unexpected and unwelcome".[16] Professor Tomkins contends that whether it was these things or not, it was clearly lobbying. As the House of Commons Select Committee on Public Administration ("PASC") observed in its recent report on lobbying, "lobbying has become a much maligned term".[17] Professor Tomkins considers this is unfortunate, as (again quoting from the PASC report), "lobbying should be – and often is – a force for good".[18] In PASC's view, lobbying has become a maligned term in large part because of the secrecy in which it is shrouded. Reform, PASC concluded, was "necessary". In particular, "measures are needed … to ensure that the process of lobbying takes place in as public a way as possible, subject to the maximum reasonable degree of transparency".[19] Such a conclusion is consistent with the *Principles of Public Life* as first set out by the (Nolan) Committee on Standards in Public Life in 1995.[20] Two of the seven principles are accountability ("holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office") and openness ("holders of public office should be as open as possible about all the decisions and actions that they take; they should give reasons for their decisions and restrict information only when the wider public interest clearly demands"). Professor Tomkins surmises that it is the framework of analysis set out by PASC and by the *Principles of Public Life* which should inform determination of the constitutionally appropriate bounds of confidentiality in this appeal.

[OA3] 55. In cross examination Professor Tomkins further explained that "lobbying -- it's not part of the constitutional function of the monarchy to engage in lobbying. What do I mean by lobbying? What I mean by lobbying is much broader actually -- I have read Mr Swift's skeleton argument, and in Mr Swift's skeleton argument he asserts that lobbying generally means pursuing one's own interests. That's not at all what I mean by lobbying. What I mean by lobbying is pursuing on one's own initiative an agenda of some sort which may very well not be in one's own interests. You know, the sort of thing that campaign groups and lobby groups do, organisations like Liberty and Justice and Amnesty International aren't engaged in pursuing their own advantage; they are engaged in the activity of pursuing a political goal. There's no -- that is not the constitutional function of

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[16] At [124].

[17] PASC, *Lobbying: Access and Influence in Whitehall*, First Report for 2008-09, HC 36, January 2009, para. 2, Exhibit 5.

[18] ibid., page 3.

[19] ibid., para. 144.

[20] Exhibit 6.

the monarchy. The constitutional function of the monarchy is to advise and to warn, not to lobby. So my understanding of how that constitutional matrix would apply to the facts of this case, as I understand them, is that correspondence which can be said to be advising or warning, there is an argument there that such correspondence might have been caught by the constitutional convention, were it not for the fact that, in my view, Prince Charles, through his own actions, has already surrendered his political neutrality, and we have talked about that. But correspondence which goes beyond advising and warning, and which, as it were, trespasses into the domain of lobbying, is not caught by the apprenticeship convention because the apprenticeship convention speaks to the tripartite convention and it's not part of the constitutional function of the Crown to engage in campaigns of lobbying or crusading for certain outcomes of public policy to be changed."[21]

[OA3] 56. Professor Tomkins informed us that Sir Ivor Jennings additionally argued that the longer the precedents the more likely it would be that a general practice may qualify as a constitutional convention. He therefore contends that Prince Charles's practice of corresponding regularly with ministers is an "innovation" – something he has assumed rather than inherited which is recognized by Professor Brazier in his article "The Constitutional Position of the Prince of Wales" [1995] *Public Law* 401, at 402-3.[22]

[OA3] 57. In cross-examination he further considered that if non-constitutional activity took place there may come a time when the fitness for office of the heir to the throne may come under scrutiny and that Parliament had the legal power to deal with the accession under the Act of Settlement.[23]

[OA3] 58. Professor Tomkins strongly disagrees with Professor Brazier's article where he argues that "it is time to recognise as a constitutional convention the Prince of Wales's rights to obtain information from ministers, to comment on their policies, and to urge other policies on them [and that] such communications will be carried out in strict confidence".[24] Professor Brazier claims that "Jennings's test for the existence of a convention is satisfied" (at 405) but, Professor Tomkins disagrees because, firstly as Professor Brazier himself concedes, Prince Charles's practice of corresponding regularly with ministers is a new development and is not a particularly longstanding feature of British government. Secondly, the "good constitutional reason" which Jennings stated to be a necessary component of a constitutional convention is, for the reasons already explained, absent in the case of Prince Charles.

[OA3] 59. In cross examination Professor Tomkins' summary of Jennings and what constitutes a constitutional convention was challenged. He explained the "distinction between constitutional law and constitutional convention, and both constitutional laws and constitutional conventions are part of the United Kingdom constitution. They are rules,

[21] Ibid page 117.

[22] See, to the same effect, Jonathan Dimbleby's biography: "the Prince was not to be diverted from using the authority of his position to speak out across a range of public issues – <u>to an extent that none of his predecessors had even contemplated</u> …" (page 327, emphasis added by Professor Tomkins) (Exhibit 2).

[23] Transcript 15/09/10 page 52.

[24] ibid., at 404.

either legal or conventional rules, of the United Kingdom constitution. There is a distinction between constitutional conventions, which are part of the United Kingdom constitution, and mere habits or traditions or usages or customs, which are things which happen, and things which happen which may even speak to the constitution but which are not binding rules of constitutional behaviour. Constitutional conventions, as I understand them, are binding rules of constitutional behaviour, like constitutional laws are, albeit that they have different sources and different consequences upon breach." He continues "the first distinction, that is to say between constitutional laws and constitutional conventions, is much easier to draw, much easier to identify than the second convention. The second convention -- that is to say the second distinction, the distinction between constitutional conventions which are binding rules of constitutional behaviour and mere habits, traditions, customs or usages, which may speak to the constitution but aren't binding rules of constitution, that's a very difficult line to draw and that's what Jennings, I think, is sketching here, but it's just a sketch. But one of the useful criteria that can be brought into play in order to make this distinction -- and it's a very, very important distinction to make because it's through this distinction that you know whether behaviour is unconstitutional or merely non-constitutional, i.e. contrary to the constitution or irrelevant to the constitution. There's a very important distinction to make and one of the, it seems to me, most useful criteria that you can bring into play, in order to make that distinction, is to ask this question: is there a good constitutional reason for the rule?"

[OA3] 60. Professor Tomkins then argues that these considerations lead him to the following conclusions.

(1) The constitutional convention that Prince Charles should be educated in and about the business of Government in order to prepare him for the time when he will be sovereign must be understood in the context of the considerations already explained. In particular, it should be understood that his future role as sovereign and his current role as heir alike are dignified roles in the United Kingdom constitution, rather than efficient roles. Even if one would not want to go so far as to say that any trespassing by Prince Charles into the efficient domain of the constitution would be an abuse of his position, there is no sound authority for the proposition that constitutional convention could be relied upon (or extended) to protect or justify such behaviour. Professor Tomkins maintains that the following considerations follow:

(2) Any confidentiality that attaches to Prince Charles's correspondence with ministers is a means to an end, and is not an end in its own right. That is to say, it attaches if and insofar (and *only* if and insofar) as it is necessary in order to preserve Prince Charles's dignified position in the constitution. It must be borne in mind that letter-writing is far from Prince Charles's only means of access with regard to ministers. The Dimbleby biography makes it clear, for example, that Prince Charles meets ministers both formally and informally on numerous occasions every year.[25] There is no shortage of means whereby ministers (or officials) may confidentially educate Prince Charles in the business of Government. In this sense, the disclosure of Prince Charles's correspondence with ministers would entail no risk at all to a constitutional convention that Prince Charles have sufficient opportunity to be educated in the business of Government. He adds that, reading the Dimbleby biography, one does not even remotely get the sense that Prince Charles enters into political

[25] e.g., p. 356; p. 433 Exhibit 2.

correspondence with ministers because he is seeking to educate himself in (or is seeking to be educated in) the business of Government. Rather, one is strongly encouraged by the author to believe that Prince Charles enters into such correspondence because he is seeking to raise or pursue matters which concern him personally.

(3) Given that Prince Charles introduced and did not inherit his habit of corresponding with ministers it cannot be the case that constitutional convention requires him to have exchanges with ministers on matters of political controversy.

(4) If and insofar as Prince Charles possesses a right to engage in lobbying the Government (i.e. pressing particular views on policy/advocating particular causes), constitutional convention does not require ministers to heed or respond to such lobbying in a manner any different from lobbying engaged in by MPs or members of the public.

(5) Lobbying by Prince Charles should accord with the *Principles of Public Life* and with the framework for ethical lobbying as set out in the 2009 report of the House of Commons Select Committee on Public Administration.

(6) It is a constitutional requirement of the first importance that the monarchy be politically neutral. Her Majesty the Queen has complied with this requirement throughout her reign. The requirement extends not only to the reigning monarch but also to those in the immediate line of succession – above all, in that regard, to the heir. It is absolutely clear from the press cuttings, from the extracts from the Dimbleby biography, and from the other materials assembled in the appellant's bundle that Prince Charles has failed to comply with the requirement that the monarchy be politically neutral. In Professor Tomkins' judgment it would not necessarily have been inconsistent with the requirement of political neutrality for Prince Charles to correspond with ministers on issues of political controversy but, in order to do so compatibly with the constitutional requirement of political neutrality, he would have had to have kept his views on such matters entirely out of the public arena. Professor Tomkins contends that given that he has manifestly failed to do this and, indeed, that he has on numerous occasions and with regard to a variety of policy issues gone considerably out of his way deliberately to draw the public's attention to his political views, there is no sound reason in constitutional convention as to why his political correspondence with ministers should remain confidential. He recalls in this regard Professor Bogdanor's observation that even "private comments are [to be] made discreetly and cautiously so that relations with ministers are not compromised". Professor Tomkins is of the view that discretion and caution have not been Prince Charles's watchwords. On the contrary, he has been strident and outspoken.

[OA3] 61. For these reasons, Professor Tomkins could not agree with the comment, attributed to an unnamed Palace spokesman that: "It's part of the Royal Family's role to highlight excellence, express commiseration, and draw attention to issues on behalf of us all. The Prince of Wales takes an active interest in all aspects of British life and believes that as well as celebrating success, part of his role must be to highlight problems and represent views in danger of not being heard. But this role can only be fulfilled properly if

complete confidentiality can be maintained".[26] He considers the comment to be altogether too sweeping and required to be substantially qualified. It may very well be part of the social or cultural role of the Royal Family "to highlight excellence, express commiseration, and draw attention to issues on behalf of us all" when the context of the excellence, commiseration or issues is non-political. But when matters of public policy are in play, it is the constitutional duty of the monarchy to preserve its political neutrality.

[OA3] 62. Professor Tomkins's clear view is that disclosure of the correspondence sought in this appeal would not undermine constitutional convention. On the contrary, such disclosure would promote good governance, constitutional propriety and a more fully informed debate on constitutional matters, each and all of which are strongly in the public interest.

[OA3] 63. Professor Tomkins concludes that applying his constitutional analysis it is evident that the Information Commissioner made a number of errors in upholding the decisions of the public authorities that the correspondence subject to the appellant's freedom of information requests was exempt from disclosure under the Freedom of Information Act 2000. See, for example, the conclusion reached by the Information Commissioner at para. 66 of Decision Notice FS50080233: "the Commissioner accepts that the constitutional convention which provides that the Heir to the Throne should be educated in the ways and workings of Government means that both Prince Charles and those he corresponded with will have had an explicit (and weighty) expectation that such communications would be confidential". Prince Charles's own behaviour in sanctioning the extensive quotations from and reproductions of his correspondence with ministers contained in the Dimbleby biography undermines this finding. Moreover, the Commissioner overstates the extent of the constitutional convention. He wrongly assumes that withholding the information requested by the appellant is necessary in order to protect the convention (whereas there are in fact many other ways by which the convention could be protected even in the event of disclosure). The Commissioner also (and fatally) overlooks to place the convention pertaining to the confidentiality of Prince Charles's correspondence in the all important constitutional context of its purpose: namely, that it is designed to preserve the monarchy's political neutrality. Once that neutrality ceases to exist (as has long since been the case with regard to Prince Charles) the constitutional obligation as to confidentiality falls away. Constitutional conventions are not free-standing; they are dependent on there being a good constitutional reason justifying them. Absent such a reason and the rule alleged to be a constitutional convention is not a constitutional convention.

[OA3] 64. In cross examination Professor Tomkins accepted that Prince Charles's education under the "Apprenticeship Convention" should be such that the heir is fully prepared to take up the responsibilities of the sovereign whenever he might be required to do so and that although there is no constitutional authority for what the education amounts to "we may assume it entails preparation, full preparation, for the range of constitutional functions which the Sovereign performs which include those under the tripartite convention".[27] This can involve letter writing and meetings but not necessarily on a daily basis or continuously through a long period of time.

[26] *Mail Online*, 25 September 2002 (see Exhibit 7).

[27] Transcript 15/09/10 page 36.

[OA3] 65. He also said "I am not aware of any constitutional authority that explains authoritatively what the education amounts to, but I think, however, for the purposes of pursuing the argument, that we may assume, at the least, that the apprenticeship convention entails preparation, full preparation, for the range of constitutional functions which the Sovereign performs which include those under the tripartite convention."[28]

[OA3] 66. In respect of the scope of the Apprenticeship Convention in cross-examination Professor Tomkins accepted the proposition of the Information Commissioner in his Decision Notices that the Apprenticeship Convention only applied to a constitutional subject matter and not for example charitable work or personal matters.[29]

[OA3] 67. Also in respect of how the Apprenticeship Convention works in cross examination he said "A minister would not be acting unconstitutionally if, on receipt of such letter, the minister didn't respond to it or just didn't deal with it. There's no constitutional obligation on any minister to correspond with the Prince of Wales on any matter, so far as I'm aware, beyond, you know, the pretty basic level of the apprenticeship convention." [30]

[OA3] 68. In cross examination in relation to the fact Prince Charles had been heir to the throne for many years he said "It's not clear that the education would constitutionally be required to be continuing throughout a long period of time. After all, the present Queen, who has exercised her constitutional responsibilities to perfection, had nothing like that length of training or preparation.[31]

[OA3] 69. In relation to what amounts to a constitutional convention Professor Tomkins in cross-examination said "there are two tests for the existence of constitutional convention which enjoy considerable support. Sir Ivor Jennings suggested, in summary, the constitutional convention existed if: (i) there are precedents underpinning it; (ii) the parties to the relevant practice consider themselves to be bound by it and (iii) there is a reason for the existence of the convention. Other writers have said that a convention is a non-legal rule for constitutional behaviour which has been consistently accepted by those affected by it as binding on them but which is not enforceable in the courts."

[OA3] 70. In relation to the royal conventions Professor Tomkins in cross examination said "I think it is helpful to see these conventions (Tripartite, Cardinal and Apprenticeship) as a hierarchy and I think it is Professor Brazier who uses the phrase "cardinal convention" to describe -- or the label for the convention that the Crown must act always and only on ministerial advice, subject to a very small number of well-defined and well-known exceptions, such as the Order of Merit, for example, which is the Queen's personal gift rather than on ministerial advice. If we start with that convention, I think that is the appropriate place to start, because the other conventions are, as it were, underneath that and speak to it. So what I mean by that is that, yes, the sovereign has the constitutional right and duty to be consulted, to advise and to warn, but subject to the overriding constitutional obligation that she must act always and only on ministerial advice. So she

[28] Ibid p 36.

[29] Ibid page 106.

[30] Ibid page 36.

[31] Ibid page 40.

doesn't have the right to -- she doesn't have the constitutional right to exercise any of her rights under the tripartite convention in a way that would jeopardise or breach or undermine or even threaten to undermine the cardinal convention. So, too, with Prince Charles. With the heir to the throne, the apprenticeship convention speaks to the tripartite convention. The apprenticeship convention isn't simply to educate the Prince in all the business of government. The apprenticeship convention is to prepare the Prince for his role as sovereign, which is to say his role to be consulted, to advise and to warn. So I would -- my understanding of the constitutional position would be that the apprenticeship convention speaks only to those aspects of the Prince's activities which are -- which in a sense he is practising or learning about in order to exercise the tripartite convention. …"[32]

[OA3] Professor Rodney Brazier

[OA3] 71. Professor Rodney Brazier (Prof. Brazier) is Professor of Constitutional Law at the University of Manchester. He holds a Doctor of Laws (LLD) degree and is a non-practising barrister whose research centres on constitutional law and practice and constitutional reform. He has published 5 books and over 55 articles in learned journals on those subjects and has acted as a specialist adviser to parliamentary committees. Two recent relevant publications are Royal Incapacity and Constitutional Continuity: The Regent and Counsellors of State [2005] and Legislating about the Monarchy [2007].

[OA3] 72. Prof. Brazier provided a written witness statement dated 22 July 2010 which had in addition 35 Annexes.

[OA3] 73. Also referred to in the witness evidence frequently was Prof. Brazier's article "The Constitutional Position of the Prince of Wales [1995][33]

[OA3] 74. Prof. Brazier sought to deal with four questions in his witness evidence [34] (1) Whether there is a constitutional convention that Prince Charles as heir to the throne has a right and duty to be informed and educated in the business of government to prepare him for the time when he will be king (2) If, so what the scope and constitutional significance of that convention is (3) How, if at all, the convention relates to the Convention that The sovereign has a right and duty to counsel encourage and warn her government and the scope and significance of the latter convention (4) the constitutional importance of the sovereign's political neutrality.

[OA3] 75. The witness provided a variety of expert support for the processes by which a constitutional convention is determined, his references included Sir Ivor Jennings, Geoffrey Marshall, de Smith and Brazier and Bradley and Ewing.[35]. However in his opinion there are two tests most commonly used to test for the existence of a constitutional convention: one of which was that suggested by Sir Ivor Jennings in his book The Law and Constitution. The associated 3 part "Jennings" test was accepted and adopted by other witnesses as a valid and relevant test. In his witness evidence Prof. Brazier summarised

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[32] Ibid page 116.

[33] Witness evidence para 45

[34] Witness evidence para 4, Transcript re-examination 16 Sept 2010 page 112

[35] Witness evidence para 6 and its footnote [2]

the Jennings test as a "constitutional convention exists if (i) there are precedents underpinning it, (ii) the parties to the relevant practice consider themselves bound by it, and (iii) there is a reason for the existence of the convention."[36] Evidence by Sir Alex Allan and Sir Stephen Lamport both adopted the approach taken by Professor Brazier for the identification of the existence of a constitutional convention and agreed with those conventions that he identified in his witness evidence.

[OA3] 76. The conventions identified by Prof. Brazier are, relevant to the sovereign, firstly the convention which requires the sovereign to act on, and use her legal powers which stem from the royal prerogative consistently with ministerial advice (which was for ease described as the cardinal convention). Prof. Brazier provided the historical background to the development of this convention in its current form. Prof. Brazier gave evidence that in practice "A Sovereign's personal views if they are different from those of ministers, had and have to give way in the end to ministers' wishes".[37]

[OA3] 77. The second of the sovereign's conventions which though separate is according to Prof. Brazier linked is the sovereign's right to be consulted, to encourage and to warn ministers. Prof. Brazier represented this as a counterbalance to the cardinal convention inasmuch as it retains a measure of influence for the sovereign and prevents the monarch "being seen as a mere rubber stamp for whatever Governments wish to do."[38] This convention was referred to as the tripartite convention. Prof. Brazier provided examples of the practical expression of this Convention in terms of the weekly Prime Minister's audiences, which are entirely confidential as to their content, that the sovereign has exchanges in writing with ministers and the same confidentiality attaches to those documents.

[OA3] 78. The combined effect of the two Conventions is that the sovereign can express views including those which are "political" but those views will remain confidential, the ministers are obliged to take account of what the sovereign says but what flows from the sovereign by way of advice, encouragement or warning can be rejected. Prof. Brazier supported this evidence with examples including one from 2001 i.e. the reign of the current Queen which is as he stated is based on speculation but which has not been denied (it related to the timing of the planned general election.) [39]

[OA3] 79. The third convention he identified is Prince Charles' constitutional right to be instructed in and about the business of government so as to prepare him for being king. This was referred to as the Apprenticeship Convention. Applying the same "Jennings" tests for the existence of a constitutional convention Prof. Brazier said that this convention "unquestionably exists" [40 and 41]. This in effect was the answer to the first of his four

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[37] Witness statement paras 17-19

[38] Witness statement para 20

[39] See footnotes 9, 10, 11 and 12 on pages 6 and 7 of this witness statement

[40] Witness statement para 44

[41] Evidence re-examination 16 Sept 2010 transcript page 105-110

questions. Further Prof. Brazier maintained that as Prince Charles is heir to the throne and could become king tomorrow it is important and relevant that the constitutional convention which affects Prince Charles "should not be considered in isolation from those which attach to the Queen". [42]

[OA3] 80. Relevant to the consideration of the appeal was the evidence given by Prof. Brazier that if as he suggests the existence of a constitutional convention can be determined by the three "Jennings tests" then the simple fact that there may have been leaks of some of the information which is covered by the convention does not of itself undermine or affect the continuing force of the convention, "That result would occur if, say, the ministers and Prince of Wales consistently and deliberately published correspondence such that it became clear they no longer accepted the obligation of total confidence inherent in the convention."[43]

[OA3] 81. In relation to the second question which related to the scope and constitutional significance of the Apprenticeship Convention, Prof. Brazier's witness statement was presenting a somewhat different position to that he had outlined in his 1995 paper see paragraph 3 above. In that paper he had identified what he represented as a new, "novel" constitutional right for Prince Charles. His witness evidence to this Tribunal stepped back from that position and asserted that what he had previously identified as "a new right" was in fact part of the Apprenticeship Convention. In his 1995 paper Prof. Brazier had suggested that Prince Charles "considers that it is his right, and indeed his duty, to raise matters of public policy with ministers"[44]. In his 2010 witness evidence [45] for this appeal and in detailed examination on that evidence by Mr Fordham, Prof. Brazier was firm in his views that he did not now subscribe to the opinion this was a new constitutional convention but rather that it was an integral part of the Apprenticeship Convention. His reasons were such communications "are of a piece with the kinds of communications which the Sovereign might have within the operation of the tripartite convention" and his second reason was that the minister's response to such communication from Prince Charles is exposing Prince Charles to the business of government.[46]

[OA3] 82. Prof. Brazier also accepted in cross-examination in relation to his 1995 thesis that the practice of being instructed in the business of government could be distinguished from the pressing of opinions to seek influence.[47] But in 2010 he considered these two practices were part of one convention partially because he no longer considered that Prince Charles raising and pressing his views on government would support a constitutional convention in

[42] Witness statement para 16

[43] Witness evidence paras 66-67

[44] The constitutional position of the Prince of Wales

[45] Note also Counsel's exchanges on 15 September 2010 Transcript page 121 concerning the Fordham skeleton argument para 53 and reference to Prof Brazier's inconsistency

[46] Witness statement paras 99-103 and 79/80. Oral examination 15 September 20011 transcript page 143 - 150

[47] Transcript 16/09/10 p 50

its own right.[48] Prof Brazier agreed that there is no clarity as to whether Prince Charles when pressing his opinions is rehearsing or doing it for real.

[OA3] 83. In his written evidence Prof. Brazier did assert that this approach to the Convention by Prince Charles – namely "pressing opinions" – does not have precedent with his predecessors. This appears at odds with the evidence given by Sir Alex Allan who suggests that there may be precedent for this by reference to the Giles St Aubyn document relating to Edward VII.[49]

[OA3] 84. Prof. Brazier identified in his witness evidence that the "unrestrictive effect of the Apprenticeship Convention is desirable".[50] The accepted and practical expression of the operation of the Apprenticeship Convention is that Prince Charles sees papers "intended primarily" for the Queen and those papers are accorded the absolute confidentiality which attaches to those sent to the sovereign.[51] This practice has substantial precedent and evidence in support was provided in the Vernon Bogdanor text.

[OA3] 85. Prof. Brazier noted that Prince Charles has receptions for ministers which are similar to audiences with the Queen.[52] He added that Prince Charles writes to ministers on governance issues and such letters must attract absolute confidentiality as attaches to the Queen's audiences and written communications – in Prof. Brazier's words, "a constitutional necessity".[53]

[OA3] 86. Initially Prof Brazier seemed to assert that the Apprenticeship Convention included Prince Charles's charitable work [54] on the basis that the welfare role is an accepted part of the sovereign's modern work[55]. Initially this witness disagreed with the Commissioner's position that the charitable work fell outside the scope of the Convention. Later Prof Brazier changed this position under cross-examination by Mr Pitt-Payne.[56] He contended it still attracts confidentiality but is outwith the convention.

[OA3] 87. Mr Fordham in his cross-examination adopted the phrase 'argumentative correspondence' [57] in relation to those exchanges of letters where Prince Charles is "pressing opinions". Prof. Brazier asserted that "argumentative correspondence falls

[48] Transcript 16/09/10 p 53

[49] Transcript Alex Allan 17 Jan 2011 pages 106/107

[50] Witness statement para 101

[51] Witness statement para 47 and Vernon Bogdanor The Monarchy and the Constitution [1995]

[52] Witness statement para 50 and 53

[53] Witness statement para 40 and 55

[54] Witness statement para 86/87 and 91

[55] Bogdanor

[56] Transcript 16 Sept 2010 page 95

[57] Witness statement para 97, 15 Sept 2010 transcript page 144

squarely within an established constitutional convention applicable to him as the heir to the throne"[58]

[OA3] 88. Prof. Brazier gave evidence that in his opinion "I think the Prince of Wales is perfectly entitled to put forward views of his on particular matters of public policy privately to ministers, the reason being that this is part of his education and preparation for government (sic). If that could be characterised as party political the website [Prince Charles's website] doesn't click with what I think his rights would be. I am not responsible for his website."[59]

[OA3] 89. The detailed examination of the evidence on Prince Charles's argumentative communications and the impact, inter alia, on Prince Charles's political neutrality was a topic given much attention in the hearing. Prof. Brazier's views expressed in the context of questions on 15 September 2010 was that in some circumstances even though there is cross-party support and hence not a party political issue there could be no constitutional reason preventing Prince Charles from speaking out but it might in Prof. Brazier's opinion be "unwise" to.

[OA3] 90. In his witness statement Prof. Brazier confirmed a view expressed previously by Dimbleby in the biography that once he is king Prince Charles would "cease to make such public interventions as they would then be constitutionally inappropriate"[60]

[OA3] 91. The third of the questions described in Prof. Brazier's written evidence concerned how, if at all the convention concerning the heir to the throne relates to the tripartite convention? In addressing this Prof. Brazier made it clear that Prince Charles does not have the rights that attach to the sovereign under the tripartite convention.[61] Under cross-examination Prof. Brazier agreed that his view was that Prince Charles was in effect "rehearsing" some aspects of the tripartite convention without however arrogating any of the sovereign's functions.[62]

[OA3] 92. Prof. Brazier made it clear Prince Charles has no "right to be consulted" in the manner of the tripartite convention but the extension of his Apprenticeship Convention to include this elements of "training" or rehearsal has started within the time of Prince Charles i.e. is without precedent.[63] Prof Brazier was strongly of the view the actions of Prince Charles in this regard were in no way acting as if he were sovereign.[64]

[OA3] 93. In summary Prof. Brazier agreed that the difference between his position in his 1995 article and the witness evidence to this appeal was that he now had a view that Prince

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[58] Transcript 16 Sept 2010 page 28

[59] Transcript 15 Sept 2010 page 155 and examination by Mr swift 16 September 2010 Transcript page 100

[60] Witness statement page 75 Transcript 15 Sept 2010 page 155

[61] Transcript 16 Sept 2010 page 30

[62] Transcript 16 Sept 2010 pages 60 to 70

[63] Transcript 16 Sept 2010 page 67

[64] Transcript 16 Sept 2010 page 70/71

Charles had a right under the Apprenticeship Convention to "rehearse" the three limbs of the tripartite convention whereas as articulated in 1995 Prof Brazier had suggested Prince Charles had a right to influence Government. When contrasted with the view expressed in the "Peat Memorandum" concerning how Prince Charles was said to view his role Prof Brazier agreed that there was no evidence in that article that Prince Charles considered himself to be in any manner rehearsing[65].

[OA3] 94. The fourth question being addressed by Prof. Brazier's witness evidence was the constitutional importance of the sovereign's political neutrality.

[OA3] 95. In relation to the Queen, Prof. Brazier's written witness evidence was "The Sovereign must be, and be seen to be [so both things; must in fact be and must be seen to be], politically neutral, outside and above party politics."[66] And in addition he stated:

> The Sovereign cannot ... make any partisan comment in, or which gets into, the public domain or give the impression that a given political party, or politician, or public policy was personally preferred, or opposed, by The Sovereign. The continued acceptance of the Monarchy depends upon that neutrality"

[OA3] 96. In relation to the Queen there is no evidence of any such disclosure: one example from a newspaper which purported to represent the Queen's views was denied. "If there is any disagreement it is kept private, thus preventing the Sovereign's impartiality being called into question."[67]

[OA3] 97. Prof. Brazier stressed that the constitutional conventions applicable to the sovereign i.e. the cardinal convention and the tripartite convention need to be applied in circumstances of complete confidentiality in order to preserve the Queen's political neutrality.[68]

[OA3] 98. The importance of such confidences were said to be that political differences could damage [the sovereign's] constitutional position vis-à-vis the Commonwealth[69] and "… to enable the value and efficacy of the constitutional relationship between The Sovereign and the Prime Minister and other Ministers to be maintained. Only in that ambience can the constitutional actors be utterly frank with each other."[70]

[OA3] 99. Professor Brazier's witness statement confirmed the position with regard to Prince Charles's audiences with ministers: "[subject to the position as regards the biography] … as far as I know no information about what has passed between Prince Charles and any

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[65] Peat memorandum bundle 2 page 62

[66] Witness evidence para 31

[67] Witness evidence paras 34,34 and footnote 14

[68] Witness evidence para 30

[69] Witness evidence para 35

[70] Witness evidence para 36, see also paras 37 to 39

individual minister after he has received him or her has been made public without their consent …"[71].

[OA3] 100. The reasons for confidentiality were as follows. First, the topics involved were often ones involving formulation of government policy and hence politically sensitive. Second, the requirement of political neutrality of the sovereign. Third, that disclosure could compromise Prince Charles's constitutional position before accession to the throne. Reference was also made to the confidentiality attaching to his offices as Counsellor of State and Regent under the Regency Act.[72]

[OA3] 101. This issue of Prince Charles's political neutrality was explored in cross examination and contrasted with an extract from a statement made by Mark Bolland in another context:[73]

> The Prince used all the means of communication at his disposal, including meetings with ministers and others, speeches and correspondence with leaders in all walks of life and politicians. He was never party political, but to argue that he was not political was difficult.

[OA3] 102. Prof. Brazier was also shown the statement by Sir Michael Peat, Private Secretary to Prince Charles, who said

> The Prince of Wales avoids making public statement on matters which are the subject of disagreement with political parties.[74]

[OA3] 103. Prof Brazier accepted in cross-examination that:

> A blanket ban [on disclosure] could not be justified only on the ground that it was based on party political matters, because, as I keep saying, there are other reasons why I would suggest that such correspondence should not be published.[75]

[OA3] 104. It was explored at some length how there are topics that Prince Charles may write about, or indeed speak about, which may not at the time of writing or speaking be party political but in time might become so. Additionally Prof Brazier was firm in his view that it is possible that the topic per se within a letter may not be party political but the tone or method of expression may be such that the letter should not be disclosed due to the potential adverse impact on public perception.[76]

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[71] Witness evidence para 51-67

[72] Witness evidence paras 58-63

[73] Bolland (deputy Private Secretary to Prince Charles. Bundle 2 page 211

[74] Bundle 4 page 39 and 40

[75] Transcript p 17

[76] Transcript 16 Sept 2010 pages 3-8

[OA3] 105. Prof. Brazier accepted that Prince Charles had made public interventions on matters of public policy such as "architecture, alternative medicine, regeneration."[77]

[OA3] 106. One crucial and much discussed point was whether the public pronouncements by Prince Charles compromise, or have compromised, his impartiality. His position was contrasted with that of the Queen: "The Queen acceded to the Throne in 1952 aged only 25. She had not then uttered a word in public, or published anything in writing which would indicate Her Majesty's views on any controversial or political matter. The Queen's personal views on such things were - and indeed remain - unknown to the public. The Queen was thus able seamlessly to embrace the tripartite convention in 1952."[78]

[OA3] 107. Prof. Brazier contrasted this with the position of Prince Charles:

> The Prince of Wales will become King having published his views widely. ...
>
> The more that a future Government's policies were to diverge from The then King's personal views the harder it would be for the citizens to perceive The King as neutral. To that extent the new King may be seen as being partisan. ...
>
> … I am in no doubt that , in the context of this Appeal, the disclosure of private correspondence ... could exacerbate the perception of a new King who held firm personal views (not party-political views) on some matters of public policy. political views) on some matters of public policy. In so far as The Prince of Wales expressed in that correspondence any views that did not wholly accord with future Ministers' own views, that perception could be reinforced. That is a significant additional reason for the non-disclosure of correspondence between His Royal Highness and Ministers.[79]

[OA3] 108. Prof. Brazier agreed in general terms with the principle that if Prince Charles has spoken on a matter publicly then letters on the same topic by him cannot damage his political neutrality – although the mode of expression by Prince Charles might cause "embarrassment"[80]

[OA3] 109. In response to a Tribunal question Prof. Brazier accepted that Prince Charles's association with some causes may already have had an impact on public perception of his political neutrality.[81]

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[77] Witness evidence paras 70-74 Transcripts 15 Sept 2010 pages 132-134

[78] Witness evidence para 69

[79] Witness evidence para 75

[80] Transcript 16 Sept 2010 pages 3-10, 17-22

[81] Transcript 16 Sept 2010 page 138

[OA3] 110. In response to a Tribunal question concerning whether Prince Charles became involved in lobbying, Prof. Brazier said he would be "… unwise to use his position in relation to a particular cause".[82]

[OA3] 111. **Publication of lists**. Prof Brazier's view was this would at best demonstrate the Apprenticeship Convention in operation. However he also argues that no further proof is needed and that to publish these lists would not be "entirely innocuous" as they would show where Prince Charles's interests lie and lead to speculation as to the areas he is seeking to influence.

[OA3] H. Factual witness evidence

[OA3] Factual witness evidence in support of the appeal

[OA3] Rob Evans[83]

[OA3] 112. Rob Evans, the appellant in this case, has worked as a journalist on the Guardian since 1999 and previously for the Financial Times, the Sunday Telegraph and on television documentaries. He has won awards for his investigative work and on his promotion of freedom of information.

[OA3] 113. Mr Evans requested that he be sent (a) a list of correspondence between Prince Charles and 7 government departments, who are the Additional Parties in this case, during the period 1 September 2004 to 1 April 2005, and (b) copies of the correspondence. His reason for doing this was to show the extent to which Prince Charles corresponded with government departments, the purpose and nature of that correspondence, the extent to which Prince Charles has engaged in public debate on controversial issues and the extent to which Prince Charles is able to, or is perceived to be able to, influence government policy or the decisions of democratically accountable bodies.

[OA3] 114. Mr Evans gave a number of examples in relation to Romania, stubble burning, reorganisation of the army, Atlantic salmon, the Human Rights Act, the outbreak of foot and mouth disease, treatment of rural communities, British citizens in Zimbabwe and correspondence with the Scottish First Minister, of what is already known to the public, of correspondence with government departments and ministers and its contents. In his view these demonstrated that Prince Charles was engaged in correspondence with government on controversial issues. He made particular reference to Jonathan Dimbleby's biography of Prince Charles published in 1994[84] suggesting that Prince Charles "bombarded" ministers with letters and was "chivvying" and "harassing" them.

[OA3] 115. In Mr Evans's view the examples he gave do not involve Prince Charles's private life, nor do they relate to his education in the ways of government in preparation for his role as king, rather "they appear to advance Prince Charles's views on matters of public controversy, often urging the government to adopt, or do more to promote, those views,

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[82] Transcripts 16 Sept 2010 page 136

[83] Witness statement dated 23/07/10 bundle 3 pp 1 – 8.

[84] "The Prince Of Wales" by Jonathan Dimbleby.

even when they are contrary to declared government policy". He also asserts that correspondence of this nature forms part of a "wider lobbying activity in which the Prince engages".

[OA3] 116. Finally he provides examples, mainly in press articles, of public statements made by Prince Charles on matters of controversy, advocating particular views and critical of government policy on such matters as alternative medicine, architecture and urban development, the environment and climate change, genetically modified crops and other aspects of farming life and education policy. A particular example is Prince Charles's intervention in the Chelsea Barracks redevelopment recognised by the judge in *CPC Group Ltd v Qatari Diar Real Estate Investment Company* [2011] EWHC 1535.

[OA3] 117. Mr Evans considered that all this evidence amounts to a strong public interest in the public seeing the correspondence he has requested.

[OA3] 118. In cross examination by Mr Swift on behalf of the Additional Parties Mr Evans admitted that much of the correspondence examples he had given became public because of leaks to the press rather than through publication by consent of the government or Prince Charles. However many other examples had been made public through the Dimbleby biography and Prince Charles's own public announcements, which had received the consent or approval of government. Mr Evans accepted that many of the examples were not recent and dated back some 15 years before his FOI request.

[OA3] 119. Mr Evans confirmed that he considered that many of the examples he had given involved public policy. However he had not made a detailed forensic examination of whether Prince Charles's public interventions were party political. The examples chosen had taken place over a long period and he had picked the best he could find.

[OA3] 120. Mr Evans considered lobbying "*is just individuals or a group making ... their views known to decision-makers*" and took a wide view of such activity.

[OA3] 121. In cross examination by Mr Pitt-Payne, on behalf of the Information Commissioner, Mr Evans considered that Prince Charles was not politically neutral in the sense that he is not someone who never makes controversial public statements on matters of political policy. In fact Prince Charles admits that he does on his web site. Mr Evans could not offer authoritative evidence as to whether or not Prince Charles took sides between political parties because he was not able to see correspondence between Prince Charles and the government. The fact that Prince Charles says on his web site that he ceases to raise matters which have become party political does not mean that he actually is political neutral. The public would only know that if the requested correspondence was disclosed when they would know what he is saying.

[OA3] 122. In re-examination Mr Evans was of the view that the heir to the throne was not entitled to make known that he held different views to the government on a matter of public policy. However Mr Evans believes that Prince Charles does make it known that he holds such views and this is in contrast with the present Queen where we know nothing of her relations with or influence on government.

[OA3] Paul Richards[85]

[OA3] 123. Paul Richards is a former special adviser from 2005 to 2009 to two ministers – Hazel Blears (with her for three years) and Patricia Hewitt (with her for one year) – in three government Departments: Health, the Cabinet Office, and Communities and Local Government. He was a former chair of the Fabian Society and is a member of their commission on the future of the monarchy. He is now a writer and political commentator.

[OA3] 124. During his period of special adviser he became aware that Prince Charles regularly corresponded with ministers on a range of issues from planning applications to government policy on health issues.

[OA3] 125. He explained that when Prince Charles writes to ministers his letters are put before the minister, effectively at the top of the file and are treated with great reverence. He gave a number of examples. This contrasts with ordinary citizens whose letters go through a centralised mailroom and which are normally dealt with by departmental staff and rarely seen by ministers or their advisers.

[OA3] 126. Mr Richards says that parliamentary lobbying is a controversial activity and that commercial lobbyists would never have the kind of direct access afforded to Prince Charles. There are various ways in which lobbying is regulated and controlled.[86] He explains that it is difficult to assess the extent of Prince Charles's influence on government but a good starting point would be the publication of his correspondence with ministers.

[OA3] 127. In cross examination Mr Richards admitted he had no real personal experience of Prince Charles lobbying. His evidence was anecdotal based on the observations and experience of others.

[OA3] Factual witness evidence in support of the Departments

[OA3] Sir Stephen Lamport

[OA3] 128. Sir Stephen Lamport was Deputy Private Secretary to Prince Charles between 1993 and 1996, and Private Secretary between 1996 and 2002. As Private Secretary he was adviser to Prince Charles in relation to all matters concerning his personal, constitutional and official role and his programme. As Private Secretary he was responsible for the procedures relating to the handling of documents.

[OA3] 129. Sir Stephen submitted three open written witness statements, dated 23 July 2010, 24 August 2010 and 13 January 2011. In addition Sir Stephen provided a closed witness statement also dated 23 July 2010 which expanded upon on certain points in his first open witness statement.

[85] Witness statement dated 23/07/10 bundle 3 pp 9 – 12.

[86] Public Administration Select Committee's report on lobbying; Lobbying: access and influence in Whitehall 2008 – 2009 Government response to the Committee's First Response Report of Session.

[OA3] 130. In Sir Stephen's first open witness evidence he addressed a number of key points which were in support of "his strong conviction as to the overriding strict confidentiality that applies to the dialogue between Prince Charles and Government".[87]

[OA3] 131. Sir Stephen recognised and supported the existence of the constitutional convention[88], which had been referred to as the Apprenticeship Convention by Professor Brazier in his evidence[89]. Sir Stephen described this convention in the following terms, that the Prince of Wales, as heir to the throne, be "prepared for the time when he will be King, initially through formal instruction and education in the business of government and latterly by continuing interaction with ministers."[90]

[OA3] 132. Sir Stephen in describing the scope of the Convention stressed that he understood the Apprenticeship Convention to operate in a very wide form inasmuch as it covers all Prince Charles' correspondence, no matter how anodyne, as all his interactions with ministers formed part of building a "tapestry of relations"[91] which were an essential part of his preparation to be sovereign. Further he maintained that Prince Charles's letters, in preparation, made no distinction as to whether they were arising from the Apprenticeship Convention i.e. were not "written in different ways on the basis that some may be considered 'constitutional business of government'"[92].

[OA3] 133. Sir Stephen strongly held the view that the Apprenticeship Convention also included within its scope the "urging of opinions" to ministers by the Prince of Wales. He did not accept a presentation of that element of the role of Prince Charles articulated by Prof. Brazier (during his cross-examination) as (simply) a training or rehearsal mode for the tripartite convention when he is sovereign[93]. He stressed that Prince Charles sees a distinction between his urging of his opinions and that of the role of sovereign (in the context of the Constitutional conventions applicable to the sovereign referred to by Professor Brazier as the tripartite convention[94]) but nonetheless saw it as part of his role as Prince of Wales. Further Sir Stephen expressed the view that whilst this may not be "a right" it is part of the constitutional convention and "everyone seems happy with it".[95]

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[87] First statement para 4

[88] First statement para 32

[89] Witness evidence Professor Brazier paras 41 - 50

[90] First statement para 9

[91] Closed witness evidence 24 Jan 2011

[92] First statement Para 32

[93] Prof Brazier 16 September

[94] Prof Brazier witness evidence para 22-29

[95] Cross examination of open witness evidence 17 Jan 2011

[OA3] 134. Sir Stephen accepted the characterisation made of Prince Charles in a witness statement given in evidence in another matter[96] by Mark Bolland[97], the relevant statement being "to say he is prepared to engage in matters of public policy that is absolutely true"[98]

[OA3] 135. Sir Stephen considered that some elements of Prince Charles's work are "not based on precedent, that he has created his own role".[99] However he was certain that Prince Charles's ability to discuss contentious matters with ministers is part of his preparation for kingship.[100]

[OA3] 136. Inherent in the conventions applicable to Prince Charles as heir to the throne (Apprenticeship Convention) and the sovereign (tripartite convention and cardinal convention) is the requirement for confidentiality[101]. Sir Stephen's views are that confidentiality applies because of the requirement for the public to have a view of his party political neutrality – both real and perceived – and the importance of maintaining that neutrality against the time when he becomes king.[102] The lack of confidentiality in his correspondence would inhibit his ability to relate to ministers.

[OA3] 137. Sir Stephen was able to provide evidence from his time working with Prince Charles in his capacity as Private Secretary of procedures relating to handling of letters to ministers which supported the expectation of confidentiality e.g. marking 'private and confidential' on the envelopes, ministers' letters being recognised as strictly confidential, and their not being included in internal circulation systems.[103]

[OA3] 138. Sir Stephen was certain that save for the access afforded to Dimbleby as part of the research for the authorised biography, Prince Charles had on no other occasions given approval for publication or quotation from his correspondence with ministers.[104]

[OA3] 139. The public perception of Prince Charles's political neutrality (clarified to mean party-political neutrality i.e. issues that divide the political parties) was seen by Sir Stephen as of crucial importance. "The Prince of Wales has never been accused of being party political."[105] Sir Stephen's view was that public knowledge of his letters and their

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[96] Diaries litigation 2006

[97] Deputy to Sir Stephen Lamport

[98] Bundle 2 page 211, "The Prince's role and his perception of it"

[99] Cross examination of open witness evidence 17 Jan 2011

[100] Cross Examination of open witness evidence 17 Jan 2011

[101] First witness statement para 19

[102] First open witness statement para 4 and cross-exam 17 Jan 2011

[103] First statement para 15

[104] Second witness statement par 3

[105] First statement para 22

contents would give rise to a different public perception of his neutrality when he because sovereign and "if you inhibit and corrode that now I don't know how you restore it"[106].

[OA3] 140. Sir Stephen explained that Prince Charles was in his experience careful to ensure that he "avoids making public statements on matters which were, or became, the subject of disagreement between political parties." That was achieved by the practical approach that he "… tried always to adhere to the convention that copies of speeches and articles should be sent in advance to any government minister"[107].

[OA3] 141. In cross examination Sir Stephen did agree that Prince Charles did not consider that "the cardinal principle that he shouldn't express views publicly on matters of public policy" applied to him[108]. This was a principle that would apply to the sovereign.[109]

[OA3] 142. Sir Stephen did not accept that there was a distinction that could be drawn between the public and private life of Prince Charles. He contended that for Prince Charles his "role is a function of birth"[110]

[OA3] 143. Sir Stephen was quite certain that although Prince Charles spoke to ministers and with authority on a number of subjects he did not undertake anything which could be said to be lobbying.[111]

[OA3] 144. Sir Stephen's second Open witness statement identified two issues arising from evidence by Mr Evans and Mr Richards. The first concerned the evidence relating to Prince Charles's correspondence. Sir Stephen stated that save for the quotations in the biography none of the items of correspondence quoted by Mr Evans was published or quoted with Prince Charles's approval.[112] The second concerned Prince Charles's charitable Foundation for Integrated Health and the timing of an award of a grant to that charity.

[OA3] 145. In summary, Sir Stephen made three points in favour of non-disclosure. They are that the monarch should be perceived as being politically neutral, that Prince Charles needs to prepare for being king by being briefed about the nation's affairs and by expressing his own views to Government (in turn he says ministers often find his views useful) and that if what Prince Charles says or writes to ministers were not to be confidential their exchanges would be "bland and denuded" of any useful content with the

[106] Cross examination 17 Jan 2011

[107] First witness statement para 31 and Cross examination 17 Jan 2011

[108] Cross examination 17 Jan 2011

[109] See Professor Bogdanor

[110] First witness statement para 28

[111] Cross examination 17 Jan 2011

[112] Second statement para 3

practical effect that the convention of the heir to the throne being instructed in Government business could not survive.[113]

[OA3] Sir Alex Allan

[OA3] 146. Sir Alex Allan served as a senior civil servant in the Treasury and 10 Downing Street. He had direct personal involvement with negotiations with the Royal Family when he was the Principal Private Secretary to the Chancellor of the Exchequer and subsequently was responsible for liaison between the Prime Minister's office and Buckingham Palace between 1992 and 1997. From 2004 he was Permanent Secretary at the Department for Constitutional Affairs with regular contact with Buckingham Palace. At the time of the witness statement he was at the Cabinet Office where he is, inter alia, overseeing the constitutional reform agenda.[114]

[OA3] 147. Sir Alex made an open witness statement dated 23 July 2010 and a closed witness statement also dated 23 July 2010.

[OA3] 148. Sir Alex's open witness evidence was to illustrate the potential detriment to the public interest that would arise from the disclosure of the disputed information.[115]

[OA3] 149. Sir Alex supported the evidence given by Professor Brazier concerning the existence of the "tripartite convention" and the "Apprenticeship Convention" (using terms adopted by Professor Brazier). He stated that the Brazier analysis "very much accords with my own understanding of the conventions and how they operate". [116] He expanded upon his understanding of the reasons for the existence of the "Apprenticeship Convention":

> The Monarch's responsibilities are such that it is necessary that they are thoroughly conversant in the business of government. … Hence the … constitutional convention that the Heir to the Throne should be instructed in the business of government, and be able to build relationships with … Ministers … . While I was in 10 Downing Street, the Prime Minister regularly had Audiences of The Prince of Wales, on the same basis as those he had of the Queen.[117]

[OA3] 150. Sir Alex in evidence confirmed his view that the tripartite convention and Apprenticeship Conventions are "*closely linked i.e. as preparation for when he will exercise his constitutional rights as Sovereign*".[118]

[OA3] 151. Sir Alex confirmed his view that it is a convention that the monarch does not express personal views publicly.[119]. In relation to the monarch's rights under the tripartite

[113] First witness statement para 38 pages 37/38

[114] Open witness statement para 2

[115] Open witness statement para 1

[116] Open witness statement paras 4 and 7

[117] Open witness statement para 15

[118] Open witness statement para 16

convention, the "*practical expression of exercise of these rights is the PM's weekly audience with the Queen*". Sir Alex expanded on his knowledge of the operation of the weekly audience: (1) it involves liaison between private secretaries to draw up an agenda of issues that are current or likely to become so, (2) the Prime Minister (PM) and Queen are free to discuss any topic, (3) details of the Audience are not publicly disclosed, (4) no-one other than the PM and the Queen are present (5) no notes are taken, and (6) no question to the PM re his discussions with the Queen would be permitted in the House of Commons.[120]

[OA3] 152. In examination of the scope of the Apprenticeship Convention Sir Alex confirmed his belief that the Convention was wide in its operation. He described it as "*including seeking to persuade Government Ministers*" and drew from Giles St Aubyn[121] evidence to support the view that there was precedent for this by reference to Edward VII who had "extensive knowledge and discussion with the Opposition", adding that "in practice it might have been quite extensive"[122]. Sir Alex confirmed this view in relation to a question from the Tribunal (Walker J) about the biography and whether the letters that Mr Dimbleby had access to were covered by the Apprenticeship Convention: Sir Alex expressed the opinion again that all Prince Charles's correspondence with ministers is covered by the convention[123]

[OA3] 153. Sir Alex in cross examination by Mr Pitt-Payne (on behalf of the Commissioner) expressed the view that certain correspondence of a social nature or exchange of pleasantries, i.e. nothing to do with Government business, would fall outside the scope of the Apprenticeship Convention.

[OA3] 154. Sir Alex did not agree with Professor Brazier's[124] suggestion that Prince Charles was "rehearsing" for when he is monarch. On the contrary, he supported the view expressed by Sir Stephen that, rather than being engaged in rehearsal or training, Prince Charles was trying to make a difference. He did so as part of his preparations for becoming sovereign, something which was not the same as the Queen's interaction with government.[125]

[OA3] 155. Initially Sir Alex accepted there was a distinction between "official documents" sent to Prince Charles and Prince Charles's letters to ministers but under re-examination by Mr Swift he expressed the view that they "do merge into one."[126]

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[119] Open witness statement para 11

[120] Open witness statement para 13

[121] Edward VII, Prince and King by Giles St Aubyn Bundle 4 pages 19-25

[122] Oral evidence transcript 17 Jan 2011 pages 106/107

[123] Transcript 17 Jan 2011 pages 143/144

[124] Transcript 16 Sept pages 61/62

[125] Transcript 17 Jan 2011 pages 135/137

[126] Transcript 17 Jan page 111 cross-exam, pages 149/141 re-examination

[OA3] 156. Sir Alex was able to provide what was suggested to be evidence of the Apprenticeship Convention in operation. He stated as noted above that the Prime Minister regularly had audiences of Prince Charles on the same basis as those he had of The Queen. Those audiences were notified in the Court Circular. However Sir Alex thought not all of Prince Charles's meetings with the Prime Minister and ministers would be reported in the Court Circular. Sir Alex also confirmed that "Prince Charles receives a wide range of official papers and meets regularly with other Ministers".[127] Later, and as a result of a tribunal question, Sir Alex agreed that, as ministerial diaries are available in The National Archive, more details about Prince Charles's meetings with ministers are available.[128] Sir Alex's view is that there is an obligation of confidentiality under the convention but it is not absolute: the parties could agree to publication[129] .

[OA3] 157. Sir Alex also referred to the role Prince Charles has in relation to the Regency Act 1937 i.e. the potential need for Prince Charles to act as Regent on behalf of the sovereign which would require Prince Charles in that context being "subject to the same constitutional conventions as the Monarch"[130] This was not explored further in the oral evidence.

[OA3] 158. The witness placed considerable emphasis upon the inherent need for confidentiality in the operation of the sovereign's conventions [131] and the Apprenticeship Convention. The witness gave evidence that from his personal experience correspondence to and from Prince Charles was confidential. He stated it was always treated as highly confidential by government departments and ministers that received it.[132], An example was that it was delivered unopened within the department. He gave supporting evidence about the treatment of Prince Charles's correspondence by other departments which were party to this appeal.

[OA3] 159. Sir Alex identified three underlying factors which were relevant to the underlying requirement for confidentiality: (1) if the views of the heir to the throne were to become public it could make the briefing process one in which the Government is "hesitant to engage" (2) it could create a hostage to fortune as Prince Charles's ability to exercise his constitutional rights in relation to those same areas of policy would be undermined (3) if the public perceived the sovereign to have particular party-political predilections as a result of views expressed while he was heir to the throne the constitutional position of the monarch as a politically neutral figure would be undermined.[133]

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[127] Open witness statement para 20

[128] Open withes statement para 15, Transcript 17 Jan 2011 pages 123/124, Tribunal question 17 Jan 2011 page 142

[129] Transcript 17 Jan 2011 pages 130-133

[130] Open witness statement para 17

[131] Open witness statement para 14

[132] Open witness statement paras 25/26 and 27-32, transcript 17 Jan 2011 page 119-120

[133] Open witness statement para 18

[OA3] 160. The access provided to Mr Dimbleby, and his subsequent use of extracts in the biography, were explored and in particular whether this created a precedent. Sir Alex's views on why the book did not create a precedent were: (1) it was written 16 years ago and in a pre-Act context, (2) the disclosures made were with the consent of the parties, (3) disclosure under the Act would be made without consent of the parties and would be contrary to their expectation of confidence, (4) the disclosure of this correspondence would be disclosure to all the world and of the text of the letters themselves.[134]Initially Sir Alex was of the view that the biography did not include any extracts from ministers' letters; however he later amended this to the view that some ministers' letters may have been quoted in the biography.[135]

[OA3] 161. The witness in his evidence expanded upon the requirements for political neutrality of the monarch which is that the monarch's position as a politically neutral Head of State is maintained through the operation of the constitutional conventions under consideration in this appeal. The corollary which ensures the monarch remains above the political fray is that the monarch has the right and duty to make his or her views known in private. [136] In contrast Sir Alex agreed that the government would have accepted it was inaccurate to state (as it did until recently on the Clarence House website) that Prince Charles avoids party-political issues.[137]Sir Alex confirmed that Prince Charles writes on subjects that he would not speak publicly about[138]: Sir Alex confirmed the evidence of Sir Stephen in relation to the process for obtaining government approval in advance for Prince Charles's speeches.[139]

[OA3] 162. Sir Alex confirmed in open witness evidence in relation to the disputed information that the frequency with which Prince Charles corresponds with relevant ministers cannot on any view be said to be "bombardment".[140]

[OA3] J. Analysis of the public interest

[OA3] J1: IC(1) promotion of good governance

[OA3] 163. No supplemental material is required on this section.

[OA3] J2: IC(2), (5), (6) royalty, government, constitutional debate

[OA3] 164. No supplemental material is required on this section.

[134] Open witness statement para 24, Transcript 17 Jan 2011 page 110

[135] Transcript 17 Jan 2011 pages 108/109 and 127

[136] Open witness statement paras 11 and 12

[137] Transcript 17 Jan 2011 pages 116/118

[138] Transcript 17 Jan 2011 page 117

[139] Transcripts 17 Jan 2011 page 112

[140] Open witness statement pars 30/31 and Transepts 17 Jan 2011 pages 121-123

[OA3] J3: IC(3), (4) understanding Prince Charles's influence

[OA3] 165. It was said on behalf of Mr Evans that the Commissioner had failed to recognise a "strong and legitimate" concern that Prince Charles engages in lobbying and that his views may have an inappropriate or disproportionate effect on policy or specific issues. The proper approach, submitted Mr Evans, was that advocacy or lobbying activities should in principle accord with "fundamental Nolan Principles" and "the safeguards identified by the select committee".

[OA3] 166. The "fundamental Nolan Principles" is a reference to the first report of the Committee on Standards in Public Life, chaired by Lord Nolan. The report, which was published in May 1995, observed that conduct in public life "is more rigorously scrutinised than it was in the past, that the standards which the public demands remain high, and that the great majority of people in public life meet those high standards." It considered however that there were weaknesses in the procedures for maintaining and enforcing those standards. By way of remedial action it identified, among other things, seven principles of public life. They included:

> Objectivity: in carrying out public business, including making public appointments, awarding contracts, or recommending individuals for awards and benefits, holders of public office should make choices on merit.
>
> Accountability: holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.
>
> Openness: holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

[OA3] 167. The committee's statement of the seven principles concluded:

> … These principles apply to all aspects of public life. The committee has set them out here for the benefit of all who serve the public in any way.

[OA3] 168. The "safeguards identified by the select committee" is a reference to the House of Commons Public Administration Select Committee first report of the session 2008-09, published on 5 January 2009. It was entitled *Lobbying: Access and influence in Whitehall* ("the PASC Lobbying Report"), and included the following:

> … we have been asked to define what we mean by lobbying. But there is no neat way of defining what is generally acknowledged to be a porous concept. … Multi-client public affairs companies ('lobbyists for hire') were an initial focus … [but] would fail to capture a large number of those involved in attempting to influence decisions within the public sector … Because of these porous boundaries and difficulties of definition, we came to the conclusion that a broad look is needed at contact between those working in the public sector and those attempting to influence their decisions. …

> We do not and cannot have insight into the thought processes of those taking decisions, but this is what would be needed in order to know for certain whether a decision has been unreasonably influenced. What this suggests is the need for a balanced and rational assessment of information on meetings, rather than the automatic assumption of undue influence. It is not, however, an argument against making this information available. Secrecy simply feeds the fantasies of those conspiracy theorists who attribute policy decisions they do not like to the nature of the process that produced them.
>
> Measures are needed … [to] ensure that the process of lobbying takes place in as public a way as possible, subject to the maximum reasonable degree of transparency …"

[OA3] 169. On 23 October 2009 the Government Response to the PASC Lobbying Report was published. At an early stage in the response the Government stated:

> … it is … important to set out the context … While the Committee's Report focuses mainly on the relationship between the lobbying industry and Government, it must be remembered that lobbying goes much wider than this. Lobbying is essentially the activity of those in a democracy making representations to government on issues of concern.

[OA3] 170. In that context, the Government stated that it:

> … accepts that it needs to consider whether there is more to do to provide the public with greater reassurance that lobbying takes place within a framework which upholds high standards of propriety …

[OA3] 171. Mr Evans pointed out that there are many matters of controversy where the reasons for government arriving at a particular conclusion will be discussed in parliament and may be examined in detail in the courts – including any contribution from Prince Charles. If Prince Charles was urging government to adopt a particular course of action, then in the context of freedom of information it was inconsistent for his interaction with government to be put in a special position – a position where he could pick and choose as to what the public knew.

[OA3] 172. Mr Paul Richards was a special advisor to Patricia Hewitt from the time when she became Secretary of State for Health in 2005 until a reshuffle occurred in 2007 when he became a special adviser to Hazel Blears in her roles as party chair and a minister in the Cabinet Office. When Mr Brown became Prime Minister she became Secretary of State for Communities and Local Government, in which role Mr Richards continued as her special adviser until 2009. Mr Richards gave written and oral evidence on behalf of Mr Evans. In his witness statement he said:

> 3. During my period as special adviser, it became clear to me that Prince Charles regularly corresponded with ministers on a range of issues close to his heart. I was aware of letters from the Prince, as confirmed by this FOIA application. In my experience it is not unusual for Prince Charles to correspond with ministers on issues such as planning applications, and government policy on health issues.

> 4. Over 30 years, Prince Charles has written to Government Ministers about political issues. The letters come with the Prince of Wales fleur-de-lis logo or addressed from Clarence House, or from one of the many charities, foundations and campaigning groups that the Prince has personally established.
>
> 5. Any citizen is entitled to lobby their MP and Government Ministers, but when the ordinary citizen writes to a Minister about a local issue the letter is dealt with through a centralized mailroom. Government has a mail room that deals with vast quantities of post, normally dealt with by departmental staff and rarely seen by ministers themselves. I have not seen it myself, as this post is not dealt with by ministers or their advisers. However, in contrast, when Prince Charles writes to Ministers, his letters are put before the minister, effectively at the top of the pile and are treated with great reverence.
>
> …
>
> 10. Parliamentary lobbying is a controversial activity, and commercial lobbyists would never have the kind of direct access Prince Charles appears to have. …
>
> 11. It is difficult to assess the extent of Prince Charles's influence. A good starting point would be the publication of the correspondence. This would help us to know the extent, and influence, of Prince Charles the lobbyist.

[OA3] 173. Other aspects of Mr Richards's witness statement were the subject of cross-examination on behalf of the Departments. Those set out above, however, were not.

[OA3] 174. Mr Richards made reference in his witness statement to a "Commission for Integrated Health" reception at Clarence House hosted by Prince Charles and a grant made by the government to what he called "the Foundation". He described involvement of Prince Charles in the reception as "an instance of behind-the-scenes lobbying." In cross-examination by Mr Swift it was established that what Mr Richards was referring to as the "Commission" or "Foundation" was FIH, and that the grant occurred before the reception. Mr Richards was shown a description by Sir Stephen Lamport of the process of grant-making, and accepted that he was not previously knowledgeable about this process: special advisers were excluded from such matters. It was suggested to him that he was wrong about a number of details concerning the reception. Mr Richards said he had not kept notes and might be wrong on these details. He was sure, however, that the event had been attended by Lord Warner, who was at the time Minister of State for NHS delivery, and that Prince Charles had made a speech – albeit a speech that had not been mentioned in his witness statement. Mr Richards said that grants were made in the context of policy priorities, that policy was influenced by external factors, and that policy parameters were set from people lobbying. If influences on policy arose through private letter or correspondence, then that was not made available to the public. He maintained that the event he had attended was an example of behind-the-scenes lobbying.

[OA3] 175. Mr Fordham observed that the strong public interest in transparency where lobbying is concerned has been recognised by the Information Tribunal: for example in *Evans v IC and Ministry of Defence* (EA/2006/0064) §§26-28; and *Department for Business, Enterprise and Regulatory Reform v IC and Friends of the Earth*

(EA/2007/0072) §§132-134. There are obvious dangers in *"privileged access to power, policy and government"*. Accordingly, it was submitted, what is called for is the *"maximum reasonable degree of transparency"* [2/225]. This is a concern of substance which, it was submitted, strongly militated against secrecy, and must be considered against the backcloth of Prince Charles's public pronouncements on matters of public controversy, and the material which is already in the public domain.

[OA3] 176. In addition on lobbying reliance was placed on media coverage:

> Press articles show that instances which have come to light of the Prince 'lobbying' government spark considerable public debate about whether such communications are appropriate and as to the particular views which the Prince has been putting forward. These interventions have frequently been the subject of comment by members of the public, newspapers, MPs, peers, ministers themselves, and professionals working in the fields in which the Prince is known to have expressed his strong views.

[OA3] 177. The Departments noted that Mr Evans had identified a particular term for something which was outside the education convention and was to be regarded as "lobbying". It was said to be "advocacy communication". This, submitted the Departments, was not only "undefined and probably indefinable," but also served "no relevant purpose." Prince Charles's constitutional position, it was said, required communication with ministers or departments on a wide range of matters. An attempt to characterise such communication as "lobbying":

> … entirely overlooks the constitutional position of the heir to the throne, and the fact that the heir is required to be able properly to perform the responsibilities of the sovereign from the point of succession.

[OA3] 178. In his evidence to us Professor Tomkins expressed the view that Prince Charles had failed to comply with a constitutional requirement that the monarchy be politically neutral, in the sense that his views on issues of political controversy must be kept entirely out of the public arena. The submissions for Mr Evans, however, did not go so far as to say that Prince Charles's public statements were unconstitutional. The Departments suggested that Mr Evans's claims of specific public interests in understanding Prince Charles's influence and the extent to which he was lobbying were based upon an assumption that Professor Tomkins was correct. The true position, submitted the Departments, was that Prince Charles was fully entitled to write to ministers with his views, such correspondence being an important part of his preparation to be king. They said that describing this process as "lobbying" was misleading, as that word was generally associated with the pursuit of personal interest.

[OA3] 179. The Departments were also concerned to repel an allegation which they discerned on the part of Mr Evans that a failure to disclose Prince Charles's letters discussing a particular policy would violate the rule of law. If there were a legal challenge to a decision, the Departments accepted that disclosure of reasons for the decision would have to be given "to the extent required to permit the court concerned to determine whether the minister has acted within the scope of the legal powers…". That led on to a submission that disclosure of the fact that Prince Charles had raised a particular argument would not be necessary unless "the sole fact" that it was Prince Charles who made the argument, rather than the argument itself, was part of the rationale for a decision. We can deal with

this submission at once. The fear of the Departments is misplaced. The point made by Mr Evans is, as we understand it, that Prince Charles should not be in a different position, as regards disclosure, from others who seek to influence government. More importantly, however, the contention by the Departments as to what might have to be disclosed in judicial proceedings seems to us to be an inappropriate generalisation. What must be disclosed in judicial proceedings necessarily depends upon the issues in those proceedings. It is not for the government to decide conclusively what those issues are. In a case where the identity of the individual urging a particular course of action may carry particular weight, we would in general expect the government to disclose this. What the position is in any particular case, however, will necessarily depend upon the court's assessment of the issues in that case. Our point is simply that the government should not seek to forestall this.

[OA3] 180. A further point made by the Departments concerned a suggested public interest in knowing whether Prince Charles had, in seeking to influence government, put himself in a position where "he forfeits political neutrality." We deal with those contentions when we come to examine the argument by the Departments that maintaining Prince Charles's political neutrality is a factor which points against disclosure.

[OA3] 181. The Departments added that examination of the disputed information would show that disclosure of it would give limited assistance in realising any public interest. We deal with that submission in our conditionally suspended annex concerning the disputed information.

[OA3] 182. The closing submissions for Mr Evans dismissed any distinction between Prince Charles's advocacy and the activities of "true" lobbyists: the principle of transparency applied whether the lobbyist's motive comprised a personal, or a client's, financial or other interests, or something else. Motive was simply irrelevant. Mr Fordham added orally that the biography recognised that the question whether Prince Charles influences government decisions is important. Whether he succeeded, or the disputed information would show he succeeded, was not determinative of the public interest in disclosure – the potential for influence was enough, particularly in the context of an individual who said he was seeking to do all he could to make a difference. But if it was important to know the result then two concrete examples were given. The first was a case where influence was successful: straw burning, as described in the biography. The second was a case where attempts to influence were unsuccessful: the biography explained that in relation to Romania Prince Charles had "gone public" because his letters had not yet made a difference. The public interest lay in seeing this interaction with government, rather than permitting Prince Charles to use his privileged access to seek to influence government free from any scrutiny. It was not for the tribunal to decide what amounted to lobbying, though it was important for the public to be able to form its own view on whether a particular passage concerned "lobbying" or "advocacy". That public interest included Prince Charles's role as a "charitable entrepreneur".

[OA3] 183. The argument that communications seeking to influence government should be disclosed was submitted to have particular strength in the present case for three reasons:

(1) it was common ground that correspondence from Prince Charles received special treatment: his views were conveyed more swiftly, more surely and more directly to ministers than the views of a member of the general public.

(2) a widespread perception existed that Prince Charles does in fact exercise special influence over the decisions of public authorities. The Chelsea Barracks case was cited by way of example.

(3) It had been said on behalf of Prince Charles that he saw himself as acting for the public benefit, "on behalf of us all". Sir Stephen Lamport told us in oral evidence that Prince Charles seeks to act for the wider public benefit, and would see that as being part of the duty of being heir to the throne. Later in his evidence, in reply to a question from Professor Angel, he told us that he did not regard Prince Charles's actions as "lobbying", and contrasted "lobbying" with "looking at issues and debating them from a standpoint which embraces a much wider vision, if you like, of public good, public welfare, and so on." The comment on behalf of Mr Evans was:

> To suggest that the public should not see what is being said on the public's behalf and for its own good is, to say the least, puzzling. Only the most compelling reasons could outweigh the public interest in disclosure in these circumstances.

[OA3] 184. More generally the ambiguities about the nature of Prince Charles's interaction with ministers, and the basis for that interaction, called for light to be shed – in the public interest – as to the manner in which Prince Charles conducts what is described on the Clarence House website and in his annual reviews as his "work" of "promoting and protecting" in his advocacy communications and how it is received.

[OA3] 185. At the stage of closing submissions a new point was made on behalf of Mr Evans deriving from information which had come to light during the course of the proceedings [see OA2 at paras 136-139]. The clear message which the Annual Reviews and the Clarence House website had conveyed was, submitted Mr Evans, that Prince Charles observed the same distinctions in private as in public, and thus did not raise party-political issues. It was now known from Sir Stephen Lamport's evidence that he did in fact raise such issues privately, and on Mr Evans's analysis it followed that the Annual Reviews and the website had misled the public as to the nature of Prince Charles's interaction with government. It was submitted for Mr Evans that in this regard there was a "lack of candour [which] can only add to the public concern as to whether [Prince Charles's] activities are appropriate."

[OA3] 186. The Commissioner's closing submissions, while not agreeing that the strength of these factors was so great as to outweigh those against disclosure, nevertheless agreed with the main points made by Mr Evans. A criticism by the Departments that the Commissioner was "having his cake and eating it" was rejected, it being often the case that there is a public interest in knowing the answer to a particular question regardless of what the content might be. However the Commissioner considered that the public interest in this regard would only have real weight if the disputed information enabled the question ("has Prince Charles influenced government policy?") to be answered. By contrast the Commissioner accepted that disclosure of the disputed information would not resolve the debate as to whether Prince Charles had engaged in "lobbying", or whether it was appropriate, for there would always be different views on those questions. Nonetheless the Commissioner considered there was a public interest in disclosure because it could potentially mean that the debate was conducted on the basis of information rather than speculation.

[OA3] 187. Closing submissions for the Departments covered a number of points.

(1) Earlier submissions that Prince Charles was not lobbying were maintained. It was said that the focus of the Select Committee Report had been on those acting for the financial, personal or other interests of the lobbyist or the lobbyist's client. The same concerns do not arise in relation to points made in the belief that they were for the good of the country, even more so when they were analogous to points that could be made by the monarch under the tripartite convention.

(2) Correspondingly, the definition of lobbying adopted by Mr Evans could encompass the monarch when exercising powers under the tripartite convention, for that would involve "making views known" to decision-makers.

(3) The criticism of "having one's cake and eating it" was maintained. The suggestion that these factors advanced the public interest assumed what it had to prove, and overlooked the role of the tribunal in identifying the competing public interests and how they balance off against each other. Decisions cited by Mr Evans were said to concern a different type of public interest. It was repeated that correspondence between Prince Charles and ministers undertook a very different function from lobbying.

(4) The Departments accepted that if the disputed information demonstrated that Prince Charles had a discernible influence upon government decision-making, there might be an increased public interest in disclosure. However, there was very little public interest in knowing that Prince Charles had written on a particular topic in the absence of any indication that his view had swayed government. Closed submissions on the disputed information demonstrated that none of it involved any discernible influence upon government decision-making. The disputed information simply did not assist in assessing his influence, one way or the other.

(5) The Chelsea Barracks case did not concern correspondence between Prince Charles and any UK public authority. Any perception that he in fact exercises special influence (if it exists) would neither be confirmed not dispelled by disclosure of the disputed information.

(6) When it is said that Prince Charles speaks "on behalf of us all" that reflects that he writes to ministers on what he believes is in the public interest. That is different from stating that it is in the public interest to reveal what he says. Here, too, the same point could be made about the exercise by the monarch of rights under the tripartite convention.

(7) As to Prince Charles's role as "charitable entrepreneur" Mr Swift commented that he had "no idea what that is". As Professor Brazier observed, charitable activity had been associated with monarchy since the end of the 18th Century. The Prince's charitable work enabled the monarchy to reach out to groups to whom it might have appeared irrelevant – without compromising political neutrality. The Royal Family were able to speak to a wider constituency. These arguments in relation to the scope of the convention were, as we understood it, relied upon more generally in answer to the public interest in being aware of what had taken place by way of lobbying.

(8) As regards the information which had been on the website and in the annual reviews, any misleading impression was immaterial to the balance of public interest. What was important was that Prince Charles understood what the responsibilities of Head of State were. Those responsibilities must include engaging with ministers on party political issues. The Queen must have on occasion sought to disagree with a Prime Minister in exercise of her rights under the tripartite convention on a matter of government policy in order to test it.

[OA3] 188. In his submissions on behalf of Mr Evans in reply, Mr Fordham noted that no reliance was placed on section 35 of the Act, which protected those participating within government. The reason was that this case concerned action which was external to government, but seeking to influence government. Prince Charles's attempts to influence government had been fully described in the biography. There was no suggestion that it caused any harm to the public interest. The *Department for Business, Enterprise and Regulatory Reform* case had not concerned professional lobbyists, but those who sought to persuade government decision-making by reference to ideas which they suggested would assist. As to Mr Swift saying that there was no clear dividing line between occasions involving advocacy and those that did not, Mr Fordham responded that Professor Brazier had thought there was such a dividing line in 1995.

[OA3] J4: IC(8) the education convention, preparation for kingship

[OA3] 189. The opening skeleton argument for Mr Evans submitted that the education convention had a particular scope, function and focus to which any legitimate accompanying protective aims or concerns should be tailored, and that Prince Charles's known engagement in advocacy correspondence in any event undermined the extent to which a public interest harm could be invoked so as to protect the disputed information from disclosure. To be educated is not the same as to seek to persuade and influence. The skeleton argument said that the Commissioner's reasoning involved a mismatch between correspondence covered by the convention and the correspondence covered by an expectation of confidentiality said to arise out of the convention. This was said, not in the context of the fallback position – which had not been recognised by Mr Evans – but in the context of what had been said by the Commissioner about defences to an action for breach of confidence.

[OA3] 190. The opening submissions for the Departments were that the education convention – with the broad scope for which they contended – was central to the public interest considerations relevant in these appeals. The education convention was said to be "the shorthand means of identifying the important practical purposes served by maintaining the confidentiality of the disputed information." While not at this stage adopting the fallback position Mr Swift, in support of his argument that the education convention had a broad scope, submitted that:

> Even if The Prince of Wales' purpose in writing about a particular policy to a minister is to raise arguments about that policy, not to practice for "Kingship", this is neither here nor there. When he writes to ministers, he is <u>in fact</u> preparing for the exercise of the tripartite convention as Monarch. The Appellant's argument is analogous to saying that because a person writes in order to communicate on a particular subject, he cannot at the same time be exercising letter-writing skills - a proposition that is obviously wrong.

[OA3] 191. The opening submissions for the Commissioner were that the education convention – with a less broad scope – called for protection "in the interests of maintaining the proper functioning of the UK's constitutional monarchy." Mr Pitt-Payne submitted that the correspondence which is at the heart of this case is closely related to Prince Charles's unique constitutional role, and to his task of preparing himself in due course to be the sovereign.

[OA3] 192. In the closing skeleton argument for Mr Evans the fallback argument was not specifically identified. Once it was seen that the education convention did not extend to advocacy correspondence, the only remaining obstacles identified by Mr Evans were those which we deal with under other heads: the need to preserve political neutrality; general considerations of privacy and confidentiality; and the chilling effect of disclosure.

[OA3] 193. In the Departments' closing skeleton argument:

(1) There was a significant change from what had been said in opening. For the first time the Departments' fallback position was clearly enunciated:

> 4. … Asking whether or not a particular act (and consequently the part of the disputed information that relates to it) is an act that is inside or outside the Convention is not itself the determinative question. What is in issue in this litigation is maintaining the confidentiality of communication/correspondence between the Prince of Wales and government ministers. Maintaining that confidentiality is a matter of the highest public interest because the continued ability of the Prince and ministers to communicate in confidence serves to ensure the proper functioning of the established constitutional arrangements of government in the United Kingdom.
>
> 5. The Sovereign's role and responsibilities in these constitutional arrangements are not in dispute in the evidence before the Tribunal. The role and responsibilities of the Prince of Wales as heir to the throne are equally important matters undertaken in pursuit of the overall public interest. All the disputed information in this case concerns communication between the Prince of Wales and government ministers. The Additional Parties' case is that the public interest in maintaining the confidentiality of this communication is high, regardless of whether or not the action that gives rise to the communication was, strictly speaking, inside or outside the Convention. If the action was within the scope of the Convention, then the public interest in confidentiality is (it appears) not a matter that is seriously in dispute. In the present case the Appellant seeks to identify different "types" of communication (for example "argumentative correspondence") and contend that these forms of communication are outside the Convention and should therefore be treated differently. This is a misconception. Even if the Convention as it is presently understood does not include (for example) "argumentative correspondence" between the Prince of Wales and government ministers, the public interest in maintaining the confidentiality of that communication is equally strong, because it forms a means by which the Prince in practice develops and exercises the skills that are the necessary skills of the Sovereign under the constitutional arrangements in existence in the United Kingdom. …

(2) On this basis it was said that other grounds justifying non-disclosure had added force because they would protect Prince Charles's preparation for kingship. Thus, for example, in relation to the concern that disclosure would have a chilling effect on frankness, the Departments' closing skeleton argument [at paragraph 38] cited Sir Stephen Lamport's oral evidence:

> … we come into this whole subject on the basis of The Prince of Wales being able to engage with government on matters of substance and, perhaps privately, of controversy, as part of the overall framework of preparing himself for kingship.
>
> If that correspondence can't be open and candid and able to address issues of real controversy, political difference and so on, then the extent to which he will actually be able to prepare himself for kingship, to understand the way in which government function, to understand the way in which issues are dealt with, is going to be, from my point of view, severely limited.

[OA3] 194. The Commissioner's approach in his closing skeleton argument was to refer to the stance that had been taken in the Decision Notices for correspondence falling outside the Commissioner's own definition of the education convention:

> 34. It is important, however, not to place too much emphasis on questions about the scope of the convention. Even in relation to correspondence falling outside the convention, the Commissioner accepts that there may be a significant public interest in maintaining confidentiality and hence in refusing disclosure. The Prince is Heir to the Throne, and therefore expected in due course to become Sovereign. When this happens, he will exercise the Sovereign's right and duty under the Tripartite Convention (as it has been called in this appeal): (a) to be consulted; (b) to encourage; and (c) to warn. It is in the public interest for The Prince to acquire experience in dealing with matters of government policy, and in dealing with Government Ministers; and for this purpose, it is in the public interest for him to develop strong relationships with Ministers, characterised by frank communication and mutual trust. Conversely, it is not in the public interest if the disclosure of correspondence between The Prince and Ministers has a chilling effect on future correspondence between them, leading such correspondence to be less frank in its content or more guarded in its tone. This is so, whether or not the correspondence that is disclosed actually falls within the strict scope of any constitutional convention.

[OA3] 195. Mr Fordham, in his oral closing submissions for Mr Evans, criticised the fallback position as trying to reintroduce the same protection as that afforded by the convention through the back door. The fallback position, added Mr Fordham, was an unsustainable analysis, and was not supported by Professor Brazier.

[OA3] 196. Mr Pitt-Payne, in oral submissions for the Commissioner, submitted that even if advocacy correspondence were outside the education convention, nevertheless:

> communication of that nature will assist him in being ready to perform that role as sovereign, to perform the Sovereign's functions under the tripartite convention. And whether all of that comes strictly within the scope of a

> specific convention relating to the Prince of Wales, is really a secondary consideration.

[OA3] 197. In his closing oral submissions for the Departments Mr Swift sought to draw support for the fallback position by noting that the exemption in section 37 was not limited to cases falling within a constitutional convention. He submitted that what the public interest required was a:

> … state of affairs … in which there is a free flow of information between the Prince of Wales and ministers on matters relating to government business [including] … the business of the day … [and] other matters that fall within the remit of government from time to time.

[OA3] 198. This "state of affairs" was said to serve important public interests for several reasons. Those relevant to this section of our judgment are the first and second:

(1) free flow of information enables Prince Charles to be "educated and informed in the business of government";

(2) free flow of information enables Prince Charles to establish and maintain good working relationships with government ministers in governments of various political persuasions over the years.

[OA3] 199. It was important, submitted Mr Swift, to have:

> the best conditions to establish and maintain the quality, the depth of relationship, that best serves the operation of the constitutional arrangements between elected government and the head of state that will apply to the Prince when he becomes king, when he becomes head of state.

[OA3] 200. The tribunal drew Mr Swift's attention to the protection which section 35 affords to the formulation of government policy, a provision which has been interpreted as offering a closed space within which government can formulate policy, and asked whether Prince Charles's interaction with government was something which came close to the sort of exercise which merited protection under section 35. Mr Swift replied that:

> … the notion of policy formulation is actually rather alien to the interest protected by Section 37, and alien to what it is that occurs by way of the correspondence between the Prince of Wales and government ministers.
>
> So the interests that are at stake in this appeal are not the section 35 interests; they are a different, we say equally important, set of interests that stem from the need to ensure that the Prince of Wales is in a position properly to assume the responsibilities of head of state as and when he is required to do that.
>
> So we say not a policy -- it would be wrong to characterise it in terms of policy formulation. One is looking actually at something that concerns a different sort of relationship within the constitutional framework in the United Kingdom: that between head of state and elected government.

[OA3] 201. Drawing all these points together Mr Swift argued that it was important in the public interest to ensure that Prince Charles was always ready to take on the

responsibilities of head of state under the tripartite convention, and for that reason education with a view to assuming that role was important in the public interest. Those matters were not limited to what was within the education convention, and in that regard the Departments adopted paragraph 34 of the Commissioner's closing skeleton argument.

[OA3] 202. At this stage Mr Swift's oral submissions turned to the suggested difficulties in drawing the line between "argumentative correspondence" and other correspondence. We have dealt with this in section G. We mention the point here because Mr Swift went on to submit that even if it were possible, drawing such a distinction would be:

> … an irrelevant consideration by reference to the public interests that actually exist. So even if certain communications could be labelled as argumentative, that would not take a communication beyond the reasons why, in the public interest, confidentiality is important. Something can be argumentative, for example, because the Prince of Wales is asking whether or not the formulation of policy A has included consideration of issue B. And that is still precisely the sort of communication that squarely promotes the Prince of Wales' understanding of government and government policy, and will plainly assist him when, in due course, he assumes the responsibilities of head of state. And it will also plainly assist him in knowing how to approach those matters, particularly the ones that are politically sensitive, and how he needs to do that when he is head of state so that, again, he meets the responsibilities of that office to the full. So this distinction between the argumentative and the benign is simply an irrelevant distinction by reference to the public interests that actually exist.

[OA3] 203. In oral submissions in reply Mr Fordham, as regards the education convention, emphasised the point that

> everyone who considers the constitutional implications of this case and is faced with the proposition that the heir to the throne has the constitutional right to warn or encourage or persuade government, immediately says, "No, no, the heir to the throne doesn't have that right. That is the Sovereign's constitutional right."

[OA3] 204. Once that was recognised, submitted Mr Fordham, advocacy communications fell outside the convention, and it was odd to say that the scope of the convention did not matter. An argument of that kind could not assist in a case where legal professional privilege was relied upon. It could not be right that free flow of information between Prince Charles and government could justify, in the absence of constitutional principle, a preferred status permitting advocacy without transparency or accountability.

[OA3] J5: IC(9) and variants: public perception of Prince Charles

[OA3] 205. The skeleton argument for Mr Evans identified in the Decision Notices "a need for apparent political neutrality" as a factor relied upon by the Commissioner in favour of non-disclosure of the disputed information. The Decision Notices had recorded an argument by the Departments that routine disclosure of correspondence between Prince Charles and ministers would mean that Prince Charles's "political neutrality would be put at risk", an argument accepted by the Commissioner to this extent:

> … it would clearly not be in the public interest if the Heir to [the] Throne and future Monarch appeared to be politically partisan.

[OA3] 206. It was submitted for Mr Evans that the Commissioner overestimated the extent to which disclosure would compromise the perception of political neutrality. A need for apparent political neutrality could not attach in blanket fashion to Prince Charles's correspondence in its entirety. It was "demonstrably unsound" to assert that this need could protect advocacy correspondence from disclosure. Moreover, the Commissioner's stance:

> cannot withstand the obvious point, that the information in the public domain – including as a result of the Prince's own actions – undermines this basis for maintaining blanket secrecy.

[OA3] 207. In reliance upon the witness statements of Sir Stephen and Sir Alex, the skeleton argument for Mr Evans noted that what was asserted was not a "principle of political neutrality," but "… something altogether narrower, in the sense of party-political." The skeleton argument at paragraph 91 referred to the Clarence House website before going on to identify what it labelled as the first of two possibilities:

> 91. Likewise, the Prince's website emphasises that the Prince is careful to avoid *"party political issues"*, including in his correspondence with Ministers. If that is the test, and if the Prince is adhering to it, there is no problem on this account in there being transparency. After all, the Prince's speeches are governed by the self-same principle and he is able to engage in them and the people and press can see those activities and judge for themselves.

[OA3] 208. The second logical possibility identified in the skeleton argument was that Prince Charles's advocacy correspondence did in substance compromise the principle of political neutrality. On the footing that the principle was concerned only with party political neutrality, it would be compromised it he did not do in his correspondence what Mr Evans identified him as having promised on the Clarence House website: *"The Prince is always careful to avoid party political issues"*. Preserving the appearance of impartiality could hardly be in the public interest if that were a false picture: it must protect and preserve an existing reality.

[OA3] 209. The skeleton argument for the Departments identified this facet of the public interest as being that non-disclosure would avoid "compromising the political neutrality upon which [Prince Charles's] future position as Sovereign depends." Citing other parts of the evidence of Sir Stephen and of the Clarence House website, it stressed that:

> The evidence is *not* that The Prince of Wales avoids party political issues: it is that he avoids raising such issues in public: see SL w/s §21 ("he takes great care to avoid **in his public statements** party political issues") and HRH's website at 4/58 ("when issues become a matter for party political debate or the subject of Government policy, The Prince stops raising them **publicly**") – emphasis added.

[OA3] 210. It was said by the Departments that Mr Evans had mischaracterised the evidence in this respect, and had started from an entirely false premise (namely, that it was wrong

for Prince Charles to express views on party political issues to ministers in private). In support of his entitlement to do so the Departments referred to Prince Charles's preparation for kingship:

> … the tripartite convention fully entitles the Monarch to express views in confidence to the government on any political issues, including party political issues. She does not forfeit political neutrality by so doing, provided that confidentiality is observed … . In preparation for exercising the Monarch's duties, The Prince of Wales is similarly entitled to express such views.

[OA3] 211. At this stage the Departments relied on the Decision Notices as identifying a public interest in both safeguarding Prince Charles's "political neutrality" and preventing "unfair criticism undermining the position of [Prince Charles] and the monarchy." On the former, the reasoning earlier in the skeleton argument was supplemented by an observation that:

> If the Prince of Wales cannot maintain political neutrality now, he cannot recover it as King. To the extent that one realizes the claimed public interest in knowing the details of correspondence between the Prince of Wales and Ministers, one necessarily throws away the benefits of the Convention and risks damage to the Prince's future ability to carry out his public duties as Sovereign.

[OA3] 212. On the latter, the skeleton argument for the Departments at paragraph 56 said this:

> 56. … even where the correspondence deals with matters which (properly viewed) are not issues affecting political neutrality, their disclosure would potentially expose The Prince of Wales to damaging criticism which would undermine his constitutional position and, through him, that of the Monarchy. This is because (as [Professor Tomkins's witness statement] and the press articles annexed by the Appellant show) there is a widespread failure in the media to distinguish between HRH expressing views on important matters of public policy, and the expression of views that are "party political". On [Professor Tomkins's] analysis, the fact that HRH has (over the years) expressed views on matters which can be said to be ones of public policy is sufficient to call into question his fitness to reign. This view is obviously incorrect.

[OA3] 213. At paragraph 110 of the skeleton argument for the Departments reference was made not only to "damage that disclosure would potentially cause to the perception of Prince Charles' political neutrality" but also to:

> The consequent impairment that disclosure would cause to The Prince of Wales' constitutional position and his ability to carry out his public duties.

[OA3] 214. The skeleton argument for the Departments added at paragraph 123 that a disclosure that Prince Charles had written 7 times to the Medicines Healthcare and Regulatory Agency (MHRA) within a particular period (which was, in fact, inaccurate) led to an allegation by the *Dispatches* programme that Prince Charles had engaged in improper lobbying (see AA w/s §41), and commented that:

> Disclosure of lists and schedules would potentially expose The Prince of Wales to unwarranted criticism of the type made by *Dispatches.*

[OA3] 215. The Commissioner's skeleton argument at paragraph 26(v) expressed a concern that:

> Disclosure of letters expressing the Prince's views on matters of Government business or on controversial policy issues would have the potential to undermine his perceived political neutrality, and this could in turn undermine the proper functioning of the UK's constitutional monarchy.

[OA3] 216. Later at paragraph 43 the public interest factors identified by the Commissioner included:

> 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.
>
> …
>
> 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.
>
> …

[OA3] 217. At paragraph 44 the Commissioner went on to acknowledge that the present case is primarily concerned with protecting the position of the heir to the throne rather than the sovereign, but added:

> That said, the significance of the Prince's position is that he is potentially a future Sovereign. There is a public interest in protecting his ability to fulfil that role in due course, in particular … by preserving his political neutrality.

[OA3] 218. Paragraph 47 of the Commissioner's skeleton argument described his conclusion that there was a risk – not limited to communications falling within the education convention - that disclosing information would undermine the perceived neutrality of Prince Charles, thereby undermining both his ability to carry out his current role as heir to the throne and his ability to carry out his future role as sovereign.

[OA3] 219. The closing skeleton argument for Mr Evans said that there was an emphatic answer to this concern. It lay in the very narrow meaning of "political neutrality" adopted by Prince Charles: that of avoiding an issue on which there is, at the relevant time, a crystallised division between the political parties such that expressing a view (either way) could be taken as being party politically partisan. This was a reliable, issue-based test, which could be used to determine whether a statement by Prince Charles would or would not compromise "political neutrality", and which on the evidence of Sir Alex was the principal test applied by the government when asked to give pre-publication approval to an article or speech by Prince Charles. He had consistently been prepared to speak out publicly on issues of public policy and controversy, and had authorised the biography to make public examples of correspondence to ministers speaking out 'privately' on that kind

of issue. And it was accepted by government that he had successfully adhered to his professed aims, maintaining his political neutrality [in this sense] intact.

[OA3] 220. Moreover, as had been accepted by Sir Stephen, advocacy correspondence must fall into one of three categories:

(1) correspondence addressing issues on which Prince Charles has spoken or written publicly, or authorised the release of information in the biography. Sir Stephen accepted that what was made public on these issues did no harm to Prince Charles's political neutrality, so there can be no damage through the release of such letters either.

(2) correspondence addressing issues on which, as it happened, Prince Charles has not expressed views publicly, but on which he would have been free to do so, applying the workable test of whether there was a party-political division on the subject at the time. Again, Sir Stephen accepted that concern for Prince Charles's perceived political neutrality cannot justify withholding those letters.

(3) It was confirmed in Sir Stephen's third witness statement Prince Charles corresponds with ministers on matters of contemporary party-political division. While it was said to follow that disclosure of this correspondence would infringe the principle of party political neutrality to which Prince Charles adheres in public, three considerations suggested that any detriment to Prince Charles's perceived political neutrality was unlikely to be significant. First, as Sir Alex pointed out, statements can be party political in a variety of ways, ranging from express endorsement of one party or criticism of another, or merely chiming with the position of one party on a given issue, through to simply comprising views on, or questions about, an issue which divides the parties, but without adopting any of the parties' stated positions. Sir Stephen's evidence, it was submitted, strongly suggested that Prince Charles's statements fell into this, least damaging category. Second, it would only be in the future, when he became king, that it would be important for the public to be unaware of the views he is expressing to government on party-political issues – which may by then not be party-political at all. Third, we are concerned with the marginal, additional damage which disclosure would cause. There is already some risk that an issue, which was not party-political at the time when Prince Charles spoke out about it, may become the subject of party-political divide after he accedes to the throne. This is a risk which Prince Charles and government have been happy to regard as more theoretical than real and it has not caused Prince Charles to alter the principle by which he identifies topics on which he can speak out. It seemed unlikely that disclosure of correspondence from 2004-2005 on subjects which once divided the parties but may no longer do so would materially increase the risk that Prince Charles, once king, would be seen as politically partisan. Accordingly, even in this third category of the advocacy correspondence, considerations of political neutrality did not carry much weight.

[OA3] 221. The closing skeleton argument for Mr Evans added that, should the tribunal find that considerations of political neutrality are engaged, there is a workable test which it can (and must) apply in order to distinguish correspondence where those considerations arise from correspondence where they do not. It is a test to be applied to the subject matter of the correspondence, and the question is whether, at the time of writing, there was a crystallised division between the political parties on the issue which the correspondence

addresses. It is anticipated that in many cases, the answer will be obvious from the terms of the correspondence itself. Where that question is answered affirmatively, the tribunal would need to go on to ascertain the degree to which disclosure would compromise neutrality.

[OA3] 222. The Departments' closing skeleton argument stressed in paragraph 6 that it was important that Prince Charles's "political neutrality … is not mistakenly impugned, contrary to his ability when called on to take on the responsibilities of the Monarch (and Head of State)." In paragraph 17 they added:

> disclosure of correspondence between the Prince and Ministers would risk the false impression that the Prince acts in a manner that is politically partisan. This latter risk exists regardless of the specific content of the correspondence. Whatever the correspondence says, the Prince's views could be perceived as "unduly supportive" of government policy, or perceived as "unduly critical" of it. What would get overlooked in the public scrutiny of the substance of this correspondence is the fact that if the Prince writes on issue A (a matter of government policy) and states views on it (whether for or against) he does not write in aid of any political partisan interest, he writes in aid of the national interest as he sees it.

[OA3] 223. At paragraphs 25 to 31 the Departments' closing skeleton argument criticised the analysis advanced by Mr Evans. If correspondence between Prince Charles and ministers on matters of day to day politics were disclosed, whatever was written by Prince Charles risked being misconstrued as having been written from a party political perspective. This would be directly contrary to the public interest.

[OA3] 224. Mr Evans's characterisation of "party-political" issues was said in the Departments' closing skeleton argument to be unduly narrow, and for all practical purposes unrealistic. Sir Stephen's evidence had been that it included issues of obvious political sensitivity which it would be unwise to engage in publicly, even if they do not divide the parties at the time. As to what would happen in the event of disclosure, the Departments reasoned as follows:

> (1) The storm of media criticism and media allegations of interference that The Prince of Wales has already faced as a result of his remarks on policy issues is amply illustrated by the Appellant's own documents in this case ...
>
> (2) That criticism and those allegations were made in a context where (as the Appellant accepts), The Prince of Wales has not dealt publicly with issues impinging on his political neutrality.
>
> (3) In that context, it needs little imagination to consider what the comment would be (and how potentially damaging to The Prince of Wales' position), were disclosure to be made of discussions between The Prince and Ministers of issues which divide political parties. The fact that whatever the Prince had said would not have been said for party political reasons … would be immaterial to the harm that would arise in practice. He would be perceived to have spoken/written for some partisan reason. That perception would be incorrect; risking this would be directly contrary to the public interest.

[OA3] 225. The Departments' closing skeleton argument took issue with Mr Evans's suggestion that divisions between the parties might no longer exist by the time Prince Charles became king. This was said to be both speculative and irrelevant:

> It is speculative for obvious reasons. It is irrelevant because the harm to the public interest would be done as soon as the Prince was perceived to have written for party political reasons, and that harm would be likely to endure indefinitely and affect the perception of the Prince's neutrality on future issues of political controversy.

[OA3] 226. Moreover, submitted the Departments, the tribunal's approach is to look at the position at the time of the request. When the requests were made in early April 2005, they were for current correspondence: correspondence between 1 September 2004 and 1 April 2005. To the extent that issues of current political controversy were raised in that correspondence, they were issues of very recent or current controversy at the time of the request. Looking from the time of the request to the future, Prince Charles could have been required to accede to the throne at any time. That being so, disclosure of correspondence on issues of current party-political controversy could plainly potentially have caused serious damage to his political neutrality, and hence to his ability to fulfil duties under the tripartite convention.

[OA3] 227. The Departments' closing skeleton argument added that partial disclosure of Prince Charles's correspondence, accompanied by non-disclosure only where party-political issues were discussed, would inevitably lead to highly damaging speculation about what was in the non-disclosed correspondence.

[OA3] 228. The Commissioner's closing skeleton argument made a first point that, in relation to Prince Charles, what is meant by political neutrality is that he abstains from making certain kinds of statement in public. He does this so that can act (both now and as sovereign) as a unifying figure, rather than being seen as partisan. There were statements that he could make in private without compromising his neutrality, but which he could not make in public. Disclosure of the disputed information would potentially disrupt this balance, by placing into the public domain statements that were always intended to be private. In effect, disclosure would turn private speech into public speech, contrary to Prince Charles's intentions.

[OA3] 229. A second point made by the Commissioner was that perceived political neutrality would be affected in any situation where Prince Charles was seen to be favouring one party, or opposing another. The notion of a "crystallised division" between the parties assumed that political debate developed in a well-defined way. Correspondence that is expressly or implicitly critical of the party in power would, however, be seen as favouring its political opponents, regardless of whether opposition parties have taken up a well-defined position on the issue in question. Likewise, correspondence expressing sympathy for a position that is, in fact, the preferred position of an opposition party, is likely to be seen as favouring that party, even if the issue is one on which there is as yet no clear government policy.

[OA3] 230. Mr Fordham's oral closing submissions for Mr Evans maintained that "party-politically partisan" was and is the test adopted by Prince Charles in relation to publicly-aired views, because he says, and has always said, "I avoid those kinds of issues". It was instructive to note that Mr Dimbleby had had extensive access to argumentative

correspondence, had discussed that argumentative function in detail in the biography by reference to specific concrete illustrations, had quoted directly from it when describing what Prince Charles was doing, and had exercised his own judgment in that regard. This had been accepted on all sides not to have compromised Prince Charles's perceived political neutrality. Mr Fordham contended that the reasons it had not done so were first, because the issues on which the letters were written did not divide the parties at the time, and second because the public are sufficiently discerning to be able to receive that information without drawing adverse conclusions about Prince Charles being party-politically partisan.

[OA3] 231. As to there being other "sensitivities" which Prince Charles chose to avoid, Mr Fordham said that did not affect the fact that Prince Charles had himself stated his own test of whether at the time he says something publicly the issue is party-political partisan. There was nothing unrealistic about the distinction: on the contrary it had been accepted by Sir Stephen that if one had materials and had to do it, one could say which side of the line the material fell. Similarly Professor Brazier had accepted that as to perceived political neutrality there could be no objection to disclosure of letters which didn't involve a party-politically partisan issue. Sir Stephen had also accepted that it would be possible to put correspondence into the three categories described in the closing skeleton argument for Mr Evans. It was now clear that the third of these might arise, it having been made clear in Sir Stephen's third witness statement that Prince Charles did correspond privately with ministers on party political matters. There was, submitted Mr Fordham, an enhanced public interest in disclosure of such correspondence because previously it had "very clearly looked" as though Prince Charles was saying that he did no such thing.

[OA3] 232. Mr Pitt-Payne's oral closing submissions for the Commissioner stressed that Prince Charles's function, and his potential function as sovereign, is "to act as a unifying factor, rather than as a partisan figure." If communications made privately became, in effect, "a form of forced public speech" then views intended to be private would become a matter of public debate. "Political neutrality" was to be seen as "abstaining from making certain kinds of statement in public", and would be disrupted if private correspondence were disclosed.

[OA3] 233. Mr Swift's oral closing submissions for the Departments stressed the importance of not disclosing information which might give the "false impression" that Prince Charles lacked "party-political neutrality." Mr Swift submitted that Prince Charles has views on issues which might be matters of party political difference, but when he expresses them he does not do so from a partisan perspective but because he is doing what he considers to be in the national interest. In that respect Mr Swift likened Prince Charles's role to that of the Queen. The same protection was needed for Prince Charles as was afforded to the Queen in order to avoid the risk that a "misperception" might arise that he held party-political views on a particular issue. As to the point that Prince Charles's public speeches had not compromised his perceived political neutrality, Mr Swift submitted that correspondence was different, it gave those involved greater latitude to express themselves without being on guard, something which was desirable as part of the public interest in the proper working of the existing arrangements. Turning to Mr Fordham's third category, Mr Swift's answer was that a particular piece of correspondence might concern a party-political issue, but this did not render it any the less part of preparation for becoming king.

[OA3] 234. In reply Mr Fordham submitted that there had been no answer to the points made for Mr Evans, particularly as regards those concerning the biography. Disclosure was a

straightforward solution, given that the public are aware that a letter advocating a particular view did not mean that the writer had an allegiance to a particular political party.

[OA3] J6: IC(11) chilling effect on frankness

[OA3] 235. The skeleton argument for Mr Evans commented that in the Decision Notices the Commissioner accepted that a "chilling effect" even outside the scope of the constitutional convention was a matter to be given some weight, albeit less weight (DN§§121-122). In that regard it was submitted that the Commissioner overestimated the extent to which disclosure would have a chilling effect on communications between Prince Charles and government. In particular it was unsound to identify a relevant "chilling effect" outside the scope of the education convention.

[OA3] 236. The opening skeleton argument for the Departments identified concerns as to the impact which disclosure would have on future communications between Prince Charles and government:

(1) Disclosure would inevitably mean that Prince Charles and ministers would be less open with each other, and less willing to deal with issues of political controversy in future correspondence. Prince Charles would consequently be less well instructed in the business of government, and less well prepared to exercise the tripartite convention as monarch;

(2) Disclosure of lists and schedules would potentially expose Prince Charles to unwarranted criticism, and have a chilling effect upon communications between Prince Charles and ministers, undermining the education convention.

[OA3] 237. The Commissioner's opening skeleton argument at paragraph 46 explained the concern about a chilling effect as one which arose in the context of the education convention:

> 46. Disclosure of information falling within the scope of the convention could have a "chilling effect" on communication between the Prince and government, thereby inhibiting the process whereby the Prince becomes educated about the business of government. The Commissioner considered that this consideration carried "notable weight": see case 1, Decision Notice at §119 …

[OA3] 238. The closing skeleton argument for Mr Evans asserted that the "chilling effect" argument could not bite on correspondence addressing issues on which Prince Charles has spoken or written publicly, nor on correspondence addressing issues on which he would have been free to speak publicly, had he wished. The chilling effect on the remaining category –Prince Charles's party-political argumentative correspondence – was said to be likely to be limited, given his apparently strong sense of moral commitment to raising issues with the Government.

[OA3] 239. As part of the shift identified earlier in the closing skeleton argument for the Departments it was said that, independently of the label "Convention" there was a strong public interest that Prince Charles and ministers can correspond freely and frankly to assist Prince Charles in preparation for kingship. Further:

(1) It was plainly wrong to argue that disclosure would have no chilling effect upon correspondence addressing issues on which Prince Charles has spoken, or would be free to speak, publicly. This would be contrary to any properly formulated analysis of the public interest. It would risk significant adverse impact on Prince Charles's ability to prepare and be ready for succession.

(2) As a matter of common sense, even on general topics that Prince Charles can raise in public, both the content of what he can say and the language in which he can say it will differ markedly, depending upon whether he is writing a confidential letter or making a public speech. It is unrealistic to suggest, therefore, that the parties' frankness and candour of discussion even on "permissible" public topics would be unaffected by disclosure of correspondence. Inevitably, letters drafted for public dissemination would look very different (and much more bland). Candid discussion of any policy issues between Prince Charles and ministers would be impossible in a public forum.

(3) Drawing artificial distinctions between categories of correspondence did not reflect the reality of how relationships between Prince Charles and ministers work. Both SL and AA's evidence indicated that correspondence was a natural part of a developing relationship with ministers which encompassed social aspects, and discussion both of politically contentious and non-contentious matters. (See e.g. 31 January 2011, AA p.39-40.) It is impossible in that context to separate out particular "categories" of correspondence, and say that disclosure would "chill" one category, but not another.

(4) Again as a matter of common sense, neither Prince Charles nor ministers would <u>want</u> to engage in correspondence under the public spotlight, even if the correspondence were on matters that Prince Charles was in broad terms entitled to raise publicly. The rationale from Prince Charles's side is plain, given his well-known views on media intrusion, and the points made by the Court of Appeal in *Prince of Wales v Associated Newspapers* about the scrutiny to which he is subject.

(5) Mr Evans had signally failed to address the passage from Sir Stephen's evidence cited in paragraph 38 of the closing skeleton argument for the Departments (see section J4 above).

[OA3] 240. The Commissioner's closing skeleton argument in paragraphs 15(iv) and 34 took a broader stance than had been taken in his opening skeleton argument, going beyond a chilling effect in the context of the education convention, and asserting that, whether or not the correspondence in questions falls strictly within the scope of a constitutional convention, disclosure would inhibit frankness of communication, impeding the parties in developing strong relationships characterised by frank communication and mutual trust, and thereby adversely affecting Prince Charles's preparation for his future role as sovereign. It was added at paragraph 47:

> 47. Disclosure of the disputed information could have an effect on both the content and the tone of future correspondence: the seriousness of that effect would partly depend on the actual terms of the correspondence that was disclosed. As far as future content is concerned, the concern is that Ministers writing to The Prince would do so with an eye to how the correspondence would be viewed by political opponents and by the public. For instance, if The Prince expressed views that were in any way

controversial, and that did not reflect the current state of Government policy, then great care would be taken to avoid saying anything that might be understood as supporting The Prince's views. Care would also be taken to avoid giving any information to The Prince that was not yet in the public domain. On The Prince's side, the concern is that future correspondence would be drafted so as to exclude anything that The Prince would not be willing to say in public. The tone would inevitably become more cautious, more formal, and less personal. All of this would impede the development of trusting and open relationships between The Prince and Ministers, and would have an adverse effect on The Prince's preparation for the role of Sovereign.

[OA3] 241. Mr Fordham, in his closing oral submissions for Mr Evans, dealt with a potential chilling effect as follows:

(1) A chilling effect, if there is one, is a relevant consideration, but it is of limited impact. This is a prince who has publicly portrayed this function. He has stated the basis on which he approaches it. He has sanctioned a biography to describe it by reference to concrete examples, and he plainly is committed vocationally to this role. To the extent that there is any deflection or any change in the tone of what's written, it is minimal and certainly doesn't begin to outweigh the public interest in an informed public and in disclosure.

(2) Further, in so far as there were any inhibitions on the part of Prince Charles so that he would perhaps express himself more guardedly, or possibly would avoid party-politically partisan issues, those can't be put into the balance by the Tribunal as matters which are damaging to the public interest. That would be a discipline that transparency would bring, and would be beneficial to the public interest.

(3) In any event, none of these points about the chilling effect are anything new or novel; they are always relied on in these cases about disclosure of correspondence that people are trying to resist. They are convincing if they are referable to a constitutional convention.

[OA3] 242. Mr Pitt-Payne in his oral closing submissions for the Commissioner stressed that even if advocacy correspondence were outside the scope of the education convention there is a public interest in that kind of correspondence being able to proceed in a free and frank way.

[OA3] 243. We noted earlier that in his closing oral submissions for the Departments Mr Swift submitted that what the public interest required was a state of affairs in which there is a free flow of information between Prince Charles and ministers on matters relating to government business. On the danger of a chilling effect Mr Swift submitted:

(1) Relationships between Prince Charles and ministers need to be established not on the basis of correspondence that is necessarily guarded in some way, but on the basis of communication that is both full and frank. That is important because these conditions are the best conditions to establish and maintain the quality, the depth of relationship, that best serves the operation of the constitutional arrangements between elected government and the head of state that will apply to Prince Charles when he becomes king, when he becomes head of state.

(2) Mr Fordham had suggested that it would be better if correspondence between Prince Charles and ministers, and vice versa, was guarded. To suggest that it would be better if it had that watered-down quality was a last throw of the dice, because it misunderstood the Act and the Regulations. They operate on the basis of an assessment of the public interest by reference to arrangements as they presently exist, and are entirely neutral as to whether those arrangements are a good thing or a bad thing. An argument to suggest a public interest in those arrangements changing so that the communications should be more guarded and of a different quality, is not an argument that can be made before the tribunal.

[OA3] 244. Mr Fordham's oral submissions in reply on behalf of Mr Evans urged that concerns about a chilling effect should be confined to communications within the education convention; if the considerations urged by the Departments and the Commissioner were given scope outside the education convention then Prince Charles was given a preferred status as advocate with no transparency or accountability as to what he did outside the reach of the constitutional principle.

[OA3] J7: IC(7), (10) maintaining confidences, preserving privacy

[OA3] 245. The opening skeleton argument for Mr Evans did not dispute that the correspondence in the present case was sent privately and confidentially. However it strongly took issue with the finding in the Decision Notices that the correspondence should be characterised as "truly personal". The Decision Notices had drawn a distinction between (a) "intimate personal or family life" as opposed to (b) "public and professional life", and had categorised the present case as falling within (a). This was said to be appropriate because of Prince Charles's "unique position" and the "significant overlap" between his "public role as Heir to the Throne and a senior member of the Royal Family" and his "private life", the two being "inextricably linked" in circumstances where Prince Charles "only occupies such [public] positions because of the family into which he was born". This analysis, it was submitted, was wrong because the correspondence was:

> not information of *"truly personal content"*, nor of *"significant intrusion"*, nor [was it] information *"more private than public" …*

[OA3] 246. Elements in the analysis propounded for Mr Evans were:

(1) The nature of the information being disclosed affects the degree of interference with the individual's Article 8 rights (see eg. *Z v Finland* (1998) 25 EHRR 371 §§95-99) and the proportionality of that interference.

(2) A disclosure of *"correspondence"* may engage Article 8: see the wording of Article 8(1).

(3) There are differences between correspondence which does or does not have 'truly personal' content; and whether that content contains intimate details (eg. medical information). There are also differences between 'personal' functions and activities, and those which concern the individual as a public or professional figure, a distinction drawn even where public and private are said to be intertwined: see eg. *Corporate Officer of the House of Commons v Information Commissioner (Baker)* (EA/2006/0015 and 0016).

(4) Correspondence from Prince Charles within the scope of the education convention and advocacy communications, are both squarely on the 'public' side of this line. It is accepted in the Decision Notices that *"the withheld information"* is information which is *"focused on the business of government"*. This is not 'truly personal' content, still less intimate personal details.

(5) Article 8 extends to *"correspondence"*. And *"private life"* does not exclude professional or business activities, in that working life constitutes a significant opportunity for the exercise of the individual's right to establish and develop relationships with other human beings: *Niemietz v Germany* (1992) 16 EHRR 97 at §§29-31. Letters which are not concerned with establishing and developing relationships with other human beings are therefore to be located within the protection for *"correspondence"* rather than *"private life"*.

(6) A person who plays a role in public life has a modified expectation of protection for 'privacy', or put another way is more likely to find Article 8 privacy rights outweighed, except where the information relates exclusively to private life**.** There is here a strong countervailing consideration: *"the public has a right to be informed, which is an essential right in a democratic society"*, which means that even *"aspects of the private life of public figures"* can be covered by that public interest right: see *Von Hannover v Germany* (2005) 40 EHRR 1 at §§63-64. In particular, as the Strasbourg Court explained in *Tarsasag a Szabadsagjogokert v Hungary* (App No.37374/05, 14 April 2009) at §37:

> ... the Court considers that it would be fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights, alleging that their opinions on public matters are related to their person and therefore constitute private data which cannot be disclosed without consent.

(7) The Commissioner was wrong to refer to disclosure of this correspondence as an act which would "infringe" and "amount to an invasion of" Prince Charles's "privacy" (DN§§65, 69-70, 124). True, Article 8 was engaged, because this was "correspondence". But Article 8 privacy rights were not being infringed, breached or invaded. There is no "invasion of privacy" through the disclosure of the opinions on public matters of Prince Charles as a public figure (cf. §70). It is quite impossible to characterise correspondence which it is accepted is "focused on the business of government" (DN§52) as being of a "private and personal nature" and relating to "intimate personal or family life" rather than "public and professional life" (DN§86). It is similarly impossible to contend that disclosure of such correspondence "would undermine His Royal Highness' dignity by invasion of his privacy" (DN para 124).

(8) To call the correspondence, and moreover to do so in blanket fashion, *"more private in nature than public"* (DN§87) is unsustainable. The crucial point relied on, to characterise *"the Prince of Wales' public role"* as part of his *"private life"* or *"inextricably linked"* with his private life, was that: *"he only occupies such positions because of the family into which he was born"* (DN§87). But this is not a sound reason for the truly *"private"*, *"personal"* and *"intimate"* characterisations of the correspondence relating to what is accepted to be a *"public role"*. Precisely the same

could be said, for example, of a hereditary peer whose Parliamentary position is based on birth (cf. *Information Commissioner's Response* §53 **[1/308]**). In fact, Prince Charles himself perceives his correspondence as being in the nature of his duty as heir to the throne (Dimbleby p.544 **[2/324]**). This is part of his 'promoting and protecting' activities (§36 above). It should be noted that in *von Hannover [62]-[64]*, the ECtHR found for Princess Caroline not because she had a hereditary title, but because she exercised no functions within or on behalf of the state. The approach is governed by function, not status. Sir Stephen Lamport refers to Prince Charles's *"role [as] a function of his birth"* (§28), but he immediately goes on to recognise the importance of distinctions based on substance (§§29-32). Sir Stephen recognises that an advocacy role is different, but he insists on the qualification that it be advocacy deliberately conducted by Prince Charles in the public domain (§§29-30) and not sought to be undertaken or continued by letter.

(9) Turning to matters that fell within the education convention, it was accepted that such matters carried a weighty expectation that they would be confidential, and indeed that the protection of the education convention was a weighty matter. Where the Commissioner had gone wrong, however, was in identifying a similarly weighty expectation that correspondence outside the education convention would be confidential.

(10) Professor Brazier's witness statement asserted that any document concerning governance sent to a minister by Prince Charles must attract the same absolute confidentiality as attaches to the Queen's audiences and written communications. This all-embracing analysis, however, was flawed.

(11) In any event, it having been publicly disclosed that Prince Charles engages in advocacy correspondence with ministers and had authorised that disclosure, it could not be right for the Commissioner to concluded that Prince Charles could pick and choose (consent and self-censor) which letters come to be in the public domain (DN§118). The fact that he had been prepared to put such activities into the public domain undermined any possible principle of an expectation of confidentiality.

[OA3] 247. The opening skeleton argument for the Departments asserted that all the disputed information was confidential, that as "correspondence" it all engaged article 8, and that the Commissioner had been right to hold that it was "truly personal." Elements in the analysis propounded for the Departments were:

(1) The concept of "private life" within Article 8(1) is a broad one, based on the need to protect a person's autonomy and relationships with others from unjustified outside interference. It is not confined to activities which are "personal" in the sense of intimate or domestic. It is capable of extending to professional or business activities. In the well-known case of *Niemietz v Germany* (1993) 16 EHRR 97, the European Court of Human Rights stated at [29]:

> The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which an individual may choose to live his personal life as he chooses at to exclude entirely the outside world not encompassed within that circle. Respect for private life

> must also comprise to a certain degree the right to establish and develop relationships with other human beings.
>
> There appears, furthermore, to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world. This view is supported by the fact that, as was rightly pointed out by the Commission, it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment in time.

(2) Further, information about a person's philosophical convictions concerns a particularly intimate aspect of his "private life" within the scope of Article 8: see e.g. *Folgero v Norway* (2008) 46 EHRR 47 at [98].

(3) In the present case some of the disputed information consists of "personal" social correspondence obviously within the scope of "private life" under Article 8. But the disputed information also engages the right to respect for private life where it concerns Prince Charles's opinions about matters of wider public interest on which he holds particular personal views or convictions. The case of *Niemietz* is an indicator that no bright line can be drawn in this respect between intimate matters concerning a person's social or family life, and matters that relate to a person's role in the wider world. Prince Charles's considered convictions about public matters of great importance to him readily fit within the *Niemietz* conception of private life. By analogy with *Folgero,* too, those convictions should be accorded significant weight as an aspect of private life under Article 8(1). They are also, of course, contained in correspondence of a confidential nature (thus falling within the protection for correspondence in Article 8(1) – see *Niemietz* at paragraph 32).

(4) In *Prince of Wales v Associated Newspapers Ltd* the defendant publisher failed in its argument that Prince Charles's diaries, which it had published in breach of confidence, did not relate in any significant way to his private life because they concerned the public life of a public figure concerning events of a political character. Blackburne J at first instance (upheld by the Court of Appeal) roundly rejected the argument that Prince Charles had no reasonable expectation of privacy because the journals concerned issues of governmental policy and public governance ([2006] ECDR 20, [2006] EWHC 522(Ch), at [110]).

(5) The correspondence largely concerned Prince Charles's views about matters of deep personal significance to him. The fact that the correspondence took place within the context of preparing to be monarch does not alter its private nature. His preparation to be king is a result not of a free decision to engage in public life, but of his birth. His role as heir to the throne is an integral part of who he is. It is, therefore, wholly artificial to separate off matters covered by the Convention, and suggest that they are "public" simply because they entail preparation for duties as monarch. The analogy

with a hereditary peer was false, for Prince Charles had no choice but to accept the duties of the heir to the throne.

(6) The case of *Von Hannover v Germany* (2005) 40 EHRR 1 is not authority for the principle that public figures "enjoy less protection" under Article 8, except where information relates exclusively to their private life. Paragraphs 61-64 of that case are authority for the completely different principle that there may be an increased interest in informing the public where the facts reported concern politicians in the exercise of their functions, or the private lives of politicians. Those paragraphs of *Von Hannover* are concerned with Article 10 rights, not Article 8 rights.

(7) The true ratio of *Niemietz* is that no firm line can be drawn for Article 8 purposes between a person's "inner circle" in which he lives his personal life as he chooses, and activities through which he engages with the outer world; and that a person's work may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given time. That reasoning is particularly applicable to Prince Charles, whose preparation for kingship is inseparable from who he is.

(8) *Tarsasag v Hungary* concerned disclosure of a complaint concerning the constitutionality of drugs legislation made to the court in Hungary by a Hungarian MP. The Hungarian court refused that disclosure. In that context, the ECtHR (unsurprisingly) held that disclosure was required, because the MP had no privacy rights to protect. But any analogy between a professional politician's formal complaint to court, and Prince Charles's private letters to ministers, is plainly inapt. *Tarsasag* applies to the views of public figures in the political sphere, for which no "private sphere" protection is necessary. By virtue of the Convention, Prince Charles is not a public figure in the political sphere, and his opinions expressed in confidential correspondence to ministers have a personal quality lacking in a complaint by a politician to a court about the constitutionality of an enactment.

(9) There is an inherent public interest in the preservation of confidences and their protection by the law, which is in itself a weighty factor in favour of confidentiality. Respect for confidentiality is in itself a matter of public interest: see e.g. Lord Goff in the *Spycatcher* case at 282-3, *Associated Newspapers Ltd v HRH Prince of Wales* [2008] Ch 57 at [66] and [68]. The importance of respecting confidentiality applies to the Prime Minister and other senior ministers and civil servants who corresponded with Prince Charles in these cases, just as it would apply to anyone else. In the present instance the need to respect confidentiality is further reinforced by the public interest recognised in the education convention.

(10) In *Prince of Wales v Associated Newspapers Ltd* at paragraph 70 the Court of Appeal noted:

> As heir to the throne, Prince Charles is an important public figure. In respect of such persons the public takes an interest in information about them that is relatively trivial. For this reason public disclosure of such information can be particularly intrusive. The judge rightly had regard to this factor…

[OA3] 248. As regards the strength of factors concerning privacy and confidentiality, the Commissioner's opening skeleton argument summarised points made in the Decision Notices. It developed those points as follows:

(1) The correspondence which is at the heart of this case is closely related to Prince Charles's unique constitutional role, and to his task of preparing himself in due course to be the sovereign. That is not a role that Prince Charles has chosen to seek; it is a role that he plays as a result of the family into which he was born. Hence in Prince Charles's case, his public and private life are inextricably intertwined. He is in a very different position from Members of Parliament who have chosen to seek elected office, and whose position was considered by the Information Tribunal in *Corporate Officer of the House of Commons v Information Commissioner* EA/2006/0015 and 0016. In their case, their public role is superimposed on a pre-existing family life. By contrast, in Prince Charles's case, from the very start of his life his unique public role was a consequence of his family circumstances. In this situation the Commissioner was right to treat the relevant correspondence as being more private than public in nature.

(2) There is a public interest in protecting the privacy and dignity of the royal family. The Commissioner acknowledged that the present case is primarily concerned with protecting the position of the heir to the throne rather than the sovereign. That said, the significance of Prince Charles's position is that he is potentially a future sovereign. There is a public interest in protecting his ability to fulfil that role in due course.

(3) It was right to conclude that there was a strong public interest in maintaining the confidentiality of communications between Prince Charles and government that were carried out for the purpose of the education convention, and that there was a significant public interest in protecting the dignity of Prince Charles and preserving him from invasion of privacy.

[OA3] 249. On questions of confidentiality and privacy the closing skeleton argument for Mr Evans observed that Prince Charles allowed Mr Dimbleby to quote, summarise, and refer to advocacy correspondence with ministers, something which could hardly be characterised as inadvertent, and was incompatible with a perceived obligation of absolute confidentiality. A practice of treating the correspondence as confidential would carry little weight where confidentiality is not required either by reason of a constitutional convention or to preserve political neutrality, and would carry even less where, as here, the confider has previously been happy to disclose a substantial quantity of advocacy correspondence. Turning to privacy considerations, the skeleton argument contested the assertion that the correspondence was 'truly personal' deserving the sort of strong protection reserved for intimate personal or private details:

(1) the biography and 'leaked' letters show that to be incorrect;

(2) the Clarence House website showed that Prince Charles's publicly aired views and letters to ministers were part of his role "at work" and in "promoting and protecting";

(3) the Strasbourg Court has explained that a public figure with public functions cannot hide behind notions of privacy rights in the case of views about matters of public policy: see *Tarsasag*;

(4) the fact of birth and hereditary status did not support cloaking all correspondence as 'truly personal': hereditary peers could act as public figures, and while it was legitimate for Prince Charles to choose the work of 'protecting and promoting', he could not invoke his royal birth to characterise these actions as 'personal' and detached from his public functions;

(5) accordingly the disputed information is likely to attract only minimal weight under article 8, for while it is "correspondence", its disclosure involves no disrespect for Prince Charles's private and family life;

(6) the Departments were therefore left with asserting a public interest in preserving confidentiality for its own sake, but in circumstances where Prince Charles has previously either not regarded his communications as confidential, or has been happy to waive that confidentiality.

[OA3] 250. On confidentiality and privacy, in addition to contentions about preparation for kingship which we have discussed earlier, the closing skeleton argument for the Departments submitted:

(1) The biography involved a breach by Prince Charles, not government, of the education convention [in the extended form contended for by the Departments]. The fact that the biography involved a breach of confidence by one party did not affect the weight to be attached to the public interest in maintaining the confidentiality of correspondence between Prince Charles and ministers. These public interests are constant (unless perhaps, altered by consistent and long-term practice to the contrary). They remain important today for reasons connected with preparation for kingship. This public interest and the significant weight attaching to it is simply not Prince Charles's to dispose of (even were he to wish to do this).

(2) The biography was a one-off exercise conducted more than 15 years ago. Prince Charles nor government has disclosed, or consented to disclosure of, correspondence since that point. As regards publication that did concern communications between Prince Charles and ministers, permission was sought and received from ministers concerned before publication, and correspondence for which permission was not received was not published. This latter point is of, itself, an indication of the importance attached to confidentiality on both sides. (See Sir Stephen's oral evidence on 17 January 2011, transcript pp.81-82.)

(3) For reasons already given, maintaining confidentiality is a matter of high public interest.

(4) It is artificial to state that Prince Charles's publicly-aired views and letters to ministers are part of his role "at work" (as opposed to "personal"), by reference to the website and Annual Reviews. The fact that Prince Charles's activities cannot be separated from who he is, and the position he has been born into (i.e. are part of his "private life") is well-illustrated by the Annual Review, in particular the introduction to Prince Charles's activities in the 2004 Annual Review:

> "While there is no established constitutional role for the Heir to the Throne, The Prince of Wales **seeks to do all he can to use his unique**

> **position to make a difference for the better** in the United Kingdom and internationally" [emphasis added by the Departments]

(5) The analogy between Prince Charles and a hereditary peer acting as a public figure is false. Hereditary peers do not act as public figures by virtue of their birth, but because of a deliberate choice. That choice is not one open to Prince Charles.

(6) The point made by the Departments is not that Prince Charles's actions are detached from public functions: they are obviously not. The point is that the private and public are <u>inseparable</u>. In writing to ministers about matters of deep personal conviction that are also issues of government policy, Prince Charles is engaging in an activity that readily fits within the notion of "private life" as set out in *Niemietz v Germany*.

[OA3] 251. The Commissioner's closing skeleton argument maintained the points made previously about the inherent and weighty public interest in the maintenance of confidences, and the further support for maintaining confidentiality which arose from the need to protect the education convention, Prince Charles's political neutrality, and Prince Charles's right to respect for his private life. It also referred to disclosure having a chilling effect on frankness, a point we discuss below.

[OA3] 252. Mr Fordham, in his closing oral submissions for Mr Evans, dealt with confidentiality and privacy as follows:

(1) The notice of appearance entered by the Departments had categorised the disputed information as being correspondence which "either records the personal views and convictions of His Royal Highness," or " … is, in respect of particular passages or particular isolated items, of a private and social nature." It was the latter which was "truly personal", not the former. The notice of appearance itself showed it was distinct from advocacy correspondence.

(2) The biography had shown that it was possible to publish advocacy correspondence without going into anything truly personal.

(3) The Strasbourg principle remained that public figures cannot use their personality rights to seek to protect their opinions on public matters. The only suggested answer was that the two were intertwined by reason of birth – not by reason of content. As to that there was a good analogy with hereditary peers, for just as they chose whether or not to discharge functions involving stating opinions on public matters so had Prince Charles chosen the function of seeking to make a difference where he can.

(4) It followed that the notion of "truly personal or private material" could not cloak advocacy correspondence.

[OA3] 253. Mr Pitt-Payne in oral closing submissions for the Commissioner referred to what had been said in the Commissioner's skeleton arguments on confidentiality, noting that it remained the case that the confidential nature of the correspondence was not in issue. Additional points on privacy had been made by the Departments and he did not propose to repeat them.

[OA3] 254. We noted earlier that in his closing oral submissions for the Departments Mr Swift submitted that what the public interest required was a state of affairs in which there is a

free flow of information between Prince Charles and ministers on matters relating to government business. On confidentially and privacy Mr Swift submitted:

(1) Confidentiality provided the best conditions to educate Prince Charles about government, prepare him for kingship, and establish the quality and depth of relationship that best serves the constitutional arrangements when Prince Charles becomes king.

(2) Confidentiality ensures that there will be no false impression that Prince Charles lacks political neutrality;

(3) Confidentiality, by promoting free flow of information, enables Prince Charles to establish and maintain good working relationships with government ministers in governments of various political persuasions over the years.

[OA3] 255. Mr Fordham's oral submissions in reply on behalf of Mr Evans stressed that such confidentiality as arose outside the education convention would not have a constitutional character.

[OA3] J8: general aspects of the overall balance

[OA3] 256. The opening skeleton argument for Mr Evans submitted:

(1) Whether an actionable breach of confidence arises in its orthodox form, or comprises an actionable misuse of private information, the test is objective: what would the reasonable person of ordinary sensibilities feel if placed in the same position as the claimant and faced with the same publicity? See *Murray v Express Newspapers Plc* [2009] Ch 481 at §§24, 27, 35-36, 40; also *Campbell v MGN* [2004] 2 AC 457 at §99.

(2) The proportionality test means whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public: see *Prince of Wales v ANL* [2008] Ch 57 at §68; also *Derry City Council* (EA/2006/0014) at §35 especially (i)-(m); *LRT v Mayor of London* [2003] EMLR 4. Article 10 comes into play because of the public's Article 10 rights to receive information, treating the public authority as a willing discloser in the hypothetical claim for breach of confidence or misuse of private information: see *Derry City Council*. The tribunal needs to weigh up the nature and extent of the detriment from disclosure against the public interest in the information concerned, including by considering the extent of any existing relevant public debate and the contribution which the information would make to that debate: see *Derry City Council* (EA/2006/0014) at §35(h) and (l). In the public interest balance, arising under actionable misuse of private information, there needs to be an intense focus on the comparative importance of the competing rights and justifications in the individual case, applying the proportionality test: see *Re S (a child)* [2005] 1 AC 593 at §17.

(3) The Commissioner was right to recognise the orthodox balancing exercise, by reference to cases such as *LRT* and *Derry City Council* (DN§81). He was right to recognise the significance of ECHR Article 10, by reference to cases such as *Kenedi*

(DN§§82-83). He was right to hold that the public interest defence (or public interest balance) does not, in principle, require an "exceptional" public interest in disclosure (DN§84). He was right therefore to hold that in a case of commercial information there would be no especially high threshold requiring an "exceptional" set of public interest arguments (DN§85) (§11 above). Where he went wrong was in holding that there was nevertheless a situation requiring the application of a high threshold, where the information is 'personal and private' (DN§86) (§§9, 11 above). The authorities do not support this approach, and the Commissioner cited no authority as underpinning it. Nor did he explain why, if commercially protected information does not attract such a threshold, other private materials should do so.

(4) More generally, the Commissioner rightly identified the important "public interest arguments in favour of disclosure" (DN§§90, 125). He rightly recognised they "touch directly on many, if not all, of the central public interest arguments underpinning the Act" (DN§90). He recognised the public interest in "ensuring that public authorities are accountable for and transparent in their actions; furthering public debate; improving confidence in decisions taken by public authorities", and that particular weight deserved to be given to specific arguments relevant to this case in relation to Prince Charles's relationship with ministers. The determination, however, had already gone off the rails: through the characterisation of 'truly personal' content; through the approach to the education convention; the protection extending beyond its identified scope; the expanded accompanying expectation of confidentiality; and the suggestion of protecting appearances of political neutrality.

(5) Indeed, even assuming that an 'exceptionality' test were somehow apt, the Commissioner erred in holding that the factors favouring disclosure were not a 'strong set' of 'exceptional' public interest arguments (DN§91). Even assuming that there were somehow 'truly personal' content (§§11, 68-74), he erred in holding that these were insufficient to <u>outweigh</u> the interests and expectations of privacy (DN§§86-87). Even assuming somehow some harm to the public interest relating to the constitutional convention (DN§89) from communications beyond its scope (§§13-15, 75-95), he erred in holding that they did not outweigh those concerns (s.40) and were outweighed by those concerns (DN§§107-127). These findings were in each case unsound not only as to the premise, but in any event as to their conclusion. In upholding this rigid and blanket exemption, the Commissioner got the approach – and in any event the balance – wrong.

[OA3] 257. The opening skeleton argument for the Departments submitted that the relevant exemptions reflected very important public interests, prime among them being the protection of Prince Charles's ability to carry out his constitutional duties as heir to the throne and, subsequently, as sovereign. The skeleton argument added:

(1) Some of the correspondence simply sheds no light at all upon the operation of the Convention or Prince Charles' influence. This is true, for example, where the correspondence concerns matters that are purely "personal" in a narrow sense, or is effectively administrative correspondence between the office of Prince Charles and various government departments. In respect of such correspondence, no public interest in disclosure exists. The remainder of the correspondence would be of very limited assistance in realising such interests

(2) Importantly, in the context of confidentiality and privacy the relevant question is not simply whether the information is a matter of public interest, but rather whether in all the circumstances it is in the public interest that the duty of confidence should be breached: see for example *Associated Newspapers Ltd v HRH Prince of Wales* at [68], and the observation at paragraph 70 (cited earlier) that public disclosure of trivial information can be particularly intrusive.

(3) In order to justify disclosure of otherwise confidential information on grounds of public interest, the public interest in overriding confidentiality must be one of very considerable significance. Disclosure must be "necessary" in the public interest to override obligations of confidentiality (the test of necessity reflecting both the traditional public interest test, and the test for justification of interference with Article 8 rights under the European Convention). The paradigm case in which such a public interest will exist is where disclosure would expose wrongdoing. Even here, however, where allegations of misconduct have been relied upon to override duties of confidentiality, the Court of Appeal in *McKennitt v Ash* endorsed the approach of Eady J at first instance ((2006) EMLR 10 at [97]):

> I would nevertheless accept that Mr Browne is broadly correct when he submits that for a claimant's conduct to "trigger the public interest defence" a very high degree of misbehaviour must be demonstrated.

(4) Even if the public interest in overriding confidentiality is weighty, it does not necessarily follow that it would be proper to disclose the relevant material. The tribunal is required to consider all the relevant factors, including any harm that might arise from disclosure both in the particular case and more generally.

(5) It is not the case that when applying the public interest test, the tribunal should simply weigh Prince Charles's Article 8 rights against the Appellant's right to freedom of expression under Article 10 . However, in the present case, even if Article 10 rights are in play at all, analysis of the position in terms of a competition between Article 8 and Article 10 (a) does not add anything material to the principles set out above; and (b) tends to obscure rather than reveal the practical merits of the position.

(6) Logically, the first point to address is whether Article 10 is in play at all. The tribunal in *Derry City Council* concluded that for the purposes of section 41(1)(b) it must always be assumed that the public authority is a willing disseminator of the disputed information – for otherwise Article 10 would not be in play at all (see *In re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 WLR 325 at [34]). The further assumption in the analysis applied in the *Derry City Council* case is that wherever the existence of a public interest defence is asserted in response to a breach of confidence claim in some respect founded on Article 8, the strength/weakness of that defence must be analysed by reference to Article 10. In response, the Departments say that the first assumption (that the public authority is a willing disseminator) is counterfactual, and need not be made. It is inherently odd to adopt an analysis which requires a counterfactual assumption as its starting point. There must be strong justification for such an approach, and no such justification exists. This is because the second assumption (that if the obligation of confidentiality relied on is founded in whole or in part on Article 8, any public interest defence must be analysed by reference to Article 10) is incorrect.

(7) Moreover, (and at the least on the facts of the present case) the merits of any public interest defence that could be asserted, are not affected (let alone enhanced) by reliance on Article 10. In the present circumstances, there would be no effective public interest defence to an action for breach of confidence. These are circumstances in which the public interest in maintaining confidentiality is particularly strong, for all the reasons set out above. The following factors must be added to the inherent public interest in respecting confidences: the strong degree of protection which the disputed information attracts under Article 8, the weighty public interest in protecting the education convention, and ensuring that Prince Charles and ministers are not inhibited from communicating freely and frankly, the weighty public interest in maintaining Prince Charles's political neutrality, and the public interest in protecting Prince Charles and the Royal Family from unfair criticism undermining their constitutional position.

(8) By contrast, the public interest in disclosure here is by no means of the significance that is required to override obligations of confidentiality in these circumstances. In particular, quite apart from the general public interest in respecting confidences, there is no public interest of the "wrongdoing" type to override obligations of confidence, disclosure of the disputed correspondence would be of very limited assistance in realizing the generalised public interests in disclosure relied on, and the content of those letters, either from or to Prince Charles, does not have the "very high degree of importance" required by Eady J's test in *McKennitt v Ash* in order to justify disclosure.

[OA3] 258. The Commissioner's opening skeleton argument noted that Mr Evans's complaint about an "exceptionality" test took as its starting point a *prima facie* breach of confidence, but complained of the Commissioner's approach to the public interest defence. The skeleton argument added:

(1) In order for the defence to be made good, the considerations in favour of disclosure will need to be sufficiently strong to outweigh the considerations in favour of maintaining the duty of confidence. How strong the considerations in favour of disclosure must be in order for the public interest defence to succeed will inevitably vary from case to case. In the circumstances of the present case, the Commissioner was right to conclude that a strong set of public interest arguments would be required, having regard to the cumulative effect of the factors in favour of maintaining the confidentiality of the disputed information.

(2) In short, the correspondence that is at issue here is both confidential (in the traditional sense) and private (in the sense that it is information engaging Prince Charles's article 8 right to respect for private life); and further, the duty of confidence exists in order to protect an important constitutional convention. Given all these circumstances, the case is distinguishable from such cases as *Re S* [2005] AC 593, which simply involve a balance between article 8 and article 10.

(3) The Commissioner gave very careful consideration to the public interest considerations in favour of disclosure. See e.g. §§73 and 90 of the Decision Notice in case 1 (**[1/46; 1/49-50]**), criticising the Department for taking an unduly dismissive approach to the public interest.

(4) The Commissioner accepted that article 10 was material in considering the public interest defence: see e.g. §72 of his Decision Notice in case 1 **[1/46]**. He was right to do so. Article 10 does not in itself give a positive right to require a public authority to disclose information that it wishes to withhold. Rather, article 10 is relevant in the following way. Section 41(1) requires consideration as to whether disclosure of the disputed information by the public authority *otherwise than under FOIA* would constitute an actionable breach of confidence. Necessarily, this means that the question for consideration under section 41(1) is whether a *voluntary* disclosure by the public authority would amount to an actionable breach of confidence. Applying the exemption requires consideration of whether a hypothetical action for breach of confidence, to restrain voluntary disclosure, would succeed. If such an action for breach of confidence were brought against a public authority then it would be material to consider the article 10 rights of those members of the public who wished to receive the information that the public authority was seeking to disclose. Preventing the public authority from making voluntary disclosure would interfere with the rights of those individuals to receive information; and those rights are protected by article 10. Hence the article 10 rights of those individuals are relevant in considering the merits of any public interest defence to the hypothetical claim for breach of confidence with which section 41 is concerned.

(5) Moreover, the Commissioner considered all the public interest arguments in favour of disclosure, and accepted that there were public interest arguments, of some weight, in favour of disclosure. Nevertheless, in his submission rightly, he considered that these were not sufficient to make good the notional public interest defence to a claim for breach of confidence, given the strong considerations (identified above) in favour of maintaining the confidentiality of this information.

[OA3] 259. The closing skeleton argument for Mr Evans noted that different statutory positions are in play in different parts of the case. The skeleton argument added:

(1) All the statutory provisions relevant to this appeal involve, in some sense, a balancing of competing public interests. There are small differences of approach under each provision. It is frankly impossible to see that the outcome of the appeal will turn on these differences. The central and inescapable question is whether the public interest considerations for protecting the correspondence from disclosure outweigh or are outweighed by the public interest considerations for permitting its disclosure. The party which succeeds on that question, to the extent that it does so, will win the case.

(2) The approach to the notional breach of confidence action which the Tribunal must contemplate when applying s.41 was correctly stated by the Tribunal in *Derry City Council* (EA/2006/0014) [30]-[35]. In essence, what is required is a proportionality exercise in which the competing public interest factors for and against disclosure must be carefully weighed.

(3) One relevant factor is the public interest in seeing that obligations of confidence are upheld, but the weight to be attached to that factor is variable and must be assessed in all the circumstances: *Prince of Wales v Associated Newspapers Ltd* [68]-[69]. Here, that weight is reduced by Prince Charles's own willingness to publicise similar argumentative correspondence through the Dimbleby biography.

(4) The Government also submit that in every case, *"the public interest in overriding confidentiality must be one of very considerable significance"*, and that Prince Charles's letters must therefore be demonstrated to have a *"very high degree of importance"*. This overstates the test, and ignores the flexibility which is required in the modern, proportionality-based approach. They purport to derive this proposition from some words of Eady J in *McKennitt v Ash* [2006] EMLR 10, at [97] where he suggested that, for a public interest defence to succeed, a "very high degree of misbehaviour must be demonstrated". However, in the Court of Appeal, Buxton LJ commented, "As an entirely general statement, divorced from its particular context, that may well go too far". Eady J was specifically considering a public interest defence founded on one of the old, recognised categories (misconduct by the claimant). He was not articulating a principle applicable to the defence generally.

(5) The Commissioner made a similar error in his Decision Notices. He rejected the *Derry City Council* approach and, because of his finding (itself incorrect) that the correspondence is of a personal and private nature, directed himself that a very strong set of public interest arguments would be needed. There is no authority for this approach. On the contrary, Strasbourg jurisprudence recognises that the weight to be attached to article 8 concerns varies depending on how intimate the information is, and how closely connected it is to a person's integrity (see e.g., the great weight attached to intimate medical information in *Z v Finland*). The correct approach when assessing an interference with article 8 was set out by Lord Steyn in *Re S* [2005] 1 AC 593 at [17]:

> First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.

(6) That case concerned a direct balancing of article 8 and article 10, but the court is required to consider the proportionality of an interference with article 8, and thus undertake the fact-sensitive balancing exercise, whenever it is considering a justification under article 8(2). The suggestion that, merely by qualifying as "private" in some sense, a piece of information automatically attracts weighty protection under article 8, is anathema to that proportionality exercise.

(7) The Government also questioned the significance of Article 10. The public's Article 10 right to receive information comes in to play in the notional breach of confidence claim for the reasons stated by the Tribunal in *Derry City Council* and reiterated in this appeal by the IC. It is fair to say that the relevance of Article 10 is largely historical. It is thanks to the recognition that Article 10 is in play that we have moved from a few, strictly defined categories of public interest to the broader, proportionality-based approach. Article 10 case law has also correctly identified and stressed the important public interest in the free flow of information on political matters (broadly defined). See e.g. *von Hannover v Germany* [76] "The decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that [the materials published or to be published] make to a debate of general interest". A consideration of article 10 assists therefore in the

correct identification and assessment of the public interest factors favouring disclosure.

(8) Applying the *Derry City Council* test, it is abundantly clear that, if it disclosed the argumentative correspondence, the Government would have a good public interest defence to a claim for breach of confidence brought by Prince Charles. The public interest arguments in disclosure identified by the Commissioner and further articulated above are strong. There is evidence of a long-running public debate, at the highest levels, about the nature of Prince Charles's interactions with Government, to which disclosure of this correspondence would contribute. This is true public interest material and not, as the government would have it, trivia which is merely "interesting to the public". There is next to nothing in the other side of the scales. The education convention is not engaged. Considerations of political neutrality only arise in respect of that subset of the correspondence which addresses issues on which there was a crystallised party-political divide at the time, and even then only to a limited degree. The information is likely to attract only minimal weight under article 8 (it is "correspondence" but its disclosure involves no disrespect for Prince Charles's private and family life). The Government is therefore left with asserting a public interest in preserving confidentiality for its own sake, but in circumstances where Prince Charles has previously either not regarded his communications as confidential, or has been happy to waive that confidentiality.

(9) [at para 65 of the skeleton argument] The Commissioner identified what he considered to be the public interest factors in maintaining the s.37 exemption in his Decision Notices (*DBIS* [108]). The Departments wish to add to these factors, factors which are said to arise under the other FOIA provisions in play. Nothing turns on this, but the approach is wrong in law. In *OFCOM* [2009] EWCA Civ 90 [35]-[43] the Court of Appeal permitted the public authority to aggregate the different public interest factors arising under a number of exemptions in EIR Regulation 12[141]. This flowed from the construction of Reg 12(1)(b): (*"in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information"*). [On further appeal, a majority of the Supreme Court were inclined to uphold the Court of Appeal but referred the question to the ECJ: [2010] Env LR 20.] The same construction should arguably be placed on the equivalent provision of FOIA (section 2(2)(b)), but that does not assist the Departments, because section 2(2)(b) concerns only qualified exemptions and can therefore be construed only as permitting the aggregation of public interest factors relevant to several qualified exemptions. In this case, we have only one qualified exemption (s.37). The other two exemptions (sections 40 and 41) are both absolute (although both involve, internally, a balancing stage).

[OA3] 260. The closing skeleton argument for the Departments relied on what had been said in their opening skeleton argument. The skeleton argument added:

(1) At §65, the Appellant contends that, when assessing the public interests for and against disclosure for the purposes of s.37 FOIA, the Departments can only rely on public interests that arise under qualified exemptions. There is no warrant for this artificial approach. What requires balancing is the overall public interest in

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confidentiality, and the overall public interest in disclosure. That includes public interests that are relevant to absolute as well as to qualified exemptions (i.e. where the application of an absolute exemption itself requires consideration of public interest factors, as with sections 40 and 41 FOIA).

(2) The over-technical approach of the Appellant is decisively contrary to the reasoning of Keith J in *Home Office and Ministry of Justice v IC* [2009] EWHC 1611 at [25], with regard to the public interest balancing exercise under s.2(2)(b) FOIA:

> "…But as the Court of Appeal has recently held in *The Office of Government Communications v The Information Commissioner* [2009] EWCA 90 (Civ), when considering a provision similar to section 2(2)(b) in the Environmental Information Regulations 2004, it is necessary to consider whether the aggregate public interest in non-disclosure outweighs the aggregate public interest in favour of disclosure. In other words, whatever may be said about individual components of the balancing exercise, it is nevertheless a broad judgment on where the balance lies which is required."

[OA3] 261. The Commissioner's closing skeleton argument noted that issues about the respective weight of the public interests for and against disclosure are fundamental to all aspects of this appeal. The skeleton argument repeated points made in the opening skeleton argument and added:

(1) Similar considerations for and against disclosure are relevant, whichever of the various exemptions/exceptions are under consideration.

(2) Although section 41 involves a balance between competing considerations for and against disclosure, the section does not operate in exactly the same way as the qualified exemptions (e.g. section 37) subject to the public interest test. The public interest defence that is considered under section 41 is an aspect of the general law of breach of confidence; it is not something peculiar to FOIA. The starting-point is the weighty public interest in respecting confidences. The considerations in favour of disclosure must be *stronger* than this: otherwise the section 41 exemption will apply. Overall, the Commissioner's assessment in relation to all of the information falling within section 41 is that the public interest considerations, though of real substance, are not sufficiently weighty that the public interest defence to the notional claim for breach of confidence would succeed. To the extent that it satisfies the "obtaining" condition under section 41(1)(a) the disputed information is therefore exempt from disclosure under section 41.

[OA3] 262. Mr Fordham's oral closing submissions for Mr Evans noted that nowhere in the decision documents does the Commissioner say that if it were wrong to call for wholly exceptional public interest factors then the balance would still come down against disclosure. He added:

(1) Public domain matters about what has been said about influence on the part of Prince Charles –the press interest in the correspondence, the documentary programme on Channel 4, at least illustrate the importance of the issue.

(2) The public interest in information disclosure and informing the public goes beyond, and must go beyond, a generic description of what it is that the heir to the throne is engaged in.

(3) It is accepted that the tribunal can carve out the isolated passages or items which are truly private or social. The only other two exercises that would be necessary would be to identify if there were anything that truly fell within the education convention or, if the tribunal ruled that it should not be disclosed, concerned party-politically partisan issues. But subject to that, the public interest is in disclosure of the material; and so the tribunal doesn't need to go through and say, "This is an advocacy letter".

(4) The emphasis placed by Mr Evans on "advocacy letters" – and indeed by Professor Brazier – arises because that is what the content of the letters is said to be. Mr Evans nevertheless asserts that the disputed information should be disclosed where it would enable those reading it to make their own judgment about whether Prince Charles was "lobbying" or seeking to influence government.

[OA3] 263. Mr Pitt-Payne in oral closing submissions for the Commissioner said that the Commissioner accepts that this is not an easy case and that there are cogent factors on either side. He added:

(1) The Commissioner maintained that the factors in favour of maintaining the relevant exemptions are stronger than the factors in favour of disclosure.

(2) Mr Evans and the Departments had effectively taken the approach that for all the different exemptions you have to look at the factors in favour of disclosure and the factors against, weigh their strengths, and whichever set of factors is stronger will determine the outcome of the case. For this particular case, that approach was probably right. As a general approach to the Act or the Regulations, there were two important elements in it, which should not be elided. First, the focus, in terms of whether to maintain a particular exemption, should be on the particular public interest factors that are relevant to that exemption, rather than on the public interest in avoiding disclosure in some general sense. Second, there is a debate as to whether the public interest test should be examined exemption by exemption, or by aggregating all of the relevant factors for all exemptions and seeking to strike an overall balance. The Commissioner's position is that aggregation is not the right approach. In these particular proceedings, the tribunal would not, however, have to grapple with aggregation versus non-aggregation because it was not suggested that different factors in this case would be in play, depending on which exemptions you look at.

(3) The Commissioner has said that in the circumstances of this particular case, a strong set of public interest circumstances would be required. The Commissioner is not putting that forward as a general proposition in relation to the public interest defence for breach of confidence. It is true that there is an inherent and weighty public interest in the maintenance of confidences. That would be relevant in every section 41 case; and in every section 41 case, the public interest defence will need to be strong enough to outweigh that. It does not follow that in every case you will need a strong set of public interest circumstances. That position is put forward because of the various further factors which support the maintenance of confidentiality in this particular case.

(4) While the Commissioner recognised significant non-negligible public interest factors in favour of its disclosure, they are not sufficiently strong to establish a public interest defence to the notional claim of breach of confidence. As to this amounting to a blanket ban, the Commissioner had not sought in this case to fashion some kind of absolute exemption that applies in relation to this category of correspondence. It still depends on a case-specific weighing of the public interest factors on both sides, although admittedly some of the factors relied on by the Commissioner as factors against disclosure are considerations which are likely to be in play in every case.

[OA3] 264. Mr Swift in his closing submissions for the Departments echoed Mr Pitt-Payne's submission that reference to a blanket ban mischaracterised the position. He added:

(1) The Departments advanced three propositions. First, the public interest in non-disclosure is a strong interest on the facts of this case. Second, one necessarily needs something equally strong, by way of a public interest in disclosure, in order to require the public authority to disclose some or all of the disputed information. Third, there is no such strong pro disclosure public interest or set of public interests.

(2) The public interest, both for and against disclosure, combines both the general and the specific. The general are of equal importance and, in some circumstances, will be of greater importance than the specific: see *HM Treasury v Owen*, *Home Office v Ministry of Justice*, and *Export Credits Guarantee Department v Friends of the Earth*.

(3) The existence of regimes for disclosure under the Act and the Regulations should not be taken as abrogating the importance of longstanding constitutional conventions: see *HM Treasury v Information Commissioner*.

(4) Section 37(1)(a) is an exemption that has been specifically drawn within a reasonably tight compass to cover communications between the royal family and public authorities. In that regard, the fact that information requested falls within the scope of the exemption is itself a point of some importance: compare the *Owen* and *O'Brien* cases on section 35 (law officers' advice) and section 42 (legal professional privilege).

(5) As to reliance by Mr Fordham on the *Scotland Office* case and the convention that the proceedings of Cabinet between ministers remain confidential, there is a material difference between the approach that one takes in a case where Section 35 is applicable and the approach one takes in a case such as the present, where you have a much narrower specific exemption in Section 37. In short, what is said in the Scotland Office case, by reference to Section 35, does not translate to the present case. The present case is much more akin to the situation considered by Mr Justice Blake in *Owen* and by Mr Justice Wyn Williams in *O'Brien*. And on that basis, the fact that this information is within Section 37 is of itself a point of some importance.

(6) The points favouring non-disclosure identified by the Departments are not limited to matters that are part and parcel of the education convention, and are important in the public interest because they ensure that Prince Charles, as heir to the throne, is ready, and is always ready, to take on the responsibilities and obligations of head of state.

(7) The Departments' position is not that one can be dismissive of the public interest in disclosure. It is simply that in this case, the public interest in disclosure, such as it could be formulated, simply does not stand up against the public interest reasons in favour of non-disclosure.

[OA3] 265. In oral reply submissions Mr Fordham returned to the Departments' notice of appearance, which stated that the disputed information contained Prince Charles's views, but there were isolated items or passages which were social or personal. The answer is that if there are truly isolated social or personal matters, then they can be taken out. He added:

(1) As to what else, if anything, attracts a reason which could outweigh the public interest in disclosure, the only candidate would be something that truly within the education convention.

(2) If the tribunal discharges a "sleeves rolled up and hands on" function of considering the correspondence piece by piece, by reference to its nature, so be it. But that is not a necessary task; it is in the public interest for the public to see this material and be able to make of it what it may.

(3) As to Mr Swift's three-step analysis, there is a very strong public interest in disclosure, which is amply sufficient. But his analysis goes off the rails at the start, because what he has done is the same thing that the Commissioner in this case has done, which is to ratchet up to a need for something exceptional by reference to suggested public interest reasons said to bite against disclosure. If those reasons did not bite here any more than they bit in relation to the biography, then the premise for the Commissioner and the Departments has gone.

[OA3] K. Entitlement, exemptions and exceptions

[OA3] K1. Entitlement, and exemptions, under the Act

[OA3] 266. No supplemental material is required on this section.

[OA3] K2. Section 41: information provided in confidence

[OA3] 267. The opening skeleton argument for Mr Evans submitted that section 41(1) cannot encompass in blanket fashion the entirety of the correspondence. The skeleton argument added:

(1) There is a restricting precondition in section 41(1)(a). To that extent, the Commissioner was right (DN§§30-34). However, the 'mechanism' by which the information comes to be held is important (cf. DN§29). That is because *"obtained"* requires some active step by the public authority to acquire the information, for example by means of a request. It does not cover information which the person has decided unilaterally and voluntarily to send. This is Ground 1 of the appeals (see the Notice of Appeal §§14-16 **[1/284]**).

(2) In arguing for a blanket exemption for the correspondence between Prince Charles and ministers, the Departments begin with section 41 (quoted at DN§25), contending that it is universally applicable to all such communications. The immediate problem

with that submission is that it encounters the restriction in section 41(1)(a): *"obtained by the public authority from any other person"*.

(3) The Departments argue for an expansive interpretation which would have the tribunal effectively delete that requirement, saying that if information is held, and its disclosure would be a breach of confidence actionable by the person whom it concerns, then it is exempt. But information being held is covered by section 1(1)(a) (*"holds information"*) and section 1(1)(b) (*"if that is the case"*). And disclosure which would be an actionable breach of confidence by the relevant person is section 41(1)(b). Those ingredients do not suffice. There is a limiting criterion: section 41(1)(a), which the Government's arguments seek to ignore. This is the point powerfully made by the Commissioner (at DN§30):

> ... the way in which section of the Act is drafted means that information is not exempt simply if its disclosure would constitute an actionable breach of confidence as in common law. Rather the inclusion of section 41(1)(a) means that the public authority also has to have received that information from a third party. In effect section 41 of the Act creates an additional requirement ...

(4) That was the end of the road for this argument by the Departments. But for good measure the Commissioner also identified a second point at DN§31.

(5) Two questions remain. The first is whether the Commissioner was right that letters written by the public authority will contain the information *"obtained"* from the other person only if they reflect the content of that information. That conclusion (DN§33) is plainly correct. The focus is on *"the content of the information"* (DN§32), which means reflecting the *"actual"* substance of what the person has communicated (DN§33). It is no surprise then to find that letters to Prince Charles do not all meet this requirement (DN§34). The Departments are wrong to contend that a statement by a minister recording the mere fact of correspondence, or the general subject matter, is protected under section 41. The Commissioner is right on this point.

(6) The second remaining question concerns the word *"obtained"*. Parliament might have decided to dispense with section 41(1)(a), or it might have used the language *"received from"* or *"provided by"*. It did neither. The use of the word *"obtained"* must be taken to be deliberate, and it is the section itself which has to be interpreted. The natural meaning of *"obtained"* connotes an active, rather than a merely passive, step. It connotes information which has been elicited. There are other statutory exemptions which protect, in accordance with their terms, a person who volunteers information: see eg. section 40 (personal data) and section 43 (commercial interests). Those are general in import whereas section 41 is restricted to confidential information which has been actively obtained. That is unsurprising. Where a public authority acts positively in seeking or requesting or eliciting information, the person from whom the information is *"obtained"* is in a position of responsive cooperation and might well expect to find a special protection designed to deal with that situation. At any rate, that is what Parliament has provided. *"Obtain"* is used in the same sense in the DPA 1998. See e.g. the Second Data Protection Principle ("*Personal data shall be obtained only for one or more specified and lawful purposes..."*) which only

makes sense if "obtaining" is a positive, purposeful activity engaged in by the data controller.

[OA3] 268. The opening skeleton argument for the Departments submitted:

(1) It was incorrect to assert that information is not "obtained … from any other person" unless the public authority has taken *"some active step"* to obtain the information.

(2) The circumstances in which information is "obtained" from any other person for the purposes of s.41(1) is illuminated by the legislative purpose of the section. Section 41(1) exists to prevent a public authority being in a position where it is forced under to reveal confidential information, which would leave it open to civil claim for breach of confidence.

(3) By way of illustration, see *Hansard* HL vol 619 at col. 176 per Lord Falconer of Thoroton. Lord Falconer, promoting the Bill on behalf of the government in the House of Lords, stated:

> "Broadly, I believe that we agree on the basic parameters of this debate. Knowing all that, the Government take the view that public authorities should not be placed between a rock and a hard place. They should not have to choose between failing in their statutory duties under the legislation currently before your Lordships' House and leaving themselves open to an action at common law for breach of confidence which they owe to a third party."

(4) The sole proviso is that public authorities are not entitled to pull themselves up by their own bootstraps by relying under s.41 upon the confidentiality of information they have themselves created: other exemptions relating to the confidentiality of public authority's internal affairs exist to protect such information where appropriate (such as s.35 or s.36). In other words, the <u>originator</u> of the information relied upon for the purposes of s.41 should not be the public authority itself. The phrase "obtained … from any other person" simply reflects the requirement that the originator of the information should not be the authority.

(5) Ordinarily, therefore, a public authority could not rely upon s.41 to exempt from disclosure the contents of a letter it had created: the information in the letter would not be "obtained" from another person.

(6) However, the position is different where disclosure of the information contained in a letter created by the public authority inevitably entails the disclosure of information originating from another person, disclosure of which could found a civil claim for breach of confidence. Thus, for example, a letter from the public authority which states "you told me x", where x is confidential information obtained from the letter's addressee, would plainly be within the scope of s.41(1).

(7) But that is not all. Assume the public authority's letter is written in reply to a letter from its addressee. (i) If the addressee's <u>views</u> on a particular subject are confidential, disclosure of a reply which reveals those views (e.g. "my response to your view x is y") would entail disclosure of confidential information obtained from the addressee. (ii) If the fact that the addressee has written to the authority on a particular <u>subject</u> is confidential, disclosure of the authority's reply on the same

subject would entail disclosure of confidential information originating from, and hence obtained from, the addressee. (iii) Indeed, if the fact that the letter's addressee wrote to the public authority was confidential, disclosure of a reply to the letter would entail disclosure of confidential information obtained from the addressee.

(8) All aspects of the correspondence between Prince Charles and ministers are confidential, other than the fact that Prince Charles writes to ministers from time to time, and that they respond. Here, therefore, confidentiality did not merely attach to the specific views or opinions Prince Charles raised on a particular subject. The fact that Prince Charles wrote particular letters on particular dates to particular recipients was confidential; and the general subject-matter of those letters was confidential, no less than the views expressed within them. Indeed, the confidentiality of those matters was correctly recognized by the Commissioner at §§175 and 179 in relation to lists of correspondence.

(9) In those circumstances, all the correspondence between Prince Charles and the Departments, and indeed any list/schedule of letters from Prince Charles and replies from ministers, attracts the protection of s.41, save only to the extent that it consists of unsolicited letters to Prince Charles.

(10) Mr Evans's proposed interpretation of "obtained from" to cover only letters written by Prince Charles to the Departments at their request is wholly inconsistent both with the wording of s.41(1) and with the legislative intention behind s.41.

(11) As to legislative intention, Mr Evans's interpretation would (for example) exclude from protection highly confidential information contained in unsolicited letters from Prince Charles, whose disclosure gave rise to a cast-iron breach of confidence claim with no public interest defence. This would put the Departments between exactly the "rock and the hard place" described by Lord Falconer (see above): they could be required to disclose highly confidential information under the Act, which would leave them open to a breach of confidence claim by Prince Charles.

(12) As to the natural meaning of s.41, Mr Evans's contention that a person "obtains" information from another where he makes some deliberate effort to acquire it, is misconceived. The OED defines the meaning of "obtain" not only as "secure or gain as the result of request or effort", but also simply as "acquire" or "get". The legislative intention behind the section plainly shows that the latter meaning is intended no less than the former.

(13) Mr Evans seeks to contrast the use of the word "obtained" in s.41(1)(a) with the word "provided" in the parallel exemption under reg.12(5)(f). He accepts that information "provided" to an authority under reg.12(5)(f) would not need to be acquired by deliberate effort. However, this supposed distinction ignores the legislative title for the exemption in s.41, which is "information **provided** in confidence" (emphasis added by the Departments).

[OA3] 269. The Commissioner's opening skeleton argument submitted:

(1) The term "obtained" ought not to be given the restrictive construction argued for by Mr. Evans. First, as a matter of ordinary language a person can "obtain" information without requesting it or making any specific effort to acquire it. A journalist may

discover an important piece of information from a source as a result of making enquiries, or a result of an unsolicited disclosure: in either case, in ordinary speech we would describe the journalist as obtaining the information from his source.

(2) Secondly, the heading of section 41 is "information *provided* in confidence". This indicates that information is "obtained" by a public authority for the purposes of section 41(1)(a) in circumstances where it is "provided" to the public authority by a third party[142]. Clearly, the term "provided" is apt to cover the unilateral or unsolicited provision of information to a public authority, as well as covering the provision of information on request. This suggests that the term "obtained" is likewise intended to cover both situations.

(3) Thirdly, Mr. Evans' suggested construction would give rise to surprising and inconvenient consequences. Assume, for example, that a law enforcement or regulatory body receives an unsolicited piece of information, from a source that emphasises the absolute confidentiality of the information that is imparted. On Mr. Evans' construction, the information received by the public authority would not be obtained by the public authority, and hence would fall outside section 41(1)(a), because of its unsolicited nature.

(4) Fourthly, Mr. Evans' suggested construction is difficult to apply in practice. How much deliberate effort must the public authority make, in order for it to "obtain" information? If a law enforcement agency sets up a telephone number to which individuals can provide intelligence about criminal activity in confidence, does this mean that all information provided to that telephone number has been "obtained" by the agency in question? Or would the agency only "obtain" information if it had taken some steps actively to cultivate the particular source in question?

(5) The Departments' approach to the meaning of the word "obtained" is that correspondence from the public authority to Prince Charles would fall within section 41(1)(a) to the extent that it reveals (i) the fact that Prince Charles wrote particular letters on particular dates to particular ministers, or (ii) the general subject-matter of those letters. This approach is artificially wide. It would treat a letter addressed *to* Prince Charles, as containing information received *from* Prince Charles, even where none of the substantial content of the letter was derived from information that Prince Charles had provided. It should be rejected, and the Commissioner's approach as set out in the Decision Notices should be preferred.

(6) In short, the Commissioner's approach to section 41(1)(a) was correct. It gives real weight to the word "obtained": section 41(1) is not intended simply to cover all information that is protected by a duty of confidence. But the Commissioner's approach also applies the ordinary meaning of the word "obtained", rather than an artificially narrow or enlarged meaning.

[OA3] 270. Subsequent submissions by the parties in this regard did not add significantly to the points identified above.

[142] For the relevance of a heading as an aid to construction see Bennion, *Statutory Interpretation* pp 754-746.

[OA3] K3. Section 37: communications with the royal family

[OA3] 271. Below we summarise the main features of the submissions relevant to the discussion in the main judgment at section K3, where we examine the contention that we should apply adopt an approach which would treat section 37 as a special type of exemption carrying an in-built significant weight in favour of non-disclosure.

[OA3] 272. The contention was put in this way in the opening skeleton argument for the Departments:

(1) [At para 42] The tribunal should give significant weight to the public interest built in to certain confined exceptions: see e.g. *HMT v Information Commissioner and Owen* at [51] and [53] as regards s.35(1)(c) FOIA and *DBERR v O'Brien* [2009] EWHC 164 at [41], [51], [53], [54] as regards the inbuilt weight to be attached to legal professional privilege under s.42 FOIA. The Departments submit that the confined exception stated in s.37 FOIA is such an exemption, and that for this reason the existence of the section 37 exemption is itself an indication of the strong public interest in preserving the confidentiality of the disputed information in this appeal.

(2) [At para 59] The public interests in confidentiality are specifically recognized by the exemption in s.37 FOIA for communications with Her Majesty or other members of the royal family. Their specific recognition in s.37 FOIA reflects the intrinsic importance to be attached to confidentiality in communications between Prince Charles and ministers, in light of the Convention: see and compare the observations of Blake J in *HMT v Information Commissioner and Owens*, referred to above at paragraph 42.

[OA3] 273. The closing skeleton argument for Mr Evans submitted:

(1) It is not correct that section 37 carries with it a built in recognition of the public interest in withholding information which falls within its terms, such that the balancing exercise starts with the scales weighted in favour of the public authority. The general principle is that the existence of a particular qualified exemption does not imply that there will always some public interest in withholding information to which the exemption applies: DfES (EA/2006/0006) [60]-[66] & [75](i)-(ii); *OGC v Information Commissioner* [2010] QB 98, [79].

(2) Two exceptions have been recognised to this general principle. First, s.42 (Legal Professional Privilege) is recognised as carrying an in-built public interest against disclosure: see *DBERR v O'Brien* [2009] EWHC 164 [38], where the court explained that this approach is *"based squarely upon decisions of courts of the highest authority upon the importance to be attached to the concept of legal professional privilege"*. The second exemption which is recognised as carrying an in-built public interest against disclosure is s.35(1)(c) (provision of advice by Law Officers): *HM Treasury v Information Commissioner* [2010] 2 WLR 931, at [38]. The parallel with s.42 is obvious, and moreover, Blake J noted the "very specific" language of s.35(1)(c) which, he held, *"was statutory language intending to reflect the substance of the law officers' convention itself, a long-standing rule adopted by the executive for the promotion of good government"* [39].

(3) Section 37(1)(a) is different. Unlike s.42, s.37(1)(a) is not founded on previous judicial recognition of the importance to be attached to confidentiality of royal communications with government (none has been cited). Unlike s.35(1)(c), the exemption is not "very specific", it is expressed to apply to *all* communications with every member of the royal family and royal household. And unlike s.35(1)(c), section 37 does not reflect the substance of any long-standing convention. None of the parties has contended for the existence of a convention (long-standing or otherwise) conferring blanket confidentiality on communications with *every member* of the royal family and royal household.

(4) So, in the case of section 37, the default position applies: *"the weighing exercise begins with both pans empty and therefore level. Disclosure follows if that remains the position"* (DfES [65]).

[OA3] 274. Mr Swift in his closing submissions for the Departments added:

(1) It is important to recognise that Section 37(1)(a) is an exemption that has been specifically drawn within a reasonably tight compass to cover communications between the royal family and public authorities.

(2) In that regard, the fact that information requested falls within the scope of the exemption is itself a point of some importance, and you have there the case law in similar situations: *Owen*, concerning Section 35, the part of that section that deals with law officers' advice, and *O'Brien* that deals with Section 42, another tightly or specifically-drawn exemption in relation to legal professional privilege.

(3) As to Mr Fordham's reliance on the decision in the *Scotland Office* case, there is a material difference between the approach that one takes in a case where Section 35 is applicable and the approach one takes in a case such as the present, where section 37 is a much narrower specific exemption. What is said in the *Scotland Office* case, by reference to Section 35, does not translate to the present case. The present case is much more akin to the situation considered by Mr Justice Blake in *Owen* and by Mr Justice Wyn Williams in *O'Brien*. And on that basis, the fact that this information is within Section 37 is of itself a point of some importance.

[OA3] K4. Section 40: personal information

[OA3] 275. The opening skeleton argument for Mr Evans submitted that the condition found in paragraph 6(1) to Schedule 2 was met, for it would be satisfied where the public interest in disclosure outweighed that in non-disclosure – and for the same reason the requirement that the data be processed "fairly and lawfully" would also be met. It added:

(1) The fundamental value which the DPA 1998 serves to protect is the Article 8 right to personal privacy. This is clear from the recitals and article 1 of Directive 95/46/EC (Data Protection), which the 1998 Act implements. An appreciation of this underlying purpose should inform any decision as to (a) whether particular information amounts to "personal data" and (b) whether the processing of such data is fair. Thus in *Durant v FSA* [2004] FSR 28 at §28 Auld LJ said that it deciding whether a reference to the data subject amounts to his personal data, it may be helpful to consider *"whether the information is biographical in a significant sense, that is going beyond the recording of the putative data subject's involvement in a*

matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised" and that *"in short, [personal data] is information that affects his privacy, whether in his personal or family life, business or professional capacity"*.

(2) In a FOIA or EIR case, the "legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed" (Sch 2, para 6) are synonymous with the public interest in disclosure, and the test is broadly comparable to the balancing test which applies under the public interest test for qualified exemptions under FOIA: *Corporate Officer of the House of Commons (Baker)* (EA/0015&16) at §90.

(3) When considering whether disclosure would be *"unwarranted... by reason of prejudice to the rights and freedoms or legitimate interests of the data subject"* it is again necessary to focus closely on the extent to which a particular disclosure would interfere with his article 8 right to respect for private and family life. The interests of a data subject who performs a public role are not paramount, and the decision-maker can and must distinguish between personal data relating to his private and public life: see §§68-74 above. A failure to do so will lead to the vice identified by the ECtHR in *Tarsasag* (§70 above).

(4) The expectations of the data subject are relevant. But they are relevant only insofar as they are reasonable, and where the data subject has or should have knowledge of FOIA itself, those reasonable expectations are tempered by the terms of the Act: *Corporate Officer of the House of Commons (Leapman & ors)* (EA/2007/0060 et seq) §45 & 79(b), upheld on appeal [2008] EWHC 1084, see §18-34.

(5) In respect of the vast majority of the correspondence, there is no decision for the Tribunal to review, and the Tribunal must undertake its own analysis, applying the principles above, which will include asking whether each piece of correspondence satisfies the *Durant* test for personal data at all.

(6) Insofar as the Commissioner has made a determination in respect of personal data, where did he go wrong? Again, it is convenient to refer to the Department of Health Decision[143]. Again, for the reasons already given in respect of FOIA s.41 and 37, the Commissioner mischaracterised the information as potentially harmful to *"The Prince of Wales' privacy and dignity as protected by Article 8 ECHR"* and overstated the potential detriment to Prince Charles's political neutrality, while underestimating the public interest benefit in disclosure.

(7) Additionally – and in particular – the Commissioner wrongly assessed the expectations of Prince Charles (a matter on which the tribunal has no evidence from Prince Charles himself) as reasonable without reference to Prince Charles's own familiarity with the Act. Mr Evans's request covers correspondence in the 3 months following the entry into force of the Act and the Regulations (1 January 2005), as well as 4 months prior to their implementation. No doubt, as part of his education in and about the business of government, he will have been told in advance about FOIA – a major piece of legislation which changed the landscape for public bodies,

143 § 162-172 [1/258-260]

including government departments. He will, or should have, been made aware that the exemption most likely to apply to his correspondence (s.37(1)(a)) is a qualified exemption and that, even where his correspondence might also contain confidential information or personal data, it was possible that circumstances might arise which justified disclosure. If, after 1 January 2005, Prince Charles had any expectation that his correspondence would not be disclosed in any circumstances, that expectation was *unreasonable*. There may have been a legitimate "weighty" expectation in respect of correspondence falling within the scope of the Constitutional convention (properly defined), but even then, the expectation fell short of an absolute assurance of confidentiality.

(8) In the circumstances, disclosure of the correspondence would not be unfair to Prince Charles.

[OA3] 276. The opening skeleton argument for the Departments submitted:

(1) In the present case, the correspondence between Prince Charles and ministers constitutes "personal data" relating to Prince Charles. Further, disclosure of the correspondence would breach the first data protection principle, because it would be unwarranted by reason of prejudice to Prince Charles's rights, freedoms and legitimate interests, hence not in accordance with paragraph 6 of Schedule 2 to the DPA. In the circumstances, the correspondence is exempt from disclosure under s.40(2) FOIA.

(2) Prince Charles' correspondence to ministers either records the personal views and convictions of Prince Charles; or deals with topics which he considers particularly important; or is (in respect of particular passages or particular isolated items) of a private and social nature. The correspondence from ministers to Prince Charles either responds to personal views and convictions expressed by Prince Charles; or discusses policies/arrangements in areas of particular concern to Prince Charles; or is correspondence of a private and social nature.

(3) In the premises, the correspondence consists of data which "relate to" Prince Charles within the wide meaning of that phrase. Its existence and subject-matter is attributable to Prince Charles' personal interests, convictions, views, or social relations. It is also information that impinges upon Prince Charles' right to respect for private life under Article 8 ECHR. It therefore amounts to his "personal data" for the purposes of s.1 DPA and s.40 FOIA.

(4) For all the reasons already given above in relation to s.41 FOIA, disclosure of the correspondence in this case would be unwarranted by reason of prejudice to Prince Charles' rights, freedoms and legitimate interests. It would be unwarranted in particular in light of: (1) Prince Charles' reasonable expectation that the correspondence would be kept confidential; (2) The infringement that disclosure would cause to Prince Charles' right to respect for private life under Article 8 EHCR; (3)The chilling effect that disclosure would have on Prince Charles' ability to communicate freely and frankly with ministers; (4) The damage that disclosure would potentially cause to the perception of Prince Charles' political neutrality; (5) The consequent impairment that disclosure would cause to Prince Charles' constitutional position and his ability to carry out his public duties.

[OA3] 277. The Commissioner's opening skeleton argument did not address points on section 40.

[OA3] 278. The closing skeleton argument for Mr Evans submitted:

(1) The question here is whether, despite the strong public interest in disclosure, it would be "unwarranted ...by reason of prejudice to the rights and freedoms or legitimate interests of the data subject" (DPA 1998, Schedule 2, paragraph 6).

(2) Neither the government nor the Commissioner has sought to identify any rights, freedoms or interests of Prince Charles which are additional to those already considered under the other provisions.

(3) If anything, the focus here is narrower – concentrating on Prince Charles's rights as a data subject, which in substance means his rights under article 8 (the protection of which is at the heart of data protection legislation: see the recitals and article 1 of the Data Protection Directive).

(4) The very limited weight which article 8 concerns carry in respect of the argumentative correspondence has already been discussed. They cannot outweigh the factors favouring disclosure.

[OA3] 279. The closing skeleton argument for the Departments did not add significantly to points made earlier.

[OA3] 280. The Commissioner' closing skeleton argument accepted that the question of fairness involves a balance of competing interests, taking account of the interests both of Prince Charles and of other persons (and including the public's interest in disclosure of the requested information): see e.g. *Ferguson v Information Commissioner and The Electoral Commission* EA/2010/0085, paragraph 60. The following matters would fall to be taken into account in assessing fairness:

(1) the reasonable expectations of Prince Charles, having regard to the private and confidential nature of the information at issue;

(2) the potential consequences of disclosure for Prince Charles; and

(3) any interest of the public in having the information disclosed to them.

[OA3] 281. The oral closing submissions by the parties in this regard did not add significantly to the points above.

[OA3] K5. Entitlement under the Regulations

[OA3] 282. Issues concerning whether the disputed information fell within the Regulations are discussed in detail in the closed annex and the conditionally suspended annex.

[OA3] K6. Regulation 12(5)(f): adverse effect on provider's interests

[OA3] 283. The opening skeleton argument for Mr Evans submitted:

(1) If the tribunal were to accept what had been submitted by Mr Evans in relation to sections 41 and 37 on the basis of the submissions set out above or any of them, then on no view could Regulation 12(5)(f) produce a different answer in relation to the parts of the correspondence to which the Regulations apply.

(2) Regulation 12(2) creates an express presumption in favour of disclosure. Compared to the qualified exemptions in the Act (both class-based and prejudice-based) the threshold which must be crossed before this exception is engaged is a high one: "would adversely affect...": see *Archer* (EA/2006/37) §51. When considering the public interest, regard should be had to the underlying rationale for disclosure of environmental information, as stated in the parent Directive: "Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment". See *Bristol City Council* (EA/2010/0012) at §16.

(3) Where did the Commissioner go wrong? He was right to find that not all the correspondence will fall within regulation 12(5)(f): information is only *"provided"* by Prince Charles where it is contained in a communication from him, or where a communication from the government closely replicates the content of the information originally provided by Prince Charles (DoH§155). He correctly identified the higher threshold which applies under regulation 12(5) (DoH§158). He was correct to proceed on the basis that the factors to be balanced were essentially the same as those which arose under the Act (DoH§161). The error lay in the conduct of the balancing exercise itself, for the same reasons as set out above in relation to the Act.

(4) In the case of the two Departments (DEFRA and DCMS) for which all disputed information was considered by the Commissioner to fall within the Regulations, he recognised that "the public interest arguments in favour of disclosing the information are compelling" but then concluded that "disclosure of the particular correspondence falling within the scope of this request would not necessarily fulfil these public interest arguments". This "particular correspondence" presumably includes advocacy by Prince Charles on farming policy and architecture. Prince Charles has a well known public stance on these matters, and there is demonstrable public concern at his lobbying and apparent influence in these areas (see Evans WS §§13-17 **[3/7-8]**). Accordingly, and contrary to the Commissioner's conclusions, these are cases in which disclosure is particularly likely to serve the public interest.

[OA3] 284. The opening skeleton argument for the Departments submitted in general terms that in a case such as the present where there can be no doubt that there are important public interest reasons for maintaining the confidentiality of the disputed information, any general assumption in favour of disclosure has little if any effective role to play. If disclosure of the disputed information is to be required it should be on the basis of an evaluation in specifics of the particular public interest considerations identified by Mr Evans.

[OA3] 285. The skeleton argument added:

(1) The Departments consider that the contents of the correspondence as a whole, save only for unsolicited letters from ministers to Prince Charles, are exempt from disclosure under regulation 12(5)(f), to the extent that they consist of "environmental information" and are not information on emissions within regulation 12(8).

(2) Self-evidently, letters from Prince Charles to ministers consist of information "provided by" Prince Charles . But equally, disclosure of environmental information in letters from ministers to Prince Charles entails the disclosure of information "provided by" Prince Charles, where it entails disclosure of (1) the views of Prince Charles, where those views are confidential and disclosure would adversely affect Prince Charles's interests; (2) the subject-matter of Prince Charles's letters, where that subject-matter is confidential and disclosure would adversely affect Prince Charles' interests. The same principles apply here to information within the scope of regulation 12(5)(f) as apply under section 41.

(3) Prince Charles was under no legal obligation to write to ministers on particular subjects, or expressing particular views; the correspondence took place under conditions of confidentiality; and Prince Charles did not consent to disclosure of those views or subjects. Subparagraphs (i), (ii) and (iii) of reg.12(5)(f) are satisfied.

(4) As to the public interest balance under regulation 12(1), the points already made above in relation to the public interest under sections 37 and 41 are repeated. The public interest balance is strongly in favour of confidentiality, bearing in mind in particular the weighty public interests in protecting the education convention and Prince Charles's political neutrality.

[OA3] 286. The Commissioner's opening skeleton argument said that as regards correspondence engaging regulation 12(5)(f) the only issue is whether the public interest in maintaining this exception outweighed the public interest in disclosure. It added that the public interest considerations in relation to regulation 12(5)(f) are essentially the same as those that arise in respect of section 37(1).

[OA3] 287. The closing skeleton argument for Mr Evans added to earlier submissions as follows:

(1) Regulation 12(5)(f) requires the tribunal to balance the public interest in disclosure against the public interest in avoiding the adverse effect on Prince Charles's interests which "would" occur upon disclosure. As in the case of section 37, the Commissioner's arguments against disclosure were based on the three concerns of (a) respecting a constitutional convention, (b) maintaining political neutrality, and (c) Prince Charles's personal privacy and dignity: see e.g. *DCMS* [79]-[82]. It is now clear that the first concern does not arise in relation to argumentative correspondence, the second only arises to a limited degree in respect of a subset of the argumentative correspondence, and the third, if it is present and relevant at all, is of marginal significance.

(2) If the argumentative correspondence cannot be withheld under the Act sections 37 or 40, it is therefore inconceivable that comparable correspondence dealing with the environment could be withheld under Regulation 12(5)(f).

[OA3] 288. The closing skeleton argument for the Departments did not add significantly to earlier submissions in this regard.

[OA3] 289. The Commissioner's closing skeleton argument submitted:

(1) In certain generalised respects the Regulations may be more favourable to requesters. There is an express presumption in favour of disclosure: regulation 12(2). The relevant Directive (2003/4/EC) provides that the grounds for refusal specified in article 4.1 and 4.2 are to be interpreted in a restrictive way, taking into account (in the circumstances of the particular case) the public interest served by disclosure.

(2) The same public interest factors (for and against disclosure) arise here as in respect of section 37(1).

[OA3] 290. Nothing further of significance was said on this point in oral closing submissions.

[OA3] K7. Regulation 13: personal data

[OA3] 291. No additional material needs to be set out on this topic.

[OA3] K8. Lists and schedules under the Act and the Regulations

[OA3] 292. No additional material needs to be set out on this topic.

[OA3] L. Scope of the requests

[OA3] 293. The closing skeleton argument for Mr Evans submitted:

(1) The wording used by the requests is "any and all correspondence sent by Prince Charles to each minister in the Department..." and "any and all correspondence sent by each minister in the Department ... to Prince Charles...".

(2) What is sought, therefore, is the <u>substance</u> of exchanges between Prince Charles and particular ministers.

(3) It may be that these exchanges are sometimes conducted via Private Secretaries and the like, who are the actual signatories or addressees of the letters, and who may or may not expressly state that they are writing on behalf of Prince Charles or a minister. If there is correspondence which takes this <u>form</u> but which is in <u>substance</u> part of an exchange of views between Prince Charles and a minister, the tribunal is invited to treat it as falling within the requests and to consider it for disclosure.

[OA3] 294. The closing skeleton argument for the Departments submitted:

(1) Mr Evans described the information he required very precisely in his requests: no further clarification was required. He requested *"all correspondence which has been sent by Prince Charles",* and conversely *"all correspondence which has been sent by [ministers] to Prince Charles"*.

(2) He further specified in the fourth paragraph of his request that this meant *"correspondence…between ministers…and Prince Charles"*.

(3) On a liberal and sensible reading, that would include correspondence which was in effect correspondence from Prince Charles or from ministers themselves, even if it had been "pp'd" by a Private Secretary in the absence of their principal's signature.

(4) But it does not include correspondence that is in form and in fact correspondence between Private Secretaries.

(5) That is so even if Private Secretaries are writing on behalf of Prince Charles or ministers. If Mr Evans had wished to request such correspondence, it would have been easy enough. He need only have said that he required correspondence sent by <u>or on behalf of</u> Prince Charles, and correspondence sent by <u>or on behalf of</u> ministers. He did not.

[OA3] 295. The Commissioner's closing skeleton argument submitted:

(1) The wording used in the requests would cover letters from Prince Charles or a minister that were signed on their behalf by (e.g.) an assistant.

(2) But the wording of the request would not cover letters where the assistant, etc., was identified as the author and sender of the letter.

[OA3] 296. In oral closing submissions Mr Swift stressed that it was up to Mr Evans to specify what he sought, and that this issue was different from the questions of construction arising elsewhere. He added that the Departments should not have to hunt for nuances in the requests, and that if the requester wanted to capture all correspondence between two entities then the request should not be framed by reference to correspondence between two individuals.

[OA3] 297. In oral reply submissions Mr Fordham commented that if one wanted to take a technical approach to a request for correspondence sent by Prince Charles one would ask whether he personally took it to the post box. In the present case the Departments gathered together the material which they – without asking for clarification – thought fell within the request. If they were now suggesting that certain letters they assembled should be taken out of consideration, the reply was that a sensible and fair approach meant the tribunal looking at what it had got.