

This Order is not a
Precedent of the TTAB

Hearing: January 11, 2017

Mailed: March 16, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Shabby Chic Brands, LLC

—
Serial No. 85135970

—
ORDER OF REMAND

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Jill M. Pietrini of Sheppard Mullin Richter & Hampton LLP,
for Shabby Chic Brands, LLC.

Stephanie M. Ali, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

—
Before Zervas, Shaw, and Kuczma
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

On March 31, 2017, the Board affirmed the refusal to register the applied-for mark under Section 2(b) of the Trademark Act, 15 U.S.C. § 1052(b), for a variety of furniture and decorative housewares, in International Class 20; household and kitchen utensils, in International Class 21; and textile goods, in International Class 24.¹ The

¹ *In re Shabby Chic Brands, LLC*, 122 USPQ2d 1139 (TTAB 2017).

Board found that Applicant's mark is a simulation of a governmental insignia of the United Kingdom, namely, the official emblem of the Prince of Wales, as depicted in a designation filed by the Government of the United Kingdom in accordance with the Paris Convention.

Applicant appealed the decision to the United States Court of Appeals for the Federal Circuit, Appeal No. 2017-1878, and requested that the Court judicially notice certain materials not considered by the Examining Attorney or the Board in support of an argument it had not made to the Office. To allow the Examining Attorney and if necessary, the Board, to consider Applicant's new evidence and related arguments in the first instance, the USPTO and Applicant filed a joint motion to remand the case to the USPTO. On January 25, 2018, the Court granted the parties' joint motion to remand the case for additional proceedings. In a separate order, we vacated our March 31, 2017 decision.

We now suspend the appeal and remand the application to the Examining Attorney for further examination of Applicant's mark under Section 2(b) in light of the evidence and arguments in the relevant documents, namely, Applicant's Motion for Judicial Notice and Applicant's opening brief. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE § 1219.02 (June 2017) ("When a decision of the Board affirming a refusal to register in an ex parte case has been appealed to the United States Court of Appeals for the Federal Circuit, the Court, during the pendency of the appeal, may remand the application for further examination and the submission of additional evidence.").

In accordance with Trademark Rule 2.142(f)(1) the Examining Attorney is allowed until thirty days from the mailing date of this order in which to take action on the application. The Examining Attorney may request an extension of this period if additional time is needed. If the Examining Attorney determines that the refusal should be maintained, a non-final Office action should be issued. Applicant will, of course, be allowed the opportunity to rebut the Examining Attorney's decision with argument and evidence of its own. If the refusal is ultimately made final, the file should be returned to the Board, and the Examining Attorney and Applicant will be allowed time for supplemental briefing.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

In re SC Licensing, LLC

Appeal No. 17-1878

APPELLANT SC LICENSING, LLC'S MOTION FOR JUDICIAL NOTICE

Appellant SC Licensing, LLC (“Appellant”), pursuant to Fed. Cir. R. 27 and Fed. R. Evid. 201, moves the Court to take judicial notice of the following:

1. The duties of the Prince of Wales and reason the Prince of Wales is asked for his approval on various government bills as reflected on the “Royal Duties” page from the Prince of Wales’ official website, princeofwales.gov.uk, printed on October 12, 2017, attached as **Exhibit A**. A portion of this website was relied upon by the U.S. Patent and Trademark Office (“Office”) in refusing registration.
2. The file history for Ser. No. 89/001,177, which reflects the United Kingdom’s recordation of the alleged “official emblem of the Prince of Wales” (the “POW Badge”) with the Office pursuant to Article 6^{ter} of the Paris Convention for the Protection of Industrial Property (“Paris Convention”), attached as **Exhibit B**.
3. Certain powers of the Prince of Wales as set forth in United Kingdom statutory and case law, specifically, *Halsbury's Laws of England* (5th

Ed, 2014) vol 29, para 34 and *Evans v. Information Commissioners*, [2012] UKUT 313 (United Kingdom), 2012 WL 12296555, attached as **Exhibits C & D**, respectively.

Fed. R. Evid. 201(b) states that a “court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed R. Evid. 201(c)(2) states that a court “must take judicial notice if a party requests it and the court is supplied with the necessary information.” It is well established that a court of appeals has discretion to take judicial notice pursuant to Fed. R. Evid. 201 of facts not included in the record before the district court or, as is the instant case, the administrative board. Judicial notice “is available at the appellate level, even if not used by the trial tribunal, and may support or undermine that tribunal’s conclusions.” *The B.V.D. Licensing Corp. v. Body Action Design Inc.*, 6 USPQ2d 1719, 1721 (Fed. Cir. 1988).

For the following reasons, each of the above facts is the appropriate subject of judicial notice.

Certain Facts Regarding the Prince of Wales – Exhibit A

Appellant requests that the Court take judicial notice of the duties of the Prince of Wales and the reason the Prince of Wales is asked for his approval on

various government bills as reflected on the Prince of Wales' official website, princeofwales.gov.uk, printed on October 12, 2017. This Court routinely takes notice of facts that are common knowledge. *See, e.g., Hartop*, 311 F.2d at 255 (“With regard to the first question, the nature of ‘safety’ in the field of drugs and medicaments, we take judicial notice that many valued therapeutic substances or materials with desirable physiological properties, when administered to lower animals or humans, entail certain risks or may have undesirable side effects”); *In re Shell Oil Co.*, 992 F.2d 1204, 1210 (Fed. Cir. 1993) (“It is common knowledge, indisputable, and verifiable -- and hence subject to our judicial notice -- that all Shell service stations have signs bearing the Pecten design.”)

It is common knowledge that the Prince of Wales' function as it relates to the government of the United Kingdom is solely ceremonial. The attached printouts from the Prince of Wales' website reflect as much and, given their provenance, their accuracy cannot reasonably be questioned. Notably, the Office included and relied on excerpts from the same website – albeit different pages – in support of its refusal to register Appellant's mark at issue. Furthermore, foreign government websites have been held to be the proper subject of judicial notice. *See, e.g., In re Jommi*, 2013 U.S. Dist. LEXIS 163201, at *4, n.1 (N.D. Cal. Nov. 15, 2013) (“A court may take judicial notice of public records of governmental entities and authoritative sources of foreign law, including information posted on

government websites, and may also take notice of undisputed information on a private entity's website; granting judicial notice of “pages from [Swiss] government websites.”)

Application File for Ser. No. 89/001,177 – Exhibit B

Appellant requests that the Court take judicial notice of the file history for Ser. No. 89/001,177, which reflects the United Kingdom’s recordation of the POW Badge with the Office pursuant to Article 6^{ter} of the Paris Convention. This Court has previously taken judicial notice of a third party’s registered trademarks because “registration documents by the PTO are ‘capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’” *In re Chippendales USA Inc.*, 622 F.3d 1346, 1356 (Fed. Cir. 2010). Here the Court should take judicial notice of the application file for Ser. No. 89/001,177, and, specifically, Lois Boland’s letter (Director of the Office of International Relations of the Office) to Lynne Beresford (then Commissioner for Trademarks of the Office) dated April 13, 2006 regarding the United Kingdom’s request for protection of the POW Badge and her recitation of the Office’s obligation related thereto. Ms. Boland informs Ms. Beresford: “We are requested, as members of the Paris Convention bound by the Stockholm Act, to honor requests for protection if the official insignia does not conflict with previously acquired trademark rights in the United States.” This is a better case for judicial

notice than that at issue in *Chippendales*, because the file history for the POW Badge is not that of a third party, but of the alleged foreign insignia cited as a bar to Appellant's application.

Certain Facts Regarding the Prince of Wales' Powers – Exhibits C & D

While the authority regarding whether judicial notice is required for foreign legal authority is split, Appellant, in an abundance of caution, requests that the Court take judicial notice of facts regarding the Prince of Wales' powers as set forth in United Kingdom statutory and case law, specifically, *Halsbury's Laws of England* (5th Ed, 2014) vol 29, para 34 and *Evans v. Information Commissioners*, [2012] UKUT 313 (United Kingdom), 2012 WL 12296555. Courts routinely take judicial notice of foreign law and authority. *See Conservation Council of W. Austl., Inc. v. Aluminum Co. of Am.*, 518 F. Supp. 270, 272, n.2 (W.D. Pa. 1981) ("We have taken judicial notice of the laws of Australia pursuant to Fed. R. Evid. 201"); *Yuen v. U.S. Stock Transfer Co.*, 966 F. Supp. 944, 945, n.1 (C.D. Cal. 1997) (taking judicial notice, under Rule 201, of orders and pleadings from case pending before High Court of Justice of the British Virgin Islands; "[c]ourt may also take judicial notice of pleadings, orders and statutes from other jurisdictions if the documents are public records and capable of accurate and ready confirmation by sources that cannot reasonably be questioned"); *Mutual Serv. Ins. Co. v. Frit*

Indus., Inc., 358 F.3d 1312, 1321 (11th Cir. 2004) (noting that district court may take “judicial notice of authoritative statements of foreign law.”)

* * *

Appellant has informed Appellee of its intent to seek judicial notice of certain facts and Appellee has indicated its intention of opposing this request.

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER &
HAMPTON LLP

Dated: October 17, 2017

By /s/Jill M. Pietrini
Jill M. Pietrini
Paul A. Bost
SHEPPARD, MULLIN, RICHTER &
HAMPTON LLP
1901 Avenue of the Stars, Suite 1600
Los Angeles, CA 90067
(310) 228-3700

Attorneys for Appellant
SC Licensing, LLC

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

In re SC Licensing, LLC v. _____

Case No. 17-1878

CERTIFICATE OF INTEREST

Counsel for the:

(petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

SC Licensing, LLC

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
SC Licensing, LLC	SC Licensing, LLC	Liliput and Co, LLC
		RA Licensing, LLC

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

Susan Hwang, Esq. of Sheppard Mullin Richter & Hampton, LLP

FORM 9. Certificate of Interest

**Form 9
Rev. 10/17**

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See Fed. Cir. R. 47.4(a)(5) and 47.5(b).* (The parties should attach continuation pages as necessary).

None

10/17/2017

Date

/s/Paul A. Bost

Signature of counsel

Paul A. Bost

Printed name of counsel

Please Note: All questions must be answered

cc: _____

Reset Fields

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE
REQUIREMENTS**

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A). This brief contains 1,171 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Respectfully submitted,
SHEPPARD, MULLIN, RICHTER &
HAMPTON LLP

Dated: October 17, 2017

By /s/Jill M. Pietrini
Jill M. Pietrini
Attorneys for Appellant SC Licensing, LLC

PROOF OF SERVICE

I, LaTrina Martin, declare as follows:

I am employed in Los Angeles County, Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is Sheppard, Mullin, Richter & Hampton LLP, 1901 Avenue of the Stars, Suite 1600, Los Angeles, CA 90067-6055. On October 17, 2017, I caused the following document:

APPELLANT SC LICENSING, LLC'S MOTION FOR JUDICIAL NOTICE

including any and all exhibits, to be electronically filed with the Clerk of Court using the CM/ECF system, which will effectuate service of said document upon the following counsel of record in this action addressed as follows:

Thomas W. Krause
Nathan K. Kelley
Christina Hieber
Mary Beth Walker

Office of the Solicitor – U.S. Patent & Trademark Office

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made and that the foregoing is true and correct.

Executed on October 17, 2017, at Los Angeles, California.

/s/LaTrina Martin
LaTrina Martin

EXHIBIT A

Sign up to our newsletter

Get the latest updates about Their Royal Highnesses including news, events and photos straight to your inbox

Name *

Organisation

Job Title

Username *

Spaces are allowed; punctuation is not allowed except for full stops, hyphens, apostrophes, and underscores

E-mail address *

A valid e-mail address. All e-mails from the system will be sent to this address. The e-mail address is not made public and will only be used if you wish to receive a new password or wish to receive certain news or notifications by e-mail.

Password *

Password strength:

Confirm password *

Provide a password for the new account in both fields.

Country *

Select frequency *

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- Please tick if you would like to receive our e-zine newsletter with features, news and updates
Please tick if you would like to receive our e-zine newsletter with features, news and updates

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Royal duties

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The main part of The Prince of Wales's role as Heir to The Throne is to support Her Majesty The Queen as the focal point for national pride, unity and allegiance and bringing people together across all sections of society, representing stability and continuity, highlighting achievement, and emphasising the importance of service and the voluntary sector by encouragement and example.

The Prince often represents The Queen by welcoming dignitaries to the UK and attending State dinners during State visits. Along with other members of the Royal Family, His Royal Highness always attends the Trooping the

Colour ceremony which forms part of the official celebration of Her Majesty's birthday. The Prince often represents The Queen and the UK overseas at state and ceremonial occasions such as state funerals.

The Queen has always been committed to the Commonwealth and its members and visits on behalf of Her Majesty to Commonwealth countries, particularly realms, have been vital over the years.

In addition the other important parts of The Prince of Wales's Royal duties include:

- Armed Services
- Special Relationships and Regiments
- Working in the UK
- Overseas Duties
- Countries Visited
- Investitures

During celebrations for the Diamond Jubilee in 2012, The Prince was able to thank The Queen on behalf of the Nation for her many years of service at the concert held at Buckingham Palace.

In front of a crowd of thousands and a global television audience, His Royal Highness said to Her Majesty: "We're now celebrating the life and service of a very special person, over the last 60 years.

"I was three when my grandfather George VI died and suddenly, unexpectedly you and my father's lives were irrevocably changed when you were only 26.

"So as a nation this is our opportunity to thank you and my father for always being there for us.

"For inspiring us with your selfless duty and service and for making us proud to be British."



- [Read The Prince's biography](#)
- [Read more about The Prince's work in the UK](#)
- [Read about The Prince's relationship to Realms and the Commonwealth](#)

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Get the latest updates about Their Royal Highnesses including news, events and photos straight to your inbox

Name *

Organisation

Job Title

Username *

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E-mail address *

A valid e-mail address. All e-mails from the system will be sent to this address. The e-mail address is not made public and will only be used if you wish to receive a new password or wish to receive certain news or notifications by e-mail.

Password *

Password strength:

Confirm password *

Provide a password for the new account in both fields.

Country *

Select frequency *

Select how often you wish to receive subscription updates

Please tick if you would like to receive our e-zine newsletter with features, news and updates

Please tick if you would like to receive our e-zine newsletter with features, news and updates

FAQs

[Back](#)

Why is The Prince of Wales asked for his approval on various Government bills?

It is a long established convention that The Prince, as Duke of Cornwall, is asked by Parliament to provide consent to those bills which Parliament has decided would affect Duchy of Cornwall interests. The same process is followed with regards to The Queen providing consent to bills that would affect Crown interests. In modern times, neither the

Sovereign nor the Duke of Cornwall has ever refused to consent to any bill affecting Crown or Duchy of Cornwall interests. Every instance of The Prince's consent having been sought and given to legislation is a matter of public record.

EXHIBIT B

FORM FOR NON-REGISTRATION RECORDS

Serial Number: 89-001177

(OTPC please assign an 89 series code to this request.)

Class Data: Preset in Tradeups to NRN. No entry of class or g/s required.

Word Mark Text (If applicable): ICH DIEN

Pseudo Mark:

Translation:

Color Claim:

Additional Mark Data:

Mark Drawing Code (Select Only One):

- 1 - Typed Drawing
- 2 - Design Only
- 3 - Words plus Design
- 5 - Stylized Words
- 6 - Sensory Mark

Design Search Codes: 03.17.02, 24.09.07, 24.11.02

Misc. Mark Data:

Mark Description (Enter text as provided by submitting party.):

The official emblem of the Prince of Wales.

Owner Data:

Owner Information:

Party Type (Always enter as 10): 10

Name: Government of the United Kingdom

Address: c/o WIPO
34 chemin des Colombettes, 1211 Geneve 20, SWITZERLAND

Additional Owner Data:

Entity: 99 Government of the United Kingdom

Citizenship: United Kingdom

Non-Registration Information/ Other Data:

Filing Date (Date of Submission): 9/12/2005

Non-Registration Info (Select one)

- Article 6ter Paris Convention – United Kingdom Native American Tribal Insignia
- Federal Symbol State/Municipal symbol
- Federal Statute

Status Using Security Tradeups

Status : Enter non-registration status code: 969

Status Date (Date entered into TM Information System): Enter current date.

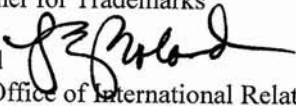


UNITED STATES PATENT AND TRADEMARK OFFICE

UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

APR 13 2006

MEMORANDUM TO: Lynne Beresford
Commissioner for Trademarks

FROM: Lois Boland 
Director – Office of International Relations

SUBJECT: Communications under Article 6ter of the Paris Convention
Official Emblem of the Prince of Wales

Please find attached a copy of Note C. 7196-55.1 GBR and its accompanying annexes from the World Intellectual Property Organization (WIPO), dated September 12, 2005, forwarding a reproduction of the official emblem of the Prince of Wales which protection is requested under Article 6ter of the Paris Convention.

We are requested, as members of the Paris Convention bound by the Stockholm Act, to honor requests for protection if the official insignia does not conflict with previously acquired trademark rights in the United States. In addition, we are also requested to deposit copies of these reproductions in the search files of the Trademark Examining Operations in order to comply with Article 6ter of the Paris Convention.

Accordingly, we request that the attached copies be entered into a Trademark database for automated search.

Attachments

cc. OLIA Chron
OLIA 4.47(c)
J. Rodriguez
N. Omelko

ORGANIZATION

世界知识产权组织

ORGANIZACIÓN MUNDIAL
DE LA PROPIEDAD INTELECTUAL



DE LA PROPRIÉTÉ INTELLECTUELLE

المنظمة العالمية للملكية الفكرية

ВСЕМИРНАЯ ОРГАНИЗАЦИЯ
ИНТЕЛЛЕКТУАЛЬНОЙ СОБСТВЕННОСТИ

C. 7196
- 55.1 GBR

September 12, 2005

Madam,
Sir,

./ Please find enclosed, together with its annex, a copy of Note C. 7195 addressed today to the Ministries of Foreign Affairs of the countries party to the Paris Convention for the Protection of Industrial Property on the subject of the official emblem of the Prince of Wales, which constitutes a State emblem adopted by the United Kingdom of Great Britain and Northern Ireland, and for which protection is requested under Article 6ter of the said Convention. A copy of Note C. 7195 is sent to the offices, including your Office, entrusted with the registration of marks by the countries party to the Paris Convention.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Ernesto Rubio'.

Ernesto Rubio
Assistant Director General

Enclosures: Note C. 7195
a reproduction of the official emblem of the Prince of Wales

ORGANIZATION

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DE LA PROPIEDAD INTELECTUAL



DE LA PROPRIÉTÉ INTELLECTUELLE

المنظمة العالمية للملكية الفكرية

ВСЕМИРНАЯ ОРГАНИЗАЦИЯ
ИНТЕЛЛЕКТУАЛЬНОЙ СОБСТВЕННОСТИ

C. 7195
-55.1 GBR

./ The International Bureau of the World Intellectual Property Organization (WIPO) presents its compliments to the Ministry of Foreign Affairs and has the honor to communicate herewith, at the request of the Government of the United Kingdom of Great Britain and Northern Ireland, a reproduction of the official emblem of the Prince of Wales, which constitutes a State emblem adopted by the United Kingdom of Great Britain and Northern Ireland, and for which protection is requested under Article 6^{ter} of the Paris Convention for the Protection of Industrial Property as revised at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967.

It is recalled that the protection of armorial bearings, flags and other State emblems of the countries of the Paris Union for the Protection of Industrial Property, and of official signs and hallmarks indicating control and warranty adopted by those countries, is provided for in Article 6^{ter} of the Paris Convention as revised at The Hague, London, Lisbon and Stockholm and that, consequently, the communication of the emblem mentioned above concerns all the countries of the Paris Union, whether party to the Stockholm Act, the Lisbon Act, the London Act or the Hague Act.

As regards the countries party to the Paris Convention that are Members of the World Trade Organization (WTO), the present communication also constitutes the communication under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) referred to in Article 3(1) of the Agreement Between WIPO and the WTO of December 22, 1995.

/...

EXHIBIT C

**Rob Evans v Information Commissioner v Department for Business,
Innovation and Skills, Department of Health, Department for
Children, Schools and Families, Department for Environment, Food
and Rural Affairs, Department for Culture, Media and Sport,
Northern Ireland Office, Cabinet Office**

Appeal Number: GI/2146/20101

Upper Tribunal (Administrative Appeals Chamber)

18 September 2012

Neutral Citation Number [2012] UKUT 313 (AAC)

2012 WL 12296555

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

18 September 2012

Comprising 7 transfers by the First-tier Tribunal of appeals from decision notices issued by the Information Commissioner (see Open Annex 1)

Information Rights:

Decision And Reasons Of The Upper Tribunal, 18 September 2012

Concerning correspondence with Prince Charles in 2004 and 2005

Representation

For Mr Evans Michael Fordham QC and Aidan Eardley (instructed by Ms Jan Clements).
For the Commissioner: Mr Timothy Pitt-Payne QC (instructed by Mr Mark Thorogood).
For the Departments; Jonathan Swift QC and Mr Julian Milford (instructed by the Treasury Solicitor).

Decision of the Upper Tribunal

Mr Justice Walker

The Upper Tribunal allows the appeals by Mr Evans. A further decision identifying information to be disclosed to Mr Evans, along with the terms of substituted decision notices, will be issued pursuant to the tribunal's directions dated 17 September 2012.

Reasons For Decision

A. Introduction

1 Mr Rob Evans, a journalist who has worked for the *Guardian* since 1999, has asked to see correspondence between Prince Charles and United Kingdom government ministers. Mr Evans contends that disclosure of the correspondence will be in the public interest, at least to the extent that the correspondence involves "advocacy" on the part of Prince Charles. In this case we are concerned with requests made by Mr Evans to seven government departments ("the Departments"). In argument on his behalf it has

been made plain that it is only "advocacy correspondence" that he seeks. It is common ground that in the present case entitlement to disclosure broadly depends on the answer to a core question: will disclosure – including any breach of confidence or privacy that disclosure will involve – be in the public interest?

2 In order to answer that question we have considered extensive evidence and submissions. For the most part the evidence and submissions have been "open" and Mr Evans has been able to play a full part in that process. Of necessity, however, evidence about the correspondence falling within Mr Evans's original requests ("the disputed information") and the private background to that correspondence has been dealt with on a "closed" basis.

3 We stress at the outset what we are not concerned with. We do not define what Prince Charles is entitled to say to government. We neither criticise nor praise what he has said or may have said. We do not seek to weigh the benefits of a constitutional monarchy over those of a republic. Our task is simply to determine whether the law requires the Departments to provide Mr Evans with the "advocacy correspondence" falling within his requests. In the United Kingdom strong views are held by many people for and against the monarchy and for and against the approach which Prince Charles has taken to his role. Some will be horrified at any suggestion that correspondence between government and the heir to the throne should be published. They fear, among other things, that disclosure would damage our constitutional structures. Others may welcome such disclosure, fearing among other things that without it there will be no real ability to understand the role played by Prince Charles in government decision-making. We approach the matter with no pre-conception. Our law requires us to weigh the public interest in disclosure and in refusing disclosure. We seek to do so dispassionately – in the words of the judicial oath, "without fear or favour, affection or ill-will."

4 For reasons which we explain below, we conclude that under relevant legislative provisions Mr Evans will, in the circumstances of the present case, generally be entitled to disclosure of "advocacy correspondence" falling within his requests. The essential reason is that it will generally be in the overall public interest for there to be transparency as to how and when Prince Charles seeks to influence government. The Departments have urged that it is important that Prince Charles should not be inhibited in encouraging or warning government as to what to do. We have not found it necessary to make a value judgment as to the desirability of Prince Charles encouraging or warning government as to what to do, for even assuming this to have the value claimed by the Departments we do not think the adverse consequences of disclosure will be as great as the Departments fear. In broad terms our ruling is that although there are cogent arguments for non-disclosure, the public interest benefits of disclosure of "advocacy correspondence" falling within Mr Evans's requests will generally outweigh the public interest benefits of non-disclosure.

5 It is important to understand the limits of this ruling. It does not entitle Mr Evans to disclosure of purely social or personal correspondence passing between Prince Charles and government ministers. It does not entitle Mr Evans to correspondence within the established constitutional convention that the heir to the throne is to be instructed in the business of government. Nor does it involve ruling on matters which do not arise in the present case. Thus, for example, it is conceivable that there may be

correspondence which, although outside the established constitutional convention, can properly be described as preparation for kingship. Or it may be that correspondence concerns an aspect of policy which is fresh and time needs to be allowed for a "protected space" before disclosure would be in the public interest. While they do not in our view arise in the present case it is possible that for these or other reasons correspondence sought in other cases may arguably not be disclosable.

6 Prince Charles is the heir to the throne, not just of the United Kingdom, but of other countries as well. As with previous male heirs to the throne he has the title " Prince of Wales ". Among his other titles he is Duke of Cornwall. He has acknowledged that there is no established constitutional role for the heir to the throne. In the absence of any such established constitutional role, he has chosen a role of seeking to make a difference – not as king, but as Prince of Wales .

7 As part of this role he explained in his *Annual Review 2004* that he has been "identifying charitable need and setting up and driving forward charities to meet it", and has also been promoting views of various kinds. It is those two features of Prince Charles's activities which in our view provide a touchstone for identifying "advocacy correspondence". It will not usually be difficult to identify whether a context for correspondence, or parts of correspondence, involves either or both of these features. When it does, then in our view it will generally be right to characterise this material as "advocacy correspondence". Confidential interaction between government ministers and others, in a context where those others are seeking to advance the work of charities or to promote views, would generally be disclosable – especially where those others have privileged access to ministers. Our conclusion is that special factors concerning Prince Charles will not – under the legislation governing the requests in this case – generally result in a different consequence.

8 There is an important proviso in the previous paragraph. As we explain in section F below, since these requests were made the legislation has changed. In future cases, in particular in relation to requests received on and after 19 January 2011, there will be severe limitations on the ability to obtain from public authorities information relating to communications with the heir to the throne.

9 We have given directions so that a decision can be made identifying information to be disclosed to Mr Evans, along with the terms of substituted decision notices. When that decision is made we will publish a further open annex on the principles governing redaction of personal details of individuals other than Prince Charles. Arrangements have been made for a closed annex setting out our analysis of the disputed information and the evidence and arguments dealt with in closed session. If there is no appeal against our decision, or any appeal is unsuccessful, then certain parts of the closed annex will no longer need to remain closed, and these will be in a conditionally suspended annex. The matters which we deal with in the present judgment are:

B. The requests, refusals and decision notices

10 Each request was made in April 2005, and concerned the period between 1 September 2004 and 1 April 2005 ("the request period"). Each request asked the relevant department, as regards the request period, for:

- (1) A list of all correspondence sent by Prince Charles to each minister in the department, identifying the recipient, sender, and date, for each item of correspondence.

- (2) A similar list of correspondence sent by each minister in the department to Prince Charles;
- (3) Complete copies of each piece of correspondence listed;
- (4) A schedule giving a brief description of each document relevant to the request, including the nature of the document, its date, and whether it was being released or not.

11 The Departments are identified in our explanatory guide at Open Annex 1 ("OA1"). A chronology of events is in Open Annex 2 ("OA2"). In summary, DEFRA informed Mr Evans that it had decided not to disclose the information requested, relying on regulatory provisions concerning environmental information in that regard. Other departments stated that they neither confirmed nor denied holding the information requested. In each case Mr Evans asked the department to reconsider. After an internal review each department maintained its initial stance, with DEFRA adding that as regards non-environmental information it neither confirmed nor denied holding the information requested.

12 Mr Evans complained to the Information Commissioner ("the Commissioner") about the way in which his request had been dealt with, and the Commissioner began an investigation. During that investigation the Departments re-examined the matter. Those which had not previously done so, and DEFRA to the extent that it had not previously done so, informed Mr Evans that they held information falling within the scope of his request. The Departments nevertheless refused to produce the correspondence sought, or the lists and schedules that had been requested.

13 The Commissioner issued separate decision notices for each department. Each decision notice held that the relevant department had been entitled to maintain its refusal, and gave reasons for so holding. Our account of those reasons is at section B of supplementary material in Open Annex 3 ("OA3"). It should be read only after reading section E of the present judgment.

C. The Appeals and the Legislation

14 On 13 January 2010 Mr Evans appealed to the Information Tribunal, which registered the proceedings as seven appeals, comprising one appeal against each of the Commissioner's decision notices. On 18 January 2010 the functions of the Information Tribunal were transferred to the First-tier Tribunal. The appeals were similarly transferred. The appeals were further transferred on 13 September 2010 to the Upper Tribunal, a course with which the parties agreed. The Upper Tribunal has treated them as a single set of proceedings.

15 Thus it is that the appeals have come before us. The parties to the appeals are Mr Evans as appellant, the Commissioner as respondent, and the Departments as additional parties. Prince Charles has not sought any formal participation in his own right in the appeals, on the basis that he is content to allow the Departments to represent his interests.

16 Cases concerning information rights are usually given priority by the First-tier Tribunal and the Upper Tribunal. The present case, however, concerns information about correspondence which took place some years ago. It raises complex questions which received initial attention from the Commissioner in 2005 and required more than 2 years intensive investigation and consideration by the Commissioner between

February 2007 and December 2009. The parties have not sought any special direction as to urgency. It is nevertheless regrettable that the case has occupied the Upper Tribunal for two years. In large part this has been because at relevant stages we have found there to be a need for work that had not previously been envisaged. We are grateful to all concerned for bearing with us during the time that has been needed in order to deal with this matter.

17 Mr Evans relies on two linked legislative provisions which apply throughout the United Kingdom and have, since 1 January 2005, imposed obligations on public authorities to provide information. They are the [Freedom of Information Act 2000](#) ("the Act") and the [Environmental Information Regulations 2004](#) ("the Regulations"). In broad terms the position can be summarised in this way.

(1) The Act is a United Kingdom statute affecting named public authorities. It requires such a public authority to disclose information falling within the Act, but it also identifies exemptions which in particular circumstances have the effect that information need not be disclosed. Exemptions relevant to the present case are in [sections 37](#) (communications with the royal family), [39](#) (environmental information), [40](#) (personal data) and [41](#) (information provided in confidence).

(2) The Regulations have their origin in the Aarhus Convention, adopted on 25 June 1998 at a meeting in Aarhus of the United Nations Economic Commission for Europe. It was signed by the UK and also by the European Community. The Aarhus Convention's first "pillar" concerns access to information. This part of the Aarhus Convention was reflected in [Directive 2003/4/EC](#) on public access to environmental information ("the Directive"), adopted by the European Parliament and the Council of the European Union on 28 January 2003. The Regulations were made under the [European Communities Act 1972](#) in order to implement the Directive. They require a public authority to disclose environmental information falling within the Regulations, but they also identify exceptions which in particular circumstances have the effect that information need not be disclosed. An exception relevant to the present case is in [regulation 12\(5\)\(f\)](#) which arises in certain circumstances where disclosure of information would adversely affect the interests of the person who provided the information. [Regulation 13](#) additionally prohibits disclosure in certain circumstances where an applicant seeks personal data concerning others.

(3) For convenience we shall use the term "exemption" to include the prohibition in [regulation 13](#), the exceptions in [regulation 12](#), and the exemptions under the Act.

18 Under each of these two legislative provisions a complainant may ask the Commissioner to decide whether a public authority has dealt with the request for information in the way that the legislative provision requires. If the Commissioner finds that there has been a relevant failure to do so, the Commissioner's decision notice must set out the steps to be taken by the authority and the period within which those steps must be taken – a period which must not expire before the end of the period within which an appeal can be brought against the notice.

D. Our task, and how we go about it

19 Our powers to determine appeals under the Act are set out in [section 58](#). They apply with certain modifications for the purposes of the Regulations (see [regulation 18](#)). The modifications do not affect these appeals. Thus under both legislative provisions

our task is defined in section 58 as follows:

58 — Determination of appeals.

(1) If on an appeal ... the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

20 Mr Michael Fordham QC and Mr Aidan Eardley on behalf of Mr Evans used the convenient shorthand that under both the Act and the Regulations we must decide “whether the decisions of the Commissioner were right.” No objection to this terminology was expressed by either Mr Timothy Pitt-Payne QC on behalf of the Commissioner or Mr Jonathan Swift QC and Mr Julian Milford on behalf of the Departments. This way of interpreting “in accordance with the law” in section 58(1)(a) connotes a “fresh start” approach. Such an approach was adopted by Judge Jacobs in *Information Commissioner v Home Office* [2011] UKUT 17 (AAC) at paragraphs 57 to 60. We accept the parties’ invitation to adopt this approach. The broad reasons why we consider the decisions of the Commissioner not to be right appear from what is set out in this judgment.

21 The skeleton argument for Mr Evans made 8 assertions of fact: (1) it is a matter of public record that Prince Charles holds and expresses strong views on matters of public policy and corresponds with ministers about them; (2) Prince Charles has repeatedly used public platforms to express his strongly held views; (3) the fact that Prince Charles corresponds regularly with ministers is well-documented and publicly admitted on Prince Charles's behalf as well as by some ministers or their advisers; (4) some of this advocacy correspondence has been published; (5) Prince Charles's self-perceived role has been described on his behalf as representational, “drawing attention to issues on behalf of us all” and “representing views in danger of not being heard”; (6) the available materials indicate that Prince Charles has expressed strong views on matters of political controversy, including as to legislation being introduced; (7) the high degree of publicity afforded to Prince Charles's dealings with government has not prevented his being educated in the ways and workings of government; (8) nor has [this high degree of publicity] deterred him from corresponding frankly with ministers.

22 We have been provided with extensive documentary evidence as well as written and oral witness evidence. This evidence has enabled us to make findings of fact which we have set out in our chronology of events at Open Annex 2. They include findings of fact

about interactions between Prince Charles and central government. Some of these were public at the time. The remainder recorded in this open judgment (including those in Open Annex 2), while they were not public at the time, have become public since. The evidence included wider aspects of the role of Prince Charles in public life, among them his charitable activities, and the description of charitable and other activities in annual reviews published by Prince Charles from 2004 onwards and on the Clarence House website from 1998 onwards. We were provided with a detailed account of many of these matters, for the period up to mid-1994, in extracts from the biography written by Jonathan Dimbleby and published in November 1994. It is common ground that Prince Charles co-operated with the preparation of the biography and checked its factual accuracy – although it was Mr Dimbleby, not Prince Charles, who decided what went into the biography and how it should be portrayed. Other evidence provided to us includes information from the annual reviews and website mentioned above.

23 The proceedings before us included witness statements and oral evidence from two constitutional experts, Professor Adam Tomkins for Mr Evans and Professor Rodney Brazier for the Departments. They also included factual witness statements and oral evidence from Mr Evans himself and Mr Paul Richards in support of the appeal, and from Mr Alex Allan (now Sir Alex Allan) and Sir Stephen Lamport for the Departments. Additionally Sir Alex and Sir Stephen provided closed witness statements and gave oral evidence in closed session. All of these witnesses were, we are sure, doing their best to assist the tribunal in an honest and straightforward way.

24 We return in section H below to the assertions of fact made in the skeleton argument for Mr Evans.

E. The Act, the Regulations and the decisions

25 The Act and the Regulations impose on relevant public authorities an obligation of disclosure. Under the Regulations the obligation is to make requested information available in certain forms or formats. Under the Act the obligation on the public authority is to state in writing whether it holds information of the description specified in a request (“the duty to confirm or deny”), and if that is the case, to communicate that information to the requester.

26 Within each legislative regime, however, there will be no entitlement to disclosure if any exemption (in the sense explained earlier) bars that entitlement. Thus if any one of the exemptions under the Act has the consequence that, in relation to particular information, no obligation of disclosure arises, then for the purposes of the Act there is no need to consider other exemptions – the position under the Act will be that the applicant has no entitlement to disclosure in relation to that information. A similar position applies as regards the Regulations.

27 Some of the exemptions in the Act are absolute, in the sense that if relevant material falls within the exemption that is an end of the matter. This is also the case for the prohibition in [regulation 13\(2\)](#), which is the relevant part of [regulation 13](#) for the purposes of the present case. Other exemptions in the Act and the Regulations are qualified, in the sense that the exemption only has effect if in all the circumstances of the case the public interest in maintaining it outweighs the public interest in disclosure. It is common ground that if the public interests either way are evenly balanced then a qualified exemption will not have effect. As to the burden of proving that the public

interest in maintaining it outweighs the public interest in disclosure, it is common ground that this lies on those who so assert. Accordingly in this case when the Departments urged the Commissioner to hold that a qualified exemption applied, it was for them to prove that the public interest in maintaining that exemption outweighed the public interest in disclosure. The position will be similar in the event that we issue a substituted decision notice dealing with a qualified exemption. In so far as the Commissioner and the Departments say that the substituted decision notice should hold that a qualified exemption has effect it is for them to prove that the public interest in maintaining that exemption outweighs the public interest in disclosure.

28 Below we set out key provisions of the Act and the Regulations. Our account of each relevant provision includes a summary of the Commissioner's conclusion on it as set out in the decision notices. A more detailed account of the decision notices is in section B of OA3.

29 All parties agree that if correspondence requested by Mr Evans is held by a department, then it will be "information" within the meaning of the Act. The question whether the correspondence requested by Mr Evans is "environmental information" requires an examination of the disputed information. The Commissioner and the Departments do not agree on the answer to that question. We deal with the issues arising in this regard in our closed and conditionally suspended annexes.

30 The Act and the Regulations are linked in the sense that section 39(1) gives an exemption under the Act for information which the public authority (a) is obliged by the Regulations to make available, or (b) would be obliged by the Regulations to make available were it not for an exemption in the Regulations. If the disputed information is environmental information, in the circumstances of the present case it will fall within one or other of (a) or (b). As section 39 is a qualified exemption, in theory the following outcome is possible: (i) information falls within the Regulations; (ii) it does not have to be disclosed under the Regulations because it is exempted under the Regulations; (iii) the information nevertheless has to be disclosed under the Act, because the public interest in maintaining the exemption under section 39 of the Act does not outweigh the public interest in disclosure. This possible outcome was not addressed in relevant decision notices. All parties agree that in the present case there is no realistic prospect of such an outcome. Accordingly we do not consider it further.

Section 37: the royal family, honours and dignities

31 One of the exemptions relied upon is in section 37. Until 19 January 2011 it stated:

37 — Communications with Her Majesty, etc. and honours.

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

(a) communications with Her Majesty, with other members of the Royal Family or the Royal Household, or

(b) the conferring by the Crown of any honour or dignity.

(2) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by

virtue of subsection (1).

32 Until 19 January 2011 [section 2](#) of the Act had the effect that this was a qualified exemption. As we explain in section F below, both [section 2](#) and [section 37](#) have been amended with effect from 19 January 2011. All parties in the present case agree, however, that for the purposes of the present case we must work by reference to those sections as they stood prior to that date.

33 [Section 37](#) makes no mention of constitutional conventions. It is common ground that such conventions exist, that certain of them affect the monarch, that one of them affects the heir to the throne, and that if relevant information is the subject of a constitutional convention then this may be relevant to the public interest balance under [section 2](#) of the Act. In particular it is common ground that the heir to the throne is entitled and bound by constitutional convention to be educated in the way and workings of government.

34 The Commissioner's detailed conclusions on the application of [section 37](#) are set out in section B4 of OA3. In summary:

(1) While the Departments had asserted that all the disputed information fell within the constitutional convention that the heir to the throne should be educated in the way and workings of government, it could not be interpreted this widely. In particular it would not cover correspondence (if any) concerning Prince Charles's charitable work or information of a particularly personal nature.

(2) However, where the information fell within the Commissioner's definition of this convention, he accepted that there was a significant and weighty public interest in preserving the operation of this convention – and in not undermining it by disclosure. Moreover it was clearly in the public interest that – in order to protect his potential position as sovereign in a constitutional democracy – Prince Charles, either as heir to the throne or when monarch, should not be perceived to be politically biased. This argument was still relevant even when the information being withheld did not fall within the scope of the constitutional convention relating to the heir to the throne.

(3) The Commissioner also accepted that the public interest would be damaged by loss of frankness and candour in debate between Prince Charles and ministers and advice given by Prince Charles to ministers which would flow from the disclosure of information.

(4) Privacy considerations contained within section 37 should not be dismissed lightly. There was 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 Prince Charles's dignity by invasion of his privacy, the Commissioner accepted that this added further weight to maintaining the exemption.

(5) In these circumstances, even allowing for public interest considerations in favour of disclosure identified in relation to section 41 (see E3 below) the Commissioner believed that the public interest favoured maintaining the

exemption.

Section 40: personal information under the Act

35 Section 40 states:

40 -

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is—

(a) in a case where the information falls within any of 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 this Act would contravene—

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).

(5) The duty to confirm or deny—

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) , and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

(7) In this section—

“the data protection principles” means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

“data subject” has the same meaning as in section 1(1) of that Act;

“personal data” has the same meaning as in section 1(1) of that Act.

36 Here and in relation to regulation 13, it is common ground that if the information requested includes personal data of which Prince Charles is the data subject, and either the first condition or the second condition applies, the Departments are prohibited from disclosing the personal data. The decision notices did not need to consider section 40, as they had already found the non-environmental disputed information exempt under sections 41 (as to part) and 37 (as to the remainder). Applying by analogy his reasoning on regulation 13 (see section E5 below), before us the Commissioner joined the Departments in contending that under section 40(3)(a) disclosure of the information to a member of the public otherwise than under the Act would contravene the first data protection principle in so far as it requires, among other things, that data be processed fairly.

Section 41: breach of confidence, including privacy

37 Section 41 states:

41 –

(1) Information is exempt information if –

(a) It was obtained by the public authority from any other person (including another public authority), and

(b) The disclosure of the information to the public (otherwise than under

this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

38 As mentioned earlier, section 41 is an absolute exemption. It is common ground that where section 41 arises there will nevertheless be a public interest balance. That balance does not arise under section 2 . Instead, it arises because breach of confidence (which for these purposes includes a breach of privacy) will not be actionable if the defendant shows that the breach was justified in the public interest. There is a distinction here from qualified exemptions, for the burden lies on Mr Evans to show that the necessary breach is in the public interest.

39 The Commissioner's detailed conclusions on the application of section 41 are set out in sections B1 to B3 of OA3. In summary:

(1) The Commissioner accepted that correspondence sent to ministers by Prince Charles will fall within the words "obtained by the public authority from any other person" in section 41(1)(a).

(2) The Commissioner held that it is possible for correspondence which was created by the public authority and sent to Prince Charles to fall within those words, and that whether it does in any case will depend upon the content of the information which was communicated. In the present case some but not all of the correspondence from relevant ministers to Prince Charles fell within these words. As regards the remainder section 41 was not engaged.

(3) Turning to section 41(1)(b), the Commissioner dealt first with the question whether a cause of action arose in relation to confidentiality and privacy. He accepted that the constitutional convention that the heir to the throne should be educated in the way and workings of government meant that both Prince Charles, and those he corresponded with, will have had an explicit (and weighty) expectation that such communications would be confidential. While he did not accept that all correspondence fell within this constitutional convention, the public authority's position was that it did. He inferred from this that the individuals involved in exchanging this correspondence would have had a weighty and explicit expectation that such information will not be disclosed. As to privacy, the Commissioner gave a broad reading to article 8(1) of the European Convention on Human Rights (ECHR). On this basis he accepted that disclosure of the information would constitute an infringement of article 8(1) and would constitute an actionable breach of confidence.

(4) Such an action would not succeed, however, if a defendant established that the public interest balance lay in favour of disclosure. 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 . In that regard, however, Prince Charles's public and private lives could be said to be inextricably linked. Therefore for the purposes of this case, and the consideration of article 8 , the Commissioner believed that he had to adopt the position that the information which is the focus of this case could 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. In favour of disclosure were public interest arguments

underpinning the Act, namely: ensuring that public authorities are accountable for and transparent in their actions; furthering public debate; and improving confidence in decisions taken by public authorities. Furthermore, specific arguments relevant to this case in relation to Prince Charles's relationship with government ministers deserved to be given particular weight. These considerations, however, did not provide the exceptional set of public interest arguments that would be needed to justify disclosure.

Regulation 12(5)(f): Adverse effect on provider's interests

40 Regulation 12 provides:

(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if–

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

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

(a) it does not hold that information when an applicant's request is received;

(b) the request for information is manifestly unreasonable;

(c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

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

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect–

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person—
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

(6) For the purposes of paragraph (1), a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

(7) For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

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

(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

(10) For the purposes of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

(11) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.

41 In the present case regulation 12 arises for consideration in this way. A Department may, under regulation 12(5)(f), refuse to disclose information to the extent that its disclosure would adversely affect the interests of the person who provided the information. Regulation 12(5)(f) only applies if the conditions at (i), (ii) and (iii) are satisfied, but it is common ground that they will be satisfied if other requirements of regulation 12 are met.

42 The Commissioner's detailed conclusions on the application of regulation 12(5)(f) are set out in section B7 of OA3. In summary:

(1) 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. Prince Charles. Again, as with section 41, the Commissioner accepted that correspondence sent by the public authority to Prince Charles could potentially fall within the scope of the regulation 12(5)(f) if it sufficiently closely replicated the content of the information originally provided to it by Prince Charles.

(2) As regards information "provided" by Prince Charles, regulation 12(5)(f), was engaged: disclosure would adversely affect him for reasons similar to those discussed above in relation to the application of sections 41 and 37. In essence, if the information were disclosed this would adversely harm Prince Charles 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 ministers and thus impinge upon the established constitutional convention. Moreover, disclosure would impinge upon Prince Charles's privacy.

(3) However this exception under the Regulations is 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. Regulation 12(2) states explicitly that a public authority must apply a presumption in favour of disclosure.

(4) In the Commissioner's opinion the public interest arguments in favour of maintaining regulation 12(5)(f) in this case were very similar to the public interest arguments in favour of maintaining section 37(1)(a), as were those in favour of disclosure. He concluded that, for the reasons he gave in relation to section 37, the public interest in disclosing the withheld information was outweighed by the public interest in maintaining the exception under regulation 12(5)(f).

Regulation 13: Personal data

43 Regulation 13 provides:

(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

(2) The first condition is–

(a) in a case where the information falls within any of 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; or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(3) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of that Act and, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

(4) In determining whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

(5) For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that–

(a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded; or

(b) by virtue of any provision of Part IV of the Data Protection Act 1998 , the information is exempt from section 7(1)(a) of that Act.

44 As noted above when discussing [section 40](#) , it is common ground that if the information requested includes personal data of which Prince Charles is the data subject, and either the first condition or the second condition applies, the Departments are prohibited from disclosing the personal data.

45 The Commissioner's detailed conclusions on the application of [regulation 13](#) are set out in section B8 of OA3. In summary:

(1) Under the first data protection principle disclosure must not be unfair. In assessing whether disclosure of personal data would be unfair the Commissioner takes into account damage or distress which the individual would suffer if the information was disclosed, and the reasonable expectations of the individual in terms of what would happen to their personal data.

(2) Disclosure of the correspondence had the potential to harm Prince Charles by impacting on his 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 his privacy and dignity as protected by article 8 ECHR .

(3) With regard to the reasonable expectations of Prince Charles, for the reasons given in relation to [section 41\(1\)\(b\)](#) , the Commissioner accepted 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. Accordingly the public authority had not created an unrealistic or unreasonable expectation under which Prince Charles might assume his personal data will not be disclosed.

(4) Consequently, in light of these weighty expectations and the likely impact on Prince Charles if the correspondence were disclosed, the Commissioner accepted that disclosure would be unfair. It followed that the public authority could rely on regulation 13(1) to withhold any environmental information which was not exempt under regulation 12(5)(f).

F. The date at which the position must be tested

46 The decision notices made no express reference to the date to be used as a reference point when determining whether a public authority has complied with its obligations in respect of an information request. As noted in section B above, during the Commissioner's investigation the Departments re-examined earlier decisions that they should neither confirm nor deny holding the requested information. In that regard their letters said that the Departments "now believe" that the balance of public interest was in favour of confirming that information was held. The letters did not assert that there had in the interim been a change in that balance. Equally, when asserting that the balance of public interest lay in not providing the correspondence sought, the Departments, although they gave the impression that they were considering the matter as at the time of the letter, did not identify any particular date by reference to which the balance was to be struck.

47 As noted in sections A and E1 above, legislative amendments took effect on 19

January 2011. On that date paragraph 3 of Schedule 7 to the Constitutional Reform and Governance Act 2010 ("CRAG 2010") came into force, and two relevant changes were made. First, section 37 was amended so that what it had said prior to that date (see section E1 above) was altered to read:

37 — Communications with Her Majesty, etc. and honours.

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

(a) communications with the Sovereign,

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

(ab) communications with a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne,

(ac) communications with other members of the Royal Family (other than communications which fall within any of paragraphs (a) to (ab) because they are made or received on behalf of a person falling within any of those paragraphs), and

(ad) communications with the Royal Household (other than communications which fall within any of paragraphs (a) to (ac) because they are made or received on behalf of a person falling within any of those paragraphs), or

(b) the conferring by the Crown of any honour or dignity.

(2) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

48 Second, section 2 was amended. Previously all information falling within section 37 had the status of qualified exemption only. With effect from 19 January 2011 section 2 was altered so that as regards section 37 it conferred the status of absolute exemption on the exemptions in paragraphs (a) to (ab) of subsection (1), and on the exemption in subsection (2) so far as relating to those paragraphs.

49 These changes in the law mean that if Mr Evans's requests had been received on or after 19 January 2011 then an absolute exemption would have applied under the Act. Under the new section 37(1)(aa) and the new section 2 no public authority will be required by the Act to provide information relating to Prince Charles at a time when he was heir to the throne. However they do not have that effect in the present case, for when the changes were made the relevant commencement order (the Constitutional Reform and Governance Act 2010 (Commencement No. 4 and Saving Provision) Order, SI 2011 No. 46) provided in article 4 :

4 Saving

The 2000 Act continues to apply as it applied immediately before 19th January 2011 in respect of any request for information received by a public authority

before that date.

50 There has been no corresponding change to the Regulations. An interesting question may arise for the future as to whether, when the Regulations are applied to a particular case, the change in legislative policy under the Act may be relevant – for example as regards the public interest balance. It is unnecessary for us to express any view on that question and we do not do so.

51 Shortly after CRAG 2010 was enacted the First-tier Tribunal raised questions with the parties which included:

... when considering the ... Act's public interest test, is the [tribunal] bound to conclude that the 2010 Act sets out what Parliament considers to be in the public interest, with the consequence that while the law has not altered and the legal test remains that which applied at the time the requests under the ... Act were made, there is no longer any room for a view that the disclosure sought by the appellant would be in the public interest.

52 The response of the Commissioner was:

... this appeal should be dealt with by reference to the provisions of FOIA that were in force at the time of the request...

The amendments that have subsequently been made under the 2010 Act should not ... affect the assessment of the public interest by the Tribunal.

53 By contrast, however, the notice of appearance for the Departments said that “even before [the CRAG 2010] amendments have come into force, the fact that Parliament has seen fit to provide for such an absolute exemption is a powerful argument against disclosure.” They cited from what had been said in Parliament in that regard.

54 The matter was dealt with in the Departments’ skeleton argument at paragraph 10:

... When the amendments made by CRAG to FOIA come into force, they will provide for an absolute exemption from disclosure both for communications with the Sovereign, and communications with the Heir to the Throne, or the person who is second in line of succession to, the Throne. Promoting CRAG in the House of Commons, the Secretary of State for Justice (Mr. Straw) stated that the amendments filled lacunae in FOIA for which he took responsibility as the minister who had originally steered FOIA through the House of Commons: i.e. FOIA as originally enacted did not properly acknowledge the fundamental public interest in maintaining the confidentiality of such communications. The Appellant does not suggest that the amendments made by CRAG have any retrospective effect for these appeals as a matter of law. However, those amendments emphasise the strong public interest that already exists in maintaining the confidentiality of the correspondence at issue, as they underline the importance that has always been attached to protecting the political neutrality of the Monarchy, and the effective operation of the various constitutional conventions, including the convention that is primarily in play in

this appeal.

55 To this extent only did the question of a reference date feature in the submissions prior to and at the first stage of the hearings. We were presented with evidence which included quite recent material. The skeleton argument for Mr Evans placed reliance on it – referring, for example, to comments made by parliamentarians on the Commissioner's decisions in the present case. No suggestion was made that we should impose a cut-off date so as to exclude from our consideration parts of that material other than the CRAG 2010 amendments.

56 Our initial view was that the reference date would be no later than the date of what we saw as the "final response" of the department in question – namely, as regards each department, the dates in March and April 2009 on which they had advised Mr Evans that they had reconsidered the matter and told him the outcome of that reconsideration. We raised this with the parties at a later hearing. section F of OA3 sets out a more detailed explanation of what transpired. For present purposes we simply note that the parties reached an agreed position at that hearing. This was that, for the purposes of our task in deciding whether the decision notices are or are not in accordance with the law, no party suggested that there was any relevant circumstance arising after the final response.

57 In the course of our deliberations we concluded that it would be useful to produce a chronology of the evidence. None had been provided to us in the course of the hearings. When we produced our draft chronology we sent it to the parties and asked whether they wished to make further submissions, including as to the reference date. Mr Evans contended that the assessment of the test for disclosure, including the public interest balance, should be approached by reference to the position as at a particular date for each Department, namely 40 days after Mr Evans requested an internal review. The dates thus arrived at would be 30 June 2005 for NIO, 29 July 2005 for DH and the Cabinet Office, 21 November 2005 for DEFRA, 27 February 2006 for DCSF, and 28 February 2006 for DBIS and DCMS. The Commissioner and the Departments agreed that in each case the latest reference date would be one determined in accordance with this approach.

58 On this basis there is now agreement that the reference date cannot be later than 28 February 2006. We recognise that in some circumstances it is permissible to have regard to later-occurring matters if they cast light on the circumstances at the reference date. Accordingly in our chronology of events at Open Annex 2 we have included events after 28 February 2006 where they may arguably shed light on the position prior to that date.

59 We return to the Departments' reliance on the CRAG 2010 amendments, and what was said about them, as emphasising the strong public interest that already existed in maintaining the confidentiality of the correspondence at issue, as they "underline the importance that has always been attached to protecting the political neutrality of the monarchy, and the effective operation of the various constitutional conventions." Mr Swift explained orally that the Departments in this regard relied on the principle that the tribunal can take into account later matters if they cast light on the balance of public interest at the time by reference to which the question fell to be decided.

60 We consider that Mr Swift was right to confine reliance on the CRAG 2010 amendments in this way. Indeed if we were entitled to take account of those amendments generally, then arguments under the Act about a chilling effect on frankness affecting the public interest balance would fall away. It could hardly be suggested that disclosure under a previous version of the Act would have a chilling effect on frankness in future correspondence, when future correspondence would, so far as the Act is concerned, benefit from an absolute exemption.

61 In our view the CRAG 2010 amendments, and what was said in support of them, are concerned with a change of legislative policy. These amendments were designed to ensure that, from the date they came into effect, a public interest balance in relation to information concerning the heir to the throne (among others) was no longer to be performed. Instead, there would be an absolute exemption. Some involved earlier may well have thought, or if they had applied their minds to it would have thought, that this would be a desirable legislative policy. Such a legislative policy, however, is not concerned with what the public interest balance under [section 2](#) would be in any specific case. What it tells us is that even if the public interest balance in relation to particular documents would lead to disclosure, nevertheless it would be desirable as a matter of legislative policy to forestall that possibility.

62 Mr Swift relied on the amendments and what was said about them as underlining the importance attached by government and others to protecting the political neutrality of the monarchy and the effective operation of constitutional conventions. We have ample evidence of the importance which government and others attached to this and it does not need underlining.

63 More generally as to the reference date, as will emerge from our discussion below, in the event we conclude that the various dates which have been put forward as potential reference dates make no difference to our conclusions. Indeed, even if we were to confine our examination solely to circumstances existing at the time of each request our conclusions would be the same. That being so, we think it preferable not to express any view on what either the Act or the Regulations may require in this regard.

G. Constitutional conventions

Constitutional conventions generally

64 In section E1 we touched on constitutional conventions, and identified some common ground. In particular it is common ground that the heir to the throne is entitled and bound by constitutional convention to be educated in and about the business of government. Issues arise as to its extent, in that (1) the Departments contend, and Mr Evans and the Commissioner deny, that it covers correspondence about social and charitable matters, and (2) the Departments and the Commissioner contend, and Mr Evans denies, that dealings between Prince Charles and successive governments have extended it so that it is not limited to the provision of information about government to Prince Charles and clarification of that information at his request. We deal with those issues in section G4 below. The significance of information falling within or outside this constitutional convention is dealt with in later sections.

65 We begin this section of our judgment with some introductory observations. Two constitutional conventions of fundamental importance are then discussed. They have relevance not only to issues concerned with the extent of the constitutional convention

concerning education of the heir to the throne, but also to other aspects of the public interest balance. We then turn to the constitutional convention that the heir to the throne is entitled and bound to be instructed in and about the business of government.

66 What are constitutional conventions? The first thing to stress is that they are not law. They are not enforced by courts. For example, there is a convention that an incumbent Prime Minister must resign if, after a general election, another party has won a majority in the House of Commons. But no-one can seek to enforce this in the courts – there is no law which says that such a Prime Minister must resign. Because it is a constitutional convention, however, a Prime Minister who broke it could be said to have acted unconstitutionally. In order to assist us, Mr Evans and the Departments provided us with expert evidence from, respectively, Professor Tomkins of the University of Glasgow and Professor Brazier of the University of Manchester. They each made written witness statements and gave oral testimony, responding to questions from counsel and the tribunal. Both did so with care, independence and integrity. We are grateful to them for their assistance. Their evidence is summarised in section G of OA3.

67 The second thing to stress is that the major constitutional conventions are core elements in the United Kingdom's parliamentary democracy. Two of them in particular need to be borne firmly in mind. They were labelled – for the purposes of this case only - by Professor Brazier as the “cardinal convention” and the “tripartite convention”. We say more about them below. As to the constitutional convention that the heir to the throne is entitled and bound to be instructed in and about the business of government, we shall call it the “education convention”. Professor Brazier labelled it – again as regards this case only – as the “apprenticeship convention”. For reasons which we explain below, we think that such a label involves an element of controversy.

68 The third thing to stress follows in part from the first. The parties invite us to decide the extent of the constitutional convention. It is only rarely that a court or tribunal has to decide a question of that kind, and it is a task which we undertake with circumspection. We are not deciding an issue of law. Questions about constitutional conventions have been the subject of much academic and political debate. So it is important to understand precisely what we were invited to do.

69 On the question of how far the constitutional convention extended the parties made reference to the test for identifying whether a constitutional convention exists at all. In his statement Professor Brazier said that there was no general agreement, but identified two tests which “enjoy considerable support”:

8 Sir Ivor Jennings has suggested [at p. 131 of *The Law and the Constitution* (5th ed., 1959)] (in summary) that a constitutional convention exists 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.

9 Other writers [for example G. Marshall and G. Moodie, *Some Problems of the Constitution* (5th ed., 1971), pp 22 – 26] have said that a convention is a non-legal rule of constitutional behaviour which has been consistently accepted by those affected by it as binding on them, but which is not enforceable in the courts.

70 Mr Swift suggested to Professor Tomkins that these tests represented different "schools of thought". That suggestion was not accepted. Professor Tomkins responded firmly that Sir Ivor Jennings's test has been accepted by constitutional legal scholarship throughout the 80-year period since the first edition of his book was published. Moreover, Professor Tomkins added that there was in fact nothing said by Marshall and Moodie which was inconsistent with what was said by Jennings.

71 Under questioning by Mr Fordham, Professor Brazier stood by his position that Jennings was not the only test. However for the purposes of this case he was content to adopt Jennings. He did not suggest that it would be enough to have something which failed Jennings but met some other test.

72 The first element of the Jennings test is summarised by Professor Brazier as being that before something can be held to be a constitutional convention there must be "precedents underpinning it". The use of the plural here may be misleading. Jennings described constitutional conventions connected with internal government as arising "by the gradual crystallisation of practice into binding rules." When explaining the third element of the test he stressed that neither precedents nor dicta were conclusive. In that context he added that:

A single precedent with a good reason may be enough to establish the rule.

73 The second element of the Jennings test is summarised by Professor Brazier as being that the parties to the relevant practice consider themselves to be bound by it. In oral evidence Professor Brazier made it clear that this requirement applied to both sides. In the present case, accordingly, in order for the departments to make good their case it would be necessary for both Prince Charles and government ministers to consider themselves to be bound to treat Prince Charles's education in the business of government, with its special constitutional status and associated special degree of confidentiality, as extending not merely – as Mr Evans accepts – to government informing Prince Charles about what it is doing and responding to queries from him.

74 The third element of the Jennings test is summarised by Professor Brazier as being that there is a reason for the existence of the convention. In response to questions from Mr Fordham Professor Brazier agreed that in the present case this means that there must be a good constitutional reason for the reach of the convention, i.e. for its scope. In that regard Professor Brazier accepted what Jennings himself had said about the third element in the test:

As in the creation of law, the creation of a convention must be due to the reason of the thing because it accords with the prevailing political philosophy, it helps to make the democratic system operate, it enables the machinery of state to run more smoothly and, if it were not there, friction would result.

75 Accordingly for the purposes of the present case, the answer to the question we posed above is that a particular constitutional obligation will be a constitutional convention if the Jennings test is met. As regards the scope of the education convention, we must apply the three elements of that test. First, we must consider

whether there is at least one precedent underpinning such a scope. Second, we must consider whether both parties to it considered themselves to be bound to treat Prince Charles's education in the business of government, with its special constitutional status and associated special degree of confidentiality, as extending not merely – as Mr Evans accepts – to government informing Prince Charles about what it is doing and responding to queries from him. Third, we must consider whether there is a reason, in the sense used by Jennings and described above, for the convention to have that scope.

The cardinal convention: the monarch acts on advice.

76 The cardinal convention is the name given by Professor Brazier to what he described as the most important convention of the British constitution. It requires the monarch to act on, and use prerogative powers consistently with, ministerial advice. Such advice is usually given by the Prime Minister on behalf of the government. There are certain exceptional circumstances where the cardinal convention does not apply, but they do not arise in this case.

The tripartite convention: be consulted, encourage, warn.

77 The tripartite convention is the name given by Professor Brazier to the convention described by Walter Bagehot as conferring on the monarch the:

... right to be consulted, the right to encourage, and the right to warn ...

78 Professor Brazier told us that it may be seen as a counterbalance to the cardinal convention, because it retains a measure of influence for the monarch, and prevents the monarch from being perceived as a mere rubber-stamp for whatever governments wish to do. What flows from the monarch to the Prime Minister or other ministers by way of advice, encouragement, or warning, can be rejected, for the cardinal convention requires that the monarch must, in the end, accept ministerial advice. But under the tripartite convention ministers are obliged to take account of what the monarch has said. There is no doubt that the monarch's views may be expressed about government policy, and in that sense the monarch can express views which are "political". Thus in 1924 George V urged Baldwin as Prime Minister to "get to grips with" matters such as housing, unemployment, the cost of food, and education.

79 Professor Brazier explained that a forum for exercise of the tripartite convention is the audience granted regularly to the Prime Minister. Only the monarch and the Prime Minister are present; and no record is made, save that the fact of the audience is published in the Court Circular. What, he stressed, is *not* published anywhere is any indication whatever of what passed between the participants (at least not until long after the event), save with the agreement of both of them. There are also exchanges in writing between ministers and the monarch, including material supplied for the monarch's information, and submissions requiring royal approval or royal assent. The same confidentiality attaches to such documents as to audiences.

80 In his witness statement Professor Brazier added that:

28 Former Prime Ministers have unanimously testified to the value and benefit which they obtained in office from being able to talk to or correspond with The Sovereign in complete confidence in these ways. They welcomed in particular

being able to exchange views in complete confidence with someone of complete political impartiality, even speaking of matters which they might be reluctant to share with colleagues.

81 Examples were given by Professor Brazier. As to encouragement, James Callaghan's autobiography, *Time and Chance* (1987), described how the Queen had encouraged him when Foreign Secretary to make a further overture to the illegal regime in Rhodesia in 1976. As to warning, in addition to the advice from George V to Baldwin, Professor Brazier noted that George VI had warned Churchill not to board a warship at the head of the D-Day landings. It is apparent from these examples that the obligations of confidentiality implicit in the tripartite convention do not last for ever – revelations in that regard being a feature of official biographies of monarchs published after their deaths.

82 Professor Tomkins expanded on the reasons for confidentiality. He drew attention to three propositions advanced in a letter written by Sir William Heseltine, then private secretary to the Queen, and published on 28 July 1986 in *The Times*. They were 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 Tomkins endorsed an analysis of this letter by Professor Bogdanor of the University of Oxford:

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. 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 . (emphasis added by Professor Tomkins).

83 Although Professor Brazier advanced additional reasons, we did not understand him to dissent from this analysis in so far as it identifies an important reason why communications between the monarch and government falling within the cardinal convention and the tripartite convention must remain confidential, and why the monarch is not entitled to reveal personal views on a matter of public policy differing from those of the government.

84 In his witness statement Professor Brazier gave two additional reasons why both the cardinal convention and the tripartite convention must be exercised "in complete confidence". The first was the danger of perception of partiality. The second was that disclosure would lead to an inhibition on frankness.

85 In his evidence to us Professor Brazier stressed that a warning by the Queen to a Prime Minister:

must not become public contemporaneously or within the period which

protects the publication of public records.

86 Professor Brazier said that the Queen's personal preferences must remain confidential. He added:

Were they to become public there would be obvious accusations of partiality.

87 In our view when one analyses this material there is ample reason to justify the principle that the internal operation of these two conventions is not revealed, at least until after a long time has passed. Our constitution reconciles monarchy and democracy through fundamental constitutional mechanisms under which (1) state power is exercised by and in the name of the monarch in accordance with the advice of ministers, and (2) the monarch is entitled to be consulted, to encourage, and to warn, but so long as ministers are in office their advice must be followed. In order to ensure that these fundamental mechanisms are not put in doubt, it is not until a long time has passed that details of how they operated in any particular instance can be revealed. We accept for the purposes of this case, and indeed it was not challenged on behalf of Mr Evans, that the possible advantages of avoiding accusations of partiality and avoiding a chilling effect on frankness may be additional reasons why both the cardinal convention and the tripartite convention must be exercised "in complete confidence", but we do not by any means regard these possible advantages as fundamental.

88 It was not suggested that Prince Charles, at a stage when he is neither king nor regent, plays any part in the tripartite convention. Indeed Professor Brazier agreed, in response to questions from Mr Fordham, that the tripartite convention is "the sovereign's only." It does not apply to the heir to the throne. Professor Brazier accepted that in the terms of the tripartite convention it would collapse an important distinction if it were said to apply to the heir to the throne.

The education convention and its scope

89 Until the present case the education convention could have been regarded as little more than a footnote. The future Edward VII (albeit at a late stage) and the future George V were educated in the business of government. There could be no doubt that it was important to instruct the heir in the business of government if it were possible to do so. On the other hand it was not essential: the future George VI had no expectation that his brother would abdicate and, as a result, received no substantial education in the business of government.

90 In a case where an heir to the throne has been in that position for many years it might be thought, at least at first blush, that education in the workings of government might well have reached a stage where it is complete. It is clear, however, that the education convention involves continuing education. The future Edward VII had little education in the workings of government until the last years of his mother's reign, but during those years he received regular batches of government papers. There is little in government that is static, and the notion that education should continue in order to keep the heir up to date seems to us, on reflection, to be unremarkable.

91 However this case does involve a remarkable feature. The Departments advanced an admittedly new contention that the education convention has been extended so that

it covers all correspondence between government and the heir to the throne. It is on the basis of this new contention that the Departments say that the disputed information merits not merely the protection which would ordinarily be afforded to confidential information but also additional protection which should be afforded to material falling within a constitutional convention. This new contention is accepted by the Commissioner as regards communications which, although not part of a specific process of education, were material to Prince Charles's education in the ways and workings of government. The Commissioner did not accept that it covered communications about Prince Charles's charitable work or information of a particularly personal nature. Mr Evans says that the education convention has not been extended at all. It should be noted in this regard that while Professor Tomkins had concerns about advocacy correspondence by Prince Charles, it was not contended by Mr Evans for the purposes of these proceedings that such correspondence was or would be unconstitutional. Mr Evans's contention was simply that the Commissioner had been wrong to say that it fell within the education convention.

92 A second remarkable feature in relation to the education convention is how Professor Brazier's view about it has changed. He explained to us that he read the biography when it was published in late 1994. It was mainly as a result of reading it that he wrote an article which was published in the journal *Public Law* in 1995. We shall refer to it as "the 1995 article". It was entitled "The Constitutional Position of the Prince of Wales ." In the 1995 article:

(1) Professor Brazier described Prince Charles's right to be instructed in the business of government so as to prepare him for kingship as "uncontroversial". Prince Charles had been inducted into constitutional and governmental affairs; the Queen had ensured that he saw an increasing range of official papers, and he had performed ceremonial duties on her behalf.

(2) Professor Brazier asserted that there was "another and more surprising right" which Prince Charles had assumed over the years. This was that he:

... communicates directly with ministers, seeks information from them, and presses his views – sometimes trenchantly and even repeatedly – about their departmental responsibilities and government policy. ... He can point to at least one instance when government policy [on the practice of burning straw stubble] ... was altered following strong representations from him.

(3) In that context Professor Brazier cited Bagehot's description of the rights of the monarch under the tripartite convention, and commented that Prince Charles was insisting "on enjoying very similar rights for himself," an insistence which Professor Brazier described as "novel".

(4) On the constitutional justification for this "innovation" Professor Brazier wrote:

Quite simply, he considers it his right and duty to raise matters of public policy with ministers. Now, the Prince's actions might be seen as no more than those of any citizen (albeit an important one) who, by pressing his ideas on ministers, is doing what is open to all. The difficulty with that interpretation lies in the Prince's proximity to the headship of state which places him on an altogether different constitutional plane. Ministers are naturally likely to afford far more weight to the Prince's views than to those of most other individuals;

by being who he is his words and actions can have constitutional consequences. Alternatively, it might be objected that the Prince's actions in relation to ministers are unconstitutional, because the rights which the Sovereign enjoys are given to her in order that she can carry out her duties as head of state. No one in government seems to have objected to the development; ministers seem to consider themselves bound to respond fully to the Prince's initiatives.

(5) In those circumstances, Professor Brazier suggested that:

... it is time to recognise as a constitutional convention the Prince of Wales' rights to obtain information from ministers, to comment on their policies and to urge other policies on them. Such communications will be carried out in strict confidence. There is no obligation on ministers to accept any of the Prince's views, and there will be no constitutional consequences if they reject them. There are more than enough precedents to establish the existence of the convention; ministers consider themselves to be bound by it; and, as a way of preparing the Prince for kingship, there is a reason for its existence.

93 In his witness statement for these proceedings Professor Brazier said of what we have called the education convention that he had "examined and articulated" this convention in the 1995 article. His witness statement noted, among other things, that Prince Charles saw a range of official papers, and represented the Queen on royal visits and the like. However it then went on to make assertions which had not featured in the 1995 article. Most importantly for present purposes, the witness statement asserted that the convention attached to each and every piece of correspondence – and indeed private conversation – between Prince Charles and ministers.

94 There was no recognition by Professor Brazier in the witness statement that the views now propounded as to the scope of the education convention differed from those he had expressed in the 1995 article. Nor did the witness statement acknowledge that in the 1995 article he had urged that rights of Prince Charles to obtain information from ministers, to comment on their policies and to urge other policies on them should be recognised as a new convention. The result was that it was only in oral evidence that we heard from Professor Brazier any explanation of how and why his views had changed. In response to Mr Fordham's questions the reason given by Professor Brazier was that, without detracting from what he had said in the 1995 article, on reflection he would "put it more or less in the same way" except in one respect. As regards rights of Prince Charles to obtain information from ministers, to comment on their policies and to urge other policies on them:

I would today say ... that it is better to take that clutch of rights as part of the apprenticeship convention; that, in doing as he does, he is not arrogating rights to himself enjoyed only by the Queen, not at all, but he is, as part of his preparation for [kingship] interacting with ministers, getting to know ministers, their policies and so on and, among other things, corresponding with them privately and meeting with them privately.

95 In re-examination Mr Swift asked Professor Brazier whether his current views

involved a distinction of substance from what was said in the 1995 article. The reply was that they did not, it was "a matter of classification and analysis". Asked why he thought his current "classification of the analysis" was better, Professor Brazier replied:

Well, briefly ... the practice of communicating orally or in writing with ministers is something which the Prince of Wales will do, as Sovereign, and, to that extent, it is a very important and useful part of his training in order to be an effective king when that day comes.

So, therefore, rather than saying it's a sort of add-on extra or a separate convention or principle, I think it is better ... to subsume it within what I've called the apprenticeship convention.

96 We were concerned that Mr Swift's questions might presage a submission that even if the disputed information did not fall within the education convention it nevertheless fell within the new constitutional convention urged in the 1995 article. That had never been the case advanced by the Departments, and it seemed to us that there might be major ramifications if any such case were sought to be advanced now, at a time when cross-examination had focused on difficulties with Professor Brazier's current thesis rather than difficulties with the thesis in the 1995 article. After hearing submissions we resolved the position by ruling that if there were to be any suggestion of any new convention, then that would have to be subject to an application to amend. There was none.

97 Mr Fordham's closing submissions identified 6 problems with Professor Brazier's current thesis. In summary those problems were:

(1) None of Prince Charles's predecessors had adopted the practice he had adopted.

(2) Professor Brazier accepted that under his thesis communications fell within the convention because they were a rehearsal for kingship, but was not able to point to anything evidencing a recognition by Prince Charles that there was a rehearsal mode or that he was acting within this rehearsal mode. There was powerful evidence that Prince Charles did not regard himself as acting in rehearsal mode. The biography made no suggestion of it. Indeed, the 1995 article characterised the correspondence in question as advocacy 'for real' under a radical parallel with the sovereign's tripartite convention. The Clarence House website described Prince Charles 'Promoting and Protecting' through publicly aired views and private correspondence, including with ministers. Sir Stephen Lamport was emphatic that the descriptions "rehearsal" and "training" were inapt. On the contrary, Prince Charles believed that his contact with government could be used for the wider public benefit. The only thing which distinguished Prince Charles's role from the sovereign's, on Sir Stephen's evidence, was that the government did not feel they had to treat his advice as they would treat the Queen's. The memorandum by Sir Michael Peat showed that as regards Prince Charles's current actions (a) he understands the constitutional functions that the sovereign has (and he would have), and (b) that is decidedly not the character of his actions, indeed (c) he would change as sovereign and stop intervening in the way that he does. That explanation was

inconsistent with Sir Stephen Lamport's and Sir Alex's metaphor of the "apprentice stonemason".

(3) The first limb of the tripartite convention was the right to be consulted. However Professor Brazier was clear that government has no perceived obligation to consult Prince Charles.

(4) It is a fundamental condition of the exercise by the sovereign of the tripartite convention that the sovereign does not express views in public on matters of public policy. If Prince Charles is to be taken as being in 'rehearsal' mode, why would he so obviously act incompatibly with the necessary discipline accompanying the role he is supposedly rehearsing? Put another way, the absence of a perceived obligation of (rehearsed) silence in public on the public policy undermines the idea of a perceived right of (rehearsed) encouragement and warning in private.

(5) It is very well-recognised that the constitutional convention applicable to the heir carries with it a duty of confidentiality. Prince Charles is said to understand well the equivalent duty of absolute confidentiality to which he is subject. It explains why there is no information in the public domain about exchanges which instruct Prince Charles in the sense understood in the 1995 article, as all concerned agreed. That contrasts with the argumentative correspondence which Prince Charles allowed his authorised biographer to quote and summarise and refer to. That action, which can hardly be characterised as inadvertent, is incompatible with a perceived obligation of absolute confidentiality. As Professor Tomkins put it, this is action fundamentally incompatible with an asserted constitutional convention. Sir Alex sought to portray the Dimpleby biography as an isolated breach of Prince Charles's constitutional obligations. But that will not do, when one is looking to Prince Charles's conduct in order to find out the scope of the Convention in the first place.

(6) Professor Brazier's thesis was not able to identify any distinction between what Prince Charles is doing, nor what the government is doing, which is different because this is supposedly 'rehearsal' mode. On the contrary, it is precisely the same course of conduct of both parties which led to the Brazier 1995 suggestion of Prince Charles having the right to seek to urge and persuade. If the true analysis is that Prince Charles has no such right, but merely a right to rehearse, there would need to be a difference between the two. But none has been identified, merely the fact that this is the heir and not the monarch.

98 We can deal shortly with problem (1). Mr Swift had several responses. We need not go beyond the first: Jennings himself did not require previous precedents. A single occasion might meet the test. In effect, it created its own precedent. This is a complete answer to this particular suggested problem.

99 Problems (2), (4) and (6) are interlinked. It seems to us that they are much more substantial. First, the submissions for the Commissioner and the departments never distinctly grappled with the point that Prince Charles himself has recognised that as

sovereign, "he must stop intervening in the way that he does." Mr Swift acknowledged that Prince Charles does not deal with government in "rehearsal mode". His suggested answer was that (1) instruction gives rise to debate, encouraged by ministers; (2) the convention takes the form of a debate or conversation, not a lecture; (3) Prince Charles can only learn how to debate and question issues of policy by actually debating and questioning issues of policy, not by pretending to do so; and (4) preparation for kingship over a period of four decades will involve forming a relationship with ministers in which matters of substance are discussed. However, in the public examples that we have seen, the plain facts are that what Prince Charles is doing is not prompted by a desire to become more familiar with the business of government, and simply is not addressing what his role would be as king. We cannot accept Mr Swift's contention that when Prince Charles discusses matters "for real" with ministers, both he and ministers appreciate that this is in the context of his preparation for kingship. The examples we have identified in our chronology of events at Open Annex 2 do not involve any assumption that Prince Charles has the rights of the monarch, but they all have as their context Prince Charles's strong belief that certain action on the part of government is needed. On analysis, as it seems to us, neither Sir Alex nor Sir Stephen was able to justify an assertion that either side saw these exchanges as part of preparation for kingship.

100 Mr Swift submitted that it would be of real utility that Prince Charles should be able to debate matters of real substance and concern as part of his preparation for exercise of the tripartite convention. He gave examples of the exercise of the tripartite convention in the past. The principal examples that he gave were those we cited earlier. They have little in common with the advocacy correspondence that has been published.

101 As to problem (3) Mr Swift submitted that is wrong that the sovereign only has the right to "advise" or "warn" on matters on which she has been consulted. We accept that the tripartite convention is not trammelled in this way. Nevertheless it is a curious feature if Prince Charles is indeed being prepared for kingship that the exercise is not said to involve consulting Prince Charles.

102 As to problem (5) Mr Swift said that what happened was that the convention was breached by Prince Charles to the limited extent that he disclosed material to Mr Dimpleby in preparation for his biography. The government itself did not breach the convention: it was presented with a *fait accompli*. It seems to us that while it could be viewed as a "one-off" breach, it is nonetheless difficult to explain this away if Prince Charles had indeed perceived the material he disclosed as having the special status of being material which is part of his education for kingship.

103 In our view the new approach as advanced by Professor Brazier in his witness statement would involve a massive extension of the education convention. The new approach seemed to involve a proposition that whenever Prince Charles interacted with government this helped to prepare him to be king and was therefore part of the education convention. The logical consequence of this proposition would be that the education convention extended both to advocacy correspondence and to correspondence on charitable or social matters without any advocacy element. As noted in section G of OA3, however, in cross-examination Professor Brazier resiled from his earlier stance in relation to charitable and social matters. What happened was

that Mr Pitt-Payne put to him the difficulty that correspondence on charitable matters might be written by any other member of the royal family: it was not done as part of preparation to be king. In the course of cross-examination Professor Brazier gave consideration to this difficulty both in relation to charitable matters and in relation to social matters. In the light of that consideration, he very fairly acknowledged that – subject to there being no advocacy element – the Commissioner was right to say that the education convention did not cover correspondence on charitable and social matters. In that regard he accepted that he may have conflated two different things which should not have been conflated: the scope of the convention on the one hand and the obligation of confidence on the other.

104 Thus the analysis of the expert witness for the Departments changed during the course of oral evidence. He was confronted with difficulties facing any proposition that whenever Prince Charles interacted with government this helped to prepare him to be king and was therefore part of the education convention. His recognition of those difficulties led him to accept the Commissioner's narrower view that the scope of the education convention did not extend to charitable or social matters. Inevitably, as it seems to us, he was thereby accepting that merely incidental help in preparation for kingship – at least in charitable and social contexts – will not suffice. What we find illuminating is that the question which led Professor Brazier to change his mind did not merely point out that other members of the royal family might write on charitable matters. There was an additional element to the question which made the crucial point that such correspondence was not written “as part of preparation to be king”. To our mind, for the reasons developed by Mr Fordham in cross-examination of Professor Brazier, that crucial point applies equally to advocacy correspondence.

105 The massive extension of the convention advanced by the Departments, and the less massive extension identified by the Commissioner, would both have to meet the second element of the Jennings test. In the context of the education convention this would require that both sides considered that as part of Prince Charles's preparation to be king they were bound to permit correspondence with government in the manner contemplated by the extension. Professor Brazier's witness statement relied on both sides exchanging correspondence on the explicit or implicit assumption that all of it would remain confidential. As noted above, however, in oral evidence he accepted that it was wrong to conflate confidentiality and the scope of the convention. The submissions for Mr Evans accepted that the traditional education convention involved informing Prince Charles about governmental matters and responding to queries from him about that information. The evidence before us, as examined in open session, demonstrates that interaction between Prince Charles and government went far beyond this, but not “as part of preparation to be king”. Published advocacy correspondence shows Prince Charles using his access to government ministers, and no doubt considering himself entitled to use that access, in order to set up and drive forward charities and to promote views – but not as part of his preparation for kingship. Ministers responded, and no doubt felt themselves obliged to respond, but again not as part of Prince Charles's preparation for kingship. Indeed Prince Charles himself accepts, and government acknowledges, that his role as king would be very different. The inevitable conclusion is that while correspondence going beyond the traditional education convention may well be confidential, and is not (despite Professor Tomkins's concerns) said by Mr Evans in these proceedings to be unconstitutional, it does not

have the special status of correspondence falling within a constitutional convention.

106 There is another element in the Jennings test which leads to the same conclusion. It is the third element: there must be good reason for the suggested extension. The good reason advanced by Professor Brazier for such a massive extension was difficult to pin down. At times it appeared to be simply that both sides regarded their discussions as confidential – something which he later accepted was not determinative of the scope of the convention. At other times it appeared to be that whenever Prince Charles interacted with government this helped to prepare him to be king – but he has accepted that, at least in the charitable and social context, merely incidental help does not suffice. In our view, however, there is an overwhelming difficulty in suggesting that there is good reason for regarding advocacy correspondence by Prince Charles as falling within a constitutional convention. It is a difficulty that was recognised in Professor Brazier's answer cited earlier: it is the constitutional role of the monarch, not the heir to the throne, to encourage or warn government. Accordingly it is fundamental that advocacy by Prince Charles cannot have constitutional status. Professor Brazier sought to escape this difficulty by saying that under his extension to the education convention there was no obligation on government to consider what Prince Charles said. This in our view offers no escape: the communication of encouragement or warning to government has constitutional status only when done by the monarch. Even if ministers (despite every appearance of thinking the contrary) are under no obligation to consider what is said, they have received it and it is open to them to take account of it. It would be inconsistent with the tripartite convention to afford constitutional status to the communication by Prince Charles, rather than the Queen, of encouragement or warning which ministers might then take account of.

107 In oral evidence Sir Stephen, when stressing the aridness of an education convention which did not involve debate, added that for Prince Charles part of his training process was being able to use his position to benefit society. Sir Alex cited this in his oral evidence when making a point that advocating particular issues as part of a dialogue increased Prince Charles's understanding of the way government works. Those abstract observations, however, do not show that it will necessarily be difficult to isolate out advocacy correspondence when it occurs.

108 It is worth noting here that Professor Brazier had no difficulty in identifying what we have called "advocacy correspondence". He called it "argumentative correspondence". It comprised the interaction with government first revealed in the biography and which so greatly differed from existing constitutional conventions that in the 1995 article he proposed that it should be recognised as a new constitutional convention. The Commissioner asserted that the distinction between "argumentative and non-argumentative material" will be extremely difficult to apply in practice. We do not think that any such difficulties are likely to be as great as the Commissioner fears. They did not trouble Professor Brazier, but the more important question is whether they would trouble someone without his expertise. It seems to us that this type of interaction will generally have a context which falls into one or other or both of two categories noted in Prince Charles's *Annual Review 2004*: "identifying charitable need and setting up and driving forward charities to meet it", and "promoting views". Those two features of Prince Charles's activities in our view provide a touchstone for identifying "advocacy correspondence", correspondence which has as a context one or other or both of these features.

109 It will not usually be difficult to identify whether a context for correspondence, or parts of correspondence, involves either or both of these features. In the first instance it will be for the department that receives a request to consider whether information it holds has such a context. In the examples given in the biography of letters from Prince Charles it is plain from the content of the letter itself that it is seeking to promote a charity or to promote a view on policy. Thus if the relevant document is the letter itself then the position will usually be clear. Similarly, if the relevant document is a ministerial reply, then either it or the letter under reply will usually show the position to be clear. Moreover, those in the department will be well-equipped, either by examining the file or asking those who dealt with the matter, to decide whether topics in a particular letter from Prince Charles which on their face may not clearly be in a relevant context, are properly to be regarded as falling within a context established by earlier letters or meetings or other interaction between Prince Charles and the department. In the case of the Cabinet Office, it would be appropriate to seek help from the department with responsibility for the subject-matter in question.

110 Taking the hypothetical examples given by the Commissioner:

(1) "The Prince asks for a copy of a recent Government publication. It relates to a subject in which he is known to have an interest." A mere request for a publication does not on its own have a context of seeking to promote a charity or to promote a view on policy. If the file shows, however, that the request is a follow-up to an earlier interaction of that kind, then the answer is likely to be that it falls within such a context.

(2) "The Prince asks for a progress report on a particular project." It seems likely that a request for a progress report will refer back to a previous discussion in which it was indicated that progress on the matter in question was to be made. Here it should be straightforward to identify the earlier occasion, and establish whether it involved Prince Charles seeking to promote a charity or to promote a view on policy. If so, then the request for a progress report is likely to have such a context.

(3) "The Prince identifies a particular problem and asks whether a specific solution has been considered but without advocating the solution, or giving any details of how it might work." On its own a letter of this kind does not seek to promote a charity or to promote a view on policy. The department would need, however, to check whether recent interaction between Prince Charles and the department showed that the letter has been written in a context of seeking to promote a charity or to promote a view on policy.

(4) It was said by the Commissioner that "the reality is that some of that correspondence is likely to reflect the views of the Prince". That may be so, but it does not seem to us that it will render an otherwise straightforward task more difficult – on the contrary, it may well make it easier.

111 For all these reasons, and the reasons set out in the closed annex, we conclude that the education convention does not go beyond what was described as being within that convention by Professor Brazier in the 1995 article, and in particular has not been extended so as to include advocacy correspondence by Prince Charles.

112 We conclude this section of our judgment by returning to the criticism we made earlier of Professor Brazier's use of the expression "apprenticeship convention". It seems to us inapt for three reasons:

(1) The convention as it existed prior to Prince Charles's advocacy activities was not a convention that involved apprenticeship. Neither the Departments nor the Commissioner have identified to us any occasion on which dealings between previous heirs to the throne and government have involved more than the traditional education

convention accepted by Mr Evans. Accordingly using a label of "apprenticeship" inevitably involves an element of assuming what has to be proved.

(2) The Departments and the Commissioner contend that in order to prepare for kingship Prince Charles must be able to interact with government in the way that he currently does. But it is clear that the way he currently interacts with government is very different from the way he will interact with government when king. An apprentice learns the skills of the trade to which the apprentice aspires, not the skills of a different trade.

(3) An apprentice works with, or under the supervision of, a master or mistress. There is no suggestion that Prince Charles as regards advocacy correspondence works with, or under the supervision of, the Queen.

H. Evidence of factual witnesses and findings of fact

113 In section H of OA3 we give an account of the main points made by factual witnesses in their evidence. Our findings of fact recorded in the chronological account at OA2 have been made after consideration of what was said by factual witnesses. For the purposes of the present judgment there is much that was described by witnesses but does not call for us to make specific findings of fact. Where a witness made an assertion of fact which was not disputed in cross-examination we assume that assertion of fact to be correct.

114 We mentioned earlier that the skeleton argument for Mr Evans made 8 assertions of fact. Below we take each of those assertions of fact in turn.

115 The first fact Mr Evans asserts is that it is a matter of public record that Prince Charles holds and expresses strong views on matters of public policy and corresponds with ministers about them. We find this assertion to be established by the evidence. In that regard we refer to OA2 at paragraphs 37, 38, 43, 45, 46, 47, 51, and 60 as regards the period to November 1994, when the biography was published. Our findings in those paragraphs are based on statements of fact in the biography. There is no reason to think that there was any relevant change in this regard after the biography, either in the period up to April 2005 when the requests were made, or in the period from then until 28 February 2006 (the agreed latest reference date).

116 The second fact Mr Evans asserts is that Prince Charles has repeatedly used public platforms to express his strongly held views. We find this assertion to be established by the evidence. In that regard we refer to OA2 at paragraphs 26, 27, 29, 31, 39, 43, 45, 57 and 59 as regards the period to November 1994. Our findings in those paragraphs are based on statements of fact in the biography. During the period up to April 2005 we refer to paragraphs 76, 81, 88 and the article written by Prince Charles described in paragraph 104. There is no reason to think that there was any relevant change in this regard in the period from then until 28 February 2006.

117 The third fact Mr Evans asserts is that Prince Charles corresponds regularly with ministers. We find this assertion to be established by the evidence. In that regard we refer to OA2 at paragraphs 37, 38, 43, 45, 46, 47, 51, 60 and 64 as regards the period to November 1994. Our findings in those paragraphs are based on statements of fact in the biography. There is no reason to think that there was any relevant change in this regard after the biography, either in the period up to April 2005, or in the period from then until 28 February 2006. Thus, for example, the *Annual Review 2004* under the heading "Promoting and protecting national traditions, virtues and excellence said that

Prince Charles did this "through letters to ... Government Ministers ..." (see OA2 at para 97).

118 The fourth fact Mr Evans asserts is that some of Prince Charles's advocacy correspondence with ministers has been published. We find this assertion to be established by the evidence. In that regard we refer to OA2 at paragraphs 41(3), 43(3), 45(1) and (2), 46(1) and (2), 47, 51 and 60 as regards the period to November 1994. Our findings in those paragraphs are based on statements of fact in the biography which published to varying degrees what was said in Prince Charles's letters. That publication occurred with Prince Charles's consent. Prince Charles has not since November 1994 consented to publication of correspondence between him and ministers.

119 The fifth fact Mr Evans asserts is that Prince Charles's self-perceived role has been described on his behalf as representational, "drawing attention to issues on behalf of us all" and "representing views in danger of not being heard". We find this assertion to be established by the evidence. In that regard we refer to OA2 at paragraph 95. We can see no reason to doubt that Prince Charles's spokeswoman used the words described in those paragraphs and accordingly find as a fact that the words cited by Mr Evans were used on that occasion. We also refer to paragraph (iii) of the introduction to Prince Charles's *Annual Review 2004*, quoted at paragraph 97 of OA2. These descriptions had all appeared prior to April 2005. Similar comments were made in the *Annual Review* for the following year: see paragraph 108 of OA2. Other than that, nothing relevant in this regard occurred during the period from April 2005 to 28 February 2006.

120 The sixth fact Mr Evans asserts is that the available materials indicate that Prince Charles has expressed strong views on matters of political controversy, including as to legislation being introduced. We deal with this subject in section J5 below.

121 The seventh fact Mr Evans asserts is that the high degree of publicity afforded to Prince Charles's dealings with government has not prevented his being educated in the ways and workings of government. We deal with this assertion in section J6 below.

122 The eighth fact Mr Evans asserts is that the high degree of publicity afforded to Prince Charles's dealings with government has not deterred him from corresponding frankly with ministers. We deal with this assertion in section J6 below.

[There is no section I]

J. Analysis of the public interest

123 In the decision notices the Commissioner identified specific public interests in disclosure of the information and in its non-disclosure. For convenience we identify these factors in this way:

Factors in favour of disclosure

IC(1) governmental accountability and transparency;

IC(2) the increased understanding of the interaction between government and monarchy;

IC(3) a public understanding of the influence, if any, of Prince Charles on matters of public policy;

IC(4) a particular significance in the light of media stories focusing on Prince Charles's alleged inappropriate interference/lobbying;

IC(5) furthering the public debate regarding the constitutional role of the monarchy and, in particular, the heir to the throne; and

IC(6) informing the broader debate surrounding constitutional reform.

Factors against disclosure

IC(7) potential to undermine the operation of the education convention;

IC(8) an inherent and weighty public interest in the maintenance of confidences;

IC(9) potential to undermine Prince Charles's perceived political neutrality;

IC(10) interference with Prince Charles's right to respect for private life under article 8 ; and

IC(11) a resultant chilling effect on the frankness of communication between Prince Charles and government ministers.

124 The parties differ as to the weight to be given to these factors, in some cases suggesting that it is negligible. Nevertheless they agree in broad terms that these are all factors which must or may be considered by a court when deciding whether the public interest in disclosure would provide a defence to an action for breach of confidence. Thus they must be examined by us when deciding whether the Departments can rely upon the absolute protection afforded by [section 41](#) of the Act, bearing in mind that the burden of showing that disclosure would be in the public interest will, under [section 41](#) , rest on Mr Evans. Similarly, as regards the public interest balance which we must consider on other exemptions, the parties agree in broad terms that these are all factors which may arise, bearing in mind that in relation to these other exemptions it is usually for the Departments to show that the balance is in favour of non-disclosure.

125 The closed annex sets out our conclusions as to the application and assessment of the public interest balance to individual documents forming part of the disputed information. The present section of our judgment describes the general approach that we have taken. We set out below our general analysis of relevant factors. Some of the Commissioner's factors can conveniently be the subject of initial discussion on their own. Others are more conveniently discussed together. Additional factors, or variants of factors, emerged in argument: we include these at appropriate points in the discussion. We then turn to our general assessment of the overall balance.

126 Accordingly the remainder of this section is structured as follows:

- J1: IC(1) Promotion of good governance;
- J2: IC(2), (5), (6) royalty, government, constitutional debate;
- J3: IC(3), (4) understanding Prince Charles's influence;
- J4: IC(8) education convention, preparation for kingship;
- J5: IC(9) and variants, public perception of Prince Charles;
- J6: IC(11) chilling effect on frankness;
- J7: IC(7), (10) maintaining confidences, preserving privacy;
- J8: General aspects of the overall balance.

:IC(1) promotion of good governance

127 The Commissioner's description of this particular public interest was:

There is a general public interest in ensuring that government is accountable for and transparent in its decision-making process.

128 In the Commissioner's submissions this was described as a "high-level" factor. There can be no doubt that it is a factor of considerable general importance. Observations about it were made in the Supreme Court earlier this year in *BBC v Sugar* [2012] UKSC 4, [2012] 1 WLR 439. The parties in that case had sought to proceed on the basis of a concession, but the High Court had declined to do so. Lord Walker said at paras 76 and 77:

76 That conclusion [that the concession could not be accepted] follows both from the 2000 Act's legislative purpose and from its language. First, legislative purpose. It is common ground that the 2000 Act was enacted in order to promote an important public interest in access to information about public bodies. There are (as Schedule 1 to the Act reveals) thousands of public authorities, large and small, which are paid for out of public funds, and whose actions or omissions may have a profound effect on citizens and residents of the United Kingdom. There is a strong public interest in the press and the general public having the right, subject to appropriate safeguards, to require public authorities to provide information about their activities. It adds to parliamentary scrutiny a further and more direct route to a measure of public accountability.

77 There is therefore force, in relation to the 2000 Act as well as in relation to the *Freedom of Information (Scotland) Act 2002*, in the proposition "that, as the whole purpose of the 2002 Act is the release of information, it should be construed in as liberal a manner as possible." That is how it was put by Lord Marnoch in *Common Services Agency v Scottish Information Comr 2007 SC 231*, para 32, approved by Lord Hope of Craighead in the *House of Lords* [2008] 1 WLR 1550, para 4. But Lord Hope continued:

"But that proposition must not be applied too widely, without regard to the way the Act was designed to operate in conjunction with the [*Data Protection Act 1998*]. It is obvious that not all government can be completely open, and special consideration also had to be given to the release of personal information relating to individuals. So while the entitlement to information is expressed initially in the broadest terms that are imaginable, it is qualified in respects that are equally significant and to which appropriate weight must also be given. The scope and nature of the various exemptions plays a key role within the Act's complex analytical framework."

129 We turn below to the key role played by the scope and nature of exemptions. In the present section of our judgment we focus on the strong public interest in the press and the general public having the right, subject to appropriate safeguards, to require

public authorities to provide information about their activities. Elements of this public interest were emphasised in the first report of the Nolan committee (the Committee on Standards in Public Life, chaired by Lord Nolan). The report was published in May 1995. We explain more about it in our chronological account at OA2. Here we note that the seven principles of public life identified by the committee included:

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.

130 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.

131 Returning to the Commissioner's description of this first factor, Mr Evans put it at the head of his list of factors favouring disclosure: it would promote "good governance". We think this is a useful description of this important general factor. In general terms there can be no doubt that promotion of good governance through accountability and transparency, particularly for the reasons explained by Lord Walker, is strongly in the public interest.

132 The Departments asserted that general considerations such as "accountability" and "transparency" did not on their own advance a submission in favour of disclosure under the Act. If they were relied upon alone they proved too much, favouring the disclosure of all information in all circumstances and thus converting every qualified exemption into an absolute obligation to disclose. The submission for the Departments was that such considerations were no more than a means to an end and were not ends in themselves. Similarly there was a submission by the Departments that if disputed information shed no light at all upon the more specific matters identified by Mr Evans, there would be no public interest in disclosure. These submissions ignore the role of accountability and transparency in promoting good governance. They cannot survive the analysis by Lord Walker in the passage cited above.

133 The Departments added that we should consider both the utility and the cost to the public interest of achieving accountability and transparency. The Departments urged us to recognize that other mechanisms would serve those purposes – for example ministers' accountability to Parliament and the electorate for their decisions. The Commissioner did not go this far, but noted that the strength of considerations of accountability and transparency will vary with the actual content of the disputed information. We agree with the Commissioner in that regard. Nevertheless, we think it important that the strength of these general interests should be acknowledged rather than minimised. It is because other methods of achieving accountability and transparency have had only limited success that freedom of information has been

agreed by signatories to the Aarhus convention as regards environmental matters, and enacted more generally throughout the United Kingdom as a whole. When disputed information concerns important aspects of the working of government, the interests in accountability and transparency will be not merely of general importance, but of particular strength.

: IC(2), (5), (6) royalty, government, constitutional debate

134 The Commissioner's description of his second particular public interest was:

(2) There is a specific public interest in the 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 the Heir to the Throne.

135 In the decision notices three aspects of this were mentioned. First, the reason for identifying this specific public interest 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. Second, those mechanisms include how the heir to the throne is educated in the ways of government in preparation for his role as sovereign. Third, while the Departments had cautioned against equating "the public interest" with a prurient public interest in the matters in question, the specific public interest in understanding how government interacts with the royal family is clearly distinct from this.

136 The Commissioner's description of his fifth particular public interest was:

(5) Disclosure of the requested information could further the public debate regarding the constitutional role of the Monarchy and, in particular, the Heir to the Throne.

137 The Commissioner's description of his sixth particular public interest was:

(6) Disclosure of the requested information could also inform the broader debate surrounding constitutional reform.

138 It is convenient to take these factors together. They are predominantly, but not exclusively, about the monarchy's role in the state. Debate surrounding constitutional reform might, in relation to the disputed information, go wider than the role of the monarchy – for example, the disputed information might be expected to be relevant to a wider debate about the role of constitutional conventions. The main focus of all three of these public interests, however, concerns the likelihood that the disputed information will be of value in understanding how government and the royal family interact with each other, along with a separate but linked understanding of how that interaction affects debate about the role of the monarchy and our constitution in general.

139 Mr Evans pointed out that these were matters of legitimate and important public debate. As noted earlier, the Departments complained that Mr Evans had not identified specific public interests that would be advanced by disclosure of the disputed

information. Consistently with that stance, it was said that any interest in understanding the operation of the constitution was “for the most part” general in nature, and that in the absence of an identification “in specifics” of public interest benefit claimed to result from disclosure, the position was that disclosure of the correspondence would not advance any identifiable public interest. The Departments urged that regard be had to the cost of disclosure as opposed to other mechanisms providing for an understanding of relevant matters. Understanding how government interacts with the royal family, and furthering constitutional debate, should not be at the expense of matters that are key to the proper operation of present constitutional arrangements. The Departments said it was difficult to see how any public interest in knowing about governmental interaction with the royal family would be advanced by disclosure of the disputed information. In relation to constitutional debate, the Departments urged that “the terms of ‘debate’ that are suggested should not be such as to predicate the end of the present arrangements.”

140 The Departments added that the public knew that there would be correspondence between the royal family, including Prince Charles, and government. Both Mr Evans and the Commissioner responded that mere knowledge that correspondence of this kind occurred, without sight of its contents, would be inadequate to meet these particular public interests. The public interest lay in the public's ability to see this material, and make of it what it may.

141 We agree with Mr Evans and the Commissioner that these specific public interests are important. The fact that Prince Charles corresponds with and meets ministers, on confidential terms, is in the public domain: but without the disclosure of actual examples of the correspondence, it is difficult for the public to understand what this actually means in practice.

142 As regards constitutional debate, the written response of the Departments (that the terms of debate should not be “such as to predicate the end of the present arrangements”) seemed to suggest an argument that those seeking information under the Act are not entitled to point to the potential value of the disputed information in enabling a better informed debate on the merits of a move to a republic. In his closing oral submissions Mr Swift did not advance such an argument. The answer to it is obvious: whether this country should remain a monarchy is of course a legitimate matter of public debate. More generally, debate about the extent and nature of interaction between government and the royal family, and how the monarchy fits in to our constitution, goes to the heart of understanding the constitutional underpinning of our current system of government. We conclude that these are all important and weighty considerations in favour of disclosure.

143 The closing submissions for Mr Evans drew attention to the significance of article 10 of the European Convention on Human Rights and the recognition that it affords to freedom of expression. We shall examine this below in the context of protection of privacy and confidentiality. For present purposes we note that while we have reached the conclusion above without reference to article 10, that article may offer a further reason for concluding that there are important and weighty considerations favouring the free flow of information on government/royal interaction and matters relevant to wider constitutional debate.

:IC(3), (4) understanding Prince Charles's influence

144 The Commissioner's description of his third particular public interest was:

(3) Disclosure of the information may allow the public to understand the influence, if any, exerted by The Prince on matters of public policy. If the withheld information demonstrated that undue weight had been placed on The Prince's views then there could be a public interest in disclosing that fact. Likewise, if the withheld information demonstrated that The Prince did not have any undue influence, then there could be a public interest in disclosing that this was the case.

145 The Commissioner's description of his fourth particular public interest was:

(4) The above points are particularly significant in the light of media stories focusing on The Prince's alleged inappropriate interference/lobbying.

146 It is convenient to examine them together. The main features of the evidence received specifically on this topic, and of the submissions, are summarised in OA3. We also deal with some subsidiary arguments at paragraphs 179 to 181 of OA3.

147 When considering these submissions, we note that certain examples of correspondence between Prince Charles and ministers are in the public domain. The correspondence about Atlantic salmon and about sea-birds in the northern Irish Sea has been made public under the 30 year rule: see paragraphs 10 to 12 of OA2. More recent correspondence, covering the period to November 1994, is identified in section H above.

148 We make no assumption that it is inappropriate for Prince Charles to urge a particular point of view on ministers. It would not be useful for us to form or express a view on whether this is inappropriate or appropriate. The public interest in disclosure lies in enabling the public to know what is being urged and what is said in response. This enables those with a legitimate interest in the matter to conduct an informed debate. We agree with the Commissioner and Mr Evans that for this reason there is no substance in the criticism of "having one's cake and eating it".

149 Submissions for the Department as to whether Prince Charles was "lobbying", and whether Mr Evans's definition of that term was too broad, seemed to us to miss the point – twice over. First, protagonists in the debate will inevitably argue about what "lobbying" involves. Second, what Mr Evans focuses upon in substance is the shedding of light on the influence exercised, or sought to be exercised, on government by Prince Charles. The Departments rightly point out that the Select Committee Report did not refer to the activities of Prince Charles. Nevertheless, that report made the point that the public interest went beyond knowing merely about the activities of those seeking to influence government for the financial, personal or other interests of themselves or another. This is a point which has relevance both before and after any of the suggested reference dates.

150 We do not consider that what may or may not have happened in relation to Chelsea Barracks case can be relied upon by Mr Evans. It occurred after the agreed latest reference date, and is so fact specific that we do not think it sheds light on the position earlier.

151 Mr Evans sought to rely upon the Chelsea Barracks case as evidence of a perception that Prince Charles exercises special influence. In our view he does not need to rely upon that case for this purpose. It seems to us that the perception that Prince Charles exercises special influence stems from the biography. As to whether it would either be confirmed or dispelled by disclosure of the disputed information, this too seems to us to miss the point: the public interest lies in having an informed debate.

152 We agree with the Departments that 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. This, however, does not answer Mr Evans's point that it seems incongruous that the public should not know about it. The Departments add, and we accept, that Prince Charles has not said that it is in the public interest to reveal what he says. It does not seem to us, however, that there is a true parallel with the exercise by the monarch of rights under the tripartite convention: for the reasons given in section G above, that convention carries with it obligations which Prince Charles does not consider applicable to his own public statements.

153 As regards the information which had been on the website and in the annual reviews, what was at best an ambiguity has now been clarified. We see considerable force in Mr Evans's submission that there was a misleading impression, but we do not think the distinction between this and an ambiguity is so important in the present context as to make it necessary for us to express a view one way or the other.

154 We add that Prince Charles's charitable activities have important characteristics which point in favour of disclosure of correspondence between him and government about them. The economic and social importance of these activities is great. Their aims are in broad terms for the advancement of society. The public interests in pursuing those aims are recognised by conferring a status which exempts charities from tax and other burdens. Their activities may have a major impact – often directly – on the lives of individuals. We note in section J3 of OA3 Mr Swift's comment that he had no idea what Prince Charles's role as “charitable entrepreneur” was. This comment in our view does no justice to the careful and detailed explanation given in the annual reviews. We accept that charitable activity has been associated with monarchy for a long time, and that Prince Charles's charitable work enables the monarchy both to reach out to groups to whom it might have appeared irrelevant and to speak to a wider constituency. None of this, however, in our view, in itself significantly detracts from the public interest in having information relevant to a debate about what influence has been exerted, or sought to be exerted, in driving forward charitable enterprises founded or supported by Prince Charles.

155 Sometimes linked with his charitable enterprises, and at other times not, activities by Prince Charles in a context of seeking to promote views may have significant ramifications, both for departments and for society in general. These activities can be of various kinds – ranging from campaigning to something much more low-key. As with Prince Charles's charitable activities, we neither praise nor criticise any particular method of seeking to promote views. Those concerned with disclosure may need, however, to consider whether any particular method of seeking to promote views may carry with it a greater or lesser public interest in disclosure.

156 An important feature when Prince Charles is seeking to promote a charity or to promote a view on policy is that he has an ability to use privileged access to ministers.

It was common ground that correspondence from him is, as one might expect, treated very differently from ordinary correspondence. It will quickly come to the attention of the minister, who is likely to take a personal interest in the response.

157 There is a further general comment to make. The media interest in Prince Charles's interaction with ministers is substantial. It seems to us that this is not a factor which in itself necessarily favours disclosure. What is relevant is that there is a real debate, generating widespread public interest, on a matter which goes to the heart of our constitution. Sensationalism merely for the sake of it will not generally be in the public interest. The media accounts we have seen have, on occasion, had sensationalist aspects. For the most part, however, the media reporting is of a kind which has focused on the substance. It is relevant when assessing the public interest to note the extent to which, over the relevant period, there have been media reports of this kind.

158 For all these reasons we are not persuaded by the Departments that the public interest in understanding Prince Charles's influence, and being able to reach an informed view about the extent to which he engages in what some may regard as "lobbying", can be minimised. The Commissioner was right to identify these as public interests which needed to be taken into consideration. He was, however, in our view wrong to conclude that material in the disputed information could only have relevance to an understanding of Prince Charles's influence if it enabled a definitive conclusion to be reached, one way or the other, as to whether Prince Charles had in fact influenced the relevant decision. To our mind, just as with disputed information which some may regard as lobbying and others may not, there is a public interest in the information being available so that members of the public can form their own view.

159 It is useful in this regard to go back to the Commissioner's description of IC(3) as set out above. His first sentence identified the interest in question. That interest lies in enabling the public to understand "the influence, if any, exerted by Prince Charles on matters of public policy." The Commissioner's second and third sentences elaborated on that public interest. They identified two consequences which might arise from disclosure. On the one hand it was said that the disputed information might demonstrate that "undue weight" had been given to Prince Charles's views. The other alternative suggested is that it might demonstrate that Prince Charles "did not have any undue influence". In each of these two cases it was suggested that "there could be a public interest" in disclosing "that fact" or "that this was the case". We doubt whether it is desirable to focus on a public interest in one or other of these two outcomes. Whether there has or has not been "undue" influence is bound, as it seems to us, to be a matter of debate. Where disputed information might reasonably be thought to shed light on the way in which Prince Charles influences or seeks to influence government, those involved in the disclosure process must consider the weight to be given to the public interest in being able to consider the matter, and to hold the debate, in the light of disclosure of that information.

160 Moreover, the Commissioner did not, in our view, afford the public interest in these respects the degree of strength which it warrants. Those who seek to influence government policy must understand that the public has a legitimate interest in knowing what they have been doing and what government has been doing in response, and thus being in a position to hold government to account. That public interest is, in our view, a very strong one, and in relation to the activities of charities established or

supported by Prince Charles it is particularly strong.

: IC(8) the education convention, preparation for kingship

161 The public interest factors examined thus far have been those relied upon by Mr Evans in seeking disclosure. We now turn to factors relied upon by one or other or both of the Commissioner and the Departments as supporting non-disclosure. It is convenient to begin with the education convention and preparation for kingship.

162 The second in the Commissioner's list of public interests against disclosure was expressed in this way:

There is a constitutional convention that The Prince is entitled to be educated in and about the business of government so as to prepare him to be Sovereign: disclosure has the potential to undermine the operation of that convention.

163 This is a reference to the education convention discussed in section G. As explained in that section, we have concluded that:

- (1) the education convention is not as broad as is suggested by either the Departments or the Commissioner, and in particular does not extend to advocacy communications;
- (2) the Commissioner was right to conclude that the education convention did not extend to communications about charitable or social matters, but was in error in holding that it covered advocacy communications;
- (3) for reasons given in our conditionally suspended annex and closed annex, none of the disputed information falls within the education convention's scope.

164 We do not repeat here either the arguments as to the scope of the education convention or the reasoning which led to our conclusion. In this section of our judgment we are concerned with fallback arguments that, even if we are right about the extent of the education convention, there remain underlying considerations which support non-disclosure. We summarise in section J4 of OA3 the main features of the submissions to us in this regard.

165 Those submissions had two main aspects which were not always clearly distinguished in the arguments. First, there were suggestions that disclosure of advocacy communications, even though they fell outside the narrow education convention, would undermine the narrow education convention. It seems to us that these suggestions lack practical substance. Moreover they ignore our reasons for excluding advocacy communications from the education convention, and in particular the fundamental problem that to include them would be incompatible with the tripartite convention. To our mind recognition that advocacy communications will generally be disclosable if requested will benefit the operation of the education convention. It will focus the minds of the parties on the important principle that the education convention does not give constitutional status to advocacy communications.

166 It follows from our reasoning on this first aspect that Mr Evans is right to say that the Commissioner " overestimated the extent to which disclosure would undermine the [education] convention " .

167 We turn to the second aspect. This was that public interest reasons underlying the suggested extended scope of the education convention would still warrant non-disclosure, even if the convention did not extend as far as they had suggested. Those reasons were specifically concerned with preparation of Prince Charles for becoming king, it being said in that regard by the Commissioner that:

[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, to develop strong relationships with Ministers, characterised by frank communication and mutual trust.

168 Here there is inevitably a substantial overlap with contentions examined earlier when considering the extent of the convention. As relied upon in the fallback contentions of the Commissioner and the Departments, they urged the importance of preparation for kingship, even where such preparation falls outside the education convention. At places those contentions made reference to Prince Charles's "constitutional role". Again we emphasise that Prince Charles does not currently have the constitutional role of encouraging and warning that is given to the sovereign. He may be called upon to act as regent if that should prove necessary. He is a counsellor of state, and he is a member both of the Privy Council and the House of Lords. Prince Charles has from time to time performed each of the latter three roles. They are not confined to the heir to the throne, and are not said to have a constitutional status akin to exercise of the tripartite convention. By contrast acting as regent, should it arise, will involve a role akin to kingship. Accordingly we treat "preparation for kingship" as including preparation for the role of regent.

169 When considering the public interest in Prince Charles's preparation for kingship in this sense, is it right to say that "advocacy correspondence" on his part, although not carried out as part of preparation for kingship, nonetheless has important benefits contributing to preparation for kingship? This is a separate question from the question whether a liability to disclosure under the Act or the Regulations would have a chilling effect. That question is discussed in section J6 below. Here we are concerned with whether, if disputed information does not fall within the education convention, public interests associated with Prince Charles's preparation for kingship may call for it to be given a higher protection from disclosure than would otherwise be the case.

170 It seems to us that in much of this part of the debate various aspects of the public interest were being confused. At one extreme the Departments were urging that advocacy interchanges between Prince Charles and ministers were in the public interest because they were similar to the monarch's interchanges with government by way of encouragement and warning, and thus the advocacy interchanges were good preparation for kingship: "it forms a means by which the Prince in practice develops and exercises the skills that are the necessary skills of the sovereign". An assumption that the two types of exchange would be similar also seems to us to be inherent in parts of the Commissioner's submissions, likening Prince Charles's advocacy interchanges to the work done by a pupil barrister appearing in court. This extreme position is to our mind divorced from reality. For the reasons given in section G, what is known publicly about the advocacy interchanges shows them to be very different from the function of the monarch when exercising the constitutional entitlement to encourage or to warn.

171 A less extreme position was adopted by Sir Stephen and Sir Alex. They did not assert that advocacy in the disputed information was akin to encouragement or warning under the tripartite convention. Advocacy communication was valuable because without it "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 [Sir Stephen's] point of view, severely limited."

172 A still less extreme position could be seen in parts of the Commissioner's submissions. The Commissioner in these parts of his submissions did not go so far as to identify a "severe limitation" on preparation for kingship. The Commissioner's analysis was that an advantage might be lost: "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."

173 Finally, points made under this head were often dependent upon an assumption that a liability to disclosure under the Act or the Regulations would have a chilling effect. As we noted earlier, that proposition calls for separate examination and is discussed in section J6 below.

174 It is conceivable that communications may fall outside the education convention as currently understood because they involved no element of education, but nonetheless might properly to be regarded as concerned with preparation for kingship. An example of something falling in this category could be a discussion between Prince Charles and the prime minister as to how he would operate the tripartite convention if he were to become king or regent. Such a discussion, touching directly on tripartite convention, would in our view arguably attract a particularly strong public interest in non-disclosure. As noted earlier, Prince Charles has said that his role will be different when he is king. Correspondence between Prince Charles and government as to what that role will be would also arguably attract a public interest in non-disclosure. The strength of that public interest might depend upon a number of factors, one of which would be the degree of closeness to discussion of the operation of the tripartite convention. The "to and fro" between Prince Charles and government involved in advocacy communications may carry an incidental benefit of increasing Prince Charles's knowledge of how government works, but unless there is some additional element they cannot properly be described as preparation for kingship.

: IC(9) and variants: public perception of Prince Charles

175 The public interest in Prince Charles being perceived as politically neutral was the third in the Commissioner's list of public interests against disclosure. The Commissioner's description of the public interest in this regard was put in various ways:

There is the potential for disclosure to undermine The Prince's perceived political neutrality.

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

176 As appears from these passages, the concern was a concern about perception, and "political" was used in a narrow sense of "party-political". The concern that was advanced by the Commissioner and the Departments was that disclosure of the disputed information might lead the public to think that Prince Charles favoured one political party over another. The Departments were at pains to stress that Prince Charles was not politically partisan, and the Commissioner made it clear that he did not suggest this. The concern is thus about misperception.

177 There were passages in the submissions on behalf of the Commissioner and the Departments which sought to advance allied reasoning. Accordingly the suggested public interests that we shall consider here cover:

- (1) the public interest in Prince Charles being perceived as party-politically neutral;
- (2) a public interest in preventing misperceptions giving rise to "unfair criticism undermining the position" of Prince Charles and the monarchy, and thus impairing proper functioning of established constitutional arrangements of government;
- (3) a public interest in avoiding misperceptions giving rise to "impairment to Prince Charles's constitutional position and his ability to carry out his public duties."

178 Section J5 of OA3 sets out the main features of the submissions made to us on these points.

179 The published materials made available to us by the parties include discussion and examples of Prince Charles's approach to matters of political controversy. Our chronology at OA2 includes the following:

(1) [OA2, paragraph 33] Prince Charles's reaction to newspaper reports in 1985 interpreting his concerns as "underpinned by an implied rebuke to the policies of the current government" was that these reports attributed to him: overtly political phrases of a kind I would never, ever use because I know exactly what the political reactions are likely to be.

(2) [OA2, paragraph 34] A leading article in *The Times* on 25 October 1985 contemplated greater latitude for Prince Charles's public statements than he would eventually adopt. It urged that: [Prince Charles] is not precluded from noticing large matters affecting the welfare of the nation, even if these matters attract party political controversy. In doing so, however, he has to be careful not to give the appearance of political partiality. He must not borrow party arguments. He must beware of party code-words. He must avoid personalities. ... Our language is not so deformed and our politics are not so penetrating as to make it impossible for an important personage to say something important and influential about a large aspect of public life without sounding partisan."

(3) [OA2, paragraph 57] Prince Charles's letter in 1991 to Kenneth Clarke defended his speech about the curriculum and stated: I tried my best to minimise anything which could be construed as 'party political' ... The last thing I wanted to do was to make your life any more difficult than it already is, but at the same time I believe there are profound values at stake which I feel it is my duty to emphasise.

(4) [OA2, paragraph 61] In 1993 Prince Charles wrote to the Director of The Prince's Trust, Tom Shebbeare: For the past 15 years I have been

entirely motivated by a desperate desire to put the "Great" back in Great Britain. Everything I have tried to do – all the projects, speeches, schemes etc. – have been with this end in mind.

(5) [OA2, paragraph 62] Speaking to Mr Dimpleby prior to publication of the biography Prince Charles said: I like to think that I haven't strayed into party politics, ... I look at each situation as I think it is. I don't come armed with a lot of baggage ... I understand the parameters in which I can operate but at the same time I'm quite prepared to push it here and there because I happen to be one of those people who feel very strongly and deeply about things ... I don't see why politicians and others should think they have the monopoly of wisdom ...

(6) [OA2 paragraph 95] In response to reports of correspondence between Prince Charles and Lord Irvine, a spokeswoman for Prince Charles made statements to the media which included the following: I think it is the Royal Family's role to take an active interest in British life and it is part of their role to highlight problems and represent views which are in danger of not being heard... That role can only be fulfilled properly if complete confidentiality is maintained. ... He [Prince Charles] does have a track record of representing minority views but that's one of the very strong roles of the Royal Family to do that. The Prince's Trust, for example, is the result of minority concerns. ... It's proper and right that he should take an interest in British life. It's not about exerting undue pressure or campaigning privately.

...

It's part of the Royal Family's role to highlight excellence, express commiseration and draw attention to issues on behalf of us all. ...

(7) [OA2, paragraph 97] Prince Charles's Annual Review for the year to 31 March 2004 stated in the introduction that his role of "promoting and protecting national traditions, virtues and excellence" included helping to ensure that views held by many people which otherwise might not be heard receive some exposure. It explained that Prince Charles performed this role through letters to and meetings with government ministers and other people of influence, by giving speeches, writing articles and participating in television programmes, adding: In doing so, he is always careful to avoid issues which are politically contentious.

(8) [OA2, paragraph 118] Between July 2005 and November 2006 the Clarence House website stated, in addition to observations similar to those in the preceding sub-paragraph: Raising issues

... When issues become a matter for party political debate or the subject of Government policy, The Prince stops raising them publicly.

(9) [OA2, paragraph 119] During the same period the Clarence House website also stated, after quoting from Prince Charles's letter to Tom Shebbeare in 1993: The Prince of Wales makes it clear he has no 'political' agenda. His aim is a long-term one, drawing on the nation's talents and traditions to help people achieve their potential in all aspects of their lives.

(10) [OA2, paragraphs 136 to 139] Because what had been said in the

Annual Reviews and on the website could give rise to ambiguity, relevant passages have been or are to be altered to read: As well as raising issues publicly to bring attention to matters that might be overlooked, His Royal Highness also privately corresponds with and meets business leaders and other people of influence on a variety of subjects that have been brought to his notice or which concern him. In doing so, The Prince is always careful to avoid party political issues.

His Royal Highness also privately corresponds with and meets Government Ministers and officials in his role as Heir to the Throne as well as a Privy Counsellor.

180 Some of the material cited above includes statements made after the requests in the present case, and indeed after 28 February 2006. We think it clear that those statements, when seeking to explain the actual position, are not suggesting that it was any different at relevant times.

181 Sir Stephen told us that one of Prince Charles's aims is to ensure that his published views do not take one side or the other on matters of party-political controversy at the time that he expressed them. A first and vital initial point needs to be made when discussing this aim. It is very different from the constitutional requirement imposed on the monarch as a corollary to the tripartite convention. As we noted in section G, the tripartite convention is "the sovereign's only". It does not apply to the heir to the throne. In the terms of the tripartite convention it would collapse an important distinction if it were said to apply to the heir to the throne. What passes between the monarch and ministers is *not* published anywhere (at least not until long after the event), save with the agreement of both of them. Because Prince Charles is heir to the throne, and not monarch, publication of communications between him and ministers during the time when he is heir is not contrary to the tripartite convention.

182 There is a second point to be made about this aim. It concerns the difference between things that are "political" in a broad sense, and those that are "party-political", and the possibility that a particular aspect of policy may change from one to the other. The word "political" can be used in a broad sense, connoting an activity relating to policy. It is apparent from Prince Charles's public advocacy, from the revelations in the biography about his private advocacy, from purported revelations elsewhere about his private advocacy, and from public criticism of his advocacy activities (see, for example, paragraphs 28, 39-40, 58, 102-103 and 104 of OA2) that in this broad sense of "political" Prince Charles's activities are not neutral and in a number of respects have been controversial. It was common ground in the present case that despite all this, and despite views he has advocated often being later adopted to a greater or lesser extent by politicians or government, Prince Charles had succeeded in not being perceived as party-political. There is a risk that a view publicly advocated by him at a time when it did not divide political parties may do so in the future, but that is a risk that he has been prepared to run.

183 This brings us to a third point concerning public perception about the Queen. There is no widespread perception among the public that the Queen is a cipher. Her views on matters such as the importance of the Commonwealth are known. What constitutional convention requires is that the views expressed by the monarch to government are not revealed – at least until long after the event. Public knowledge of the fact that the

monarch may hold – or may in the past have held – particular views on matters of public policy does not contravene any constitutional convention. As we explain below, it does not follow that failure by members of the public to distinguish between views on party-political issues and views on wider matters of policy involves “unfair criticism” – or even if it were “unfair”, that Prince Charles or the royal family generally needs to be protected from it.

184 It follows from this reasoning that we do not accept the broad general proposition advanced by the Commissioner on this aspect. It is true that a decision to abstain from making certain kinds of statement in public may be rendered ineffective if private correspondence were disclosed. This has to be seen, however, in the context of advocacy correspondence. In that context the Commissioner’s submission effectively becomes that while Prince Charles desires to be known publicly as an advocate on some issues, nevertheless there is a public interest in not revealing his advocacy on issues where he does not wish his stance to be known publicly. There may be special cases – for example, particular circumstances where, in order to achieve some public good, there is an initial period where secrecy is necessary to avoid tipping off wrongdoers. In the absence of this, or some other special circumstance, we do not accept that a desire that the public should not know of his advocacy on a particular issue of itself gives rise to a public interest in non-disclosure.

185 Underlying all this is a concern that the public will come to the “wrong” conclusion. It is a concern which no doubt underlay what the preface to the biography described as “the culture of secrecy which pervades Whitehall”. The preface was written in September 1994. Things have now moved on – not least because the Act and the Regulations have the aim of enabling members of the public to scrutinise the workings of government.

186 If it were the case that the disputed information included views on matters which either divide the political parties now or divided the political parties at the time they were made, should this make any difference?

187 We cited earlier from the editorial in *The Times* on 25 October 1985. It contemplated greater latitude for Prince Charles’s public statements than he would eventually adopt, for it saw him as “not precluded from noticing large matters affecting the welfare of the nation, *even if these matters attract party political controversy* . In doing so, however, he has to be careful not to give the appearance of political partiality. He must not borrow party arguments. He must beware of party code-words. He must avoid personalities. ...” (Our emphasis). For reasons explained in our conditionally suspended annex, we can say that in the disputed information – consistently with what in 1985 he described as his own practice - Prince Charles avoids “party arguments”, “party code-words” and “personalities”. If it were possible to identify in the disputed information anything on a topic which attracted party-political controversy either at the time it was written or now, just as *The Times* in 1985 thought the public interest permitted public statements on such a topic, we consider that in the 21st century “our language is not so deformed and our politics are not so penetrating” as to make it in the public interest not to disclose advocacy communications on such topics.

188 There is, as it seems to us, a short answer to all the various ways in which the Departments have sought to rely on dangers of “misperception” on the part of the

public. It is this: the essence of our democracy is that criticism within the law is the right of all, no matter how wrongheaded those on high may consider the criticism to be.

: IC(11) chilling effect on frankness

189 This was the fifth in the Commissioner's list of public interests against disclosure. His description of this particular public interest was:

Disclosure would have a chilling effect on future correspondence between The Prince and Government ministers. It would inhibit the frankness of the communication between these parties, impeding them in building up a relationship of mutual trust, and thereby adversely affecting The Prince's preparation for his future role as Sovereign. This is so, whether or not the correspondence in questions falls strictly within the scope of a constitutional convention.

190 The main submissions of the parties on this issue are summarised in section J6 of OA3. The legislative changes which have taken place will greatly reduce the scope for our decision to have a chilling effect on frankness. Those legislative changes reassure both Prince Charles and government that, at least as regards non-environmental information, communications between them will be protected from disclosure under the Act. We must, however, proceed by looking at the public interest at the time of the requests, or at the latest at 28 February 2006. Accordingly, and in accordance with the approach taken in the submissions, we ignore the legislative change in the discussion which follows.

191 Neither the Commissioner nor the Departments dispute that little weight is given to the potential chilling effect as regards those who are not in the position of Prince Charles and communicate with government in a context where they are seeking to advance the work of charities or to promote views. That remains the case even though it must be desirable that such communications take place, where possible, in a relationship of mutual frankness.

192 We accept as a general proposition that in the case of communications between a potential future regent or king and government it is particularly desirable that such communications take place, where possible, in a relationship of mutual frankness. We accept also that in certain contexts Prince Charles may alter the content or tone of what he says if he believes it is likely to become public. Thus a change in what Prince Charles and government say to each other in a particular context may occur. The context is one in which Prince Charles is seeking to advance the work of charities or to promote views. In our view, however, any such change is unlikely to be such as would significantly damage the public interest.

193 First, a decision that advocacy correspondence will generally be disclosable does not in any way affect correspondence falling within the education convention, correspondence concerning social matters, or any correspondence in so far as it does not involve advocacy. For reasons we have given earlier, in our view advocacy on the one hand, and matters not involving advocacy on the other, can be separated. There is accordingly unlikely to be any significant adverse impact on the ability of government and Prince Charles to have a relationship of mutual frankness on those other matters.

194 Second, there is no reason to think that any impact of a decision in favour of disclosure will affect the position once Prince Charles has become regent or king. At that stage the tripartite convention takes over, and encouragement and warning by Prince Charles as regent or king can for all practical purposes be regarded as immune from disclosure.

195 Third, there may be a change of tone in advocacy communications while Prince Charles is heir. While he is heir, however, Prince Charles's advocacy does not have constitutional status. Moreover, we doubt that any change in tone will significantly detract from whatever point either side is seeking to make.

196 Fourth, there is good reason to think that Prince Charles will not, as a result of liability to disclosure, cease to make points to government that in his view need to be made. The chronology forcefully suggests that these are things that he feels strongly cannot be left unsaid: see for example OA2 at paragraphs 35, 37, 43(4), 61, 62 and 97. Moreover, he has not been dissuaded by publicity in the past: we consider that the high degree of publicity afforded to Prince Charles's dealings with government in the past has not prevented his being educated in the ways and workings of government, nor has it deterred him from corresponding frankly with ministers. Thus each of Mr Evans's seventh and eighth propositions is made good.

: IC(7), (10) maintaining confidences, preserving privacy

197 The public interest in maintaining confidences was the first in the Commissioner's list of public interests against disclosure. His description of this particular public interest was:

The starting-point is that there is an inherent and weighty public interest in the maintenance of confidences: *Prince of Wales v Associated Newspapers* [2006] EWCA Civ 1776, [2008] Ch 57, at paragraphs 66-68.

198 The public interest in preserving privacy was the fourth in the Commissioner's list of public interests against disclosure. His description of this particular public interest was:

The correspondence engages The Prince's right to respect for private life under article 8: disclosure would be an interference with that right.

199 The decision notices explained how legal principles protecting confidentiality and privacy have developed. They are closely inter-related. Thus, as regards disclosure under the Act, Mr Evans accepted that the section 41 exemption could be made out by reference to there being either a breach of confidence or a misuse of private information. Moreover both factors give rise to arguments concerning the European Convention on Human Rights, in particular under articles 8 and 10. The close inter-relationship of these factors makes it convenient to consider them together. Our purpose here is to consider the arguments about the weight to be given to these factors in the public interest balance. This has two consequences:

(1) Our discussion assumes that the need to conduct a public interest balance has arisen. Where section 41 is engaged that need will have arisen because the notional civil liability which gives rise to an absolute exemption under that

section is itself subject to a public interest balance. Where regulation 13 is engaged the need will have arisen because the test of fair dealing involves a public interest balance. Section 37 and Regulation 12(5)(f) are qualified exemptions, and for that reason give rise to a public interest balance. We are not here concerned with whether specific exemptions are indeed engaged, and in particular with the extent to which section 41 is engaged in relation to correspondence emanating from government. It is common ground that on the facts of this case, such exemptions as are engaged will call for consideration of the public interest in confidentiality and privacy.

(2) It is on the basis of this consideration that we will turn in section J8 of this judgment to examine the suggestion that (whether under section 41 or more generally) factors concerned with confidentiality and privacy are so strong that they can only be outweighed by exceptional circumstances.

200 The main submissions advanced in this regard are summarised in section J7 of OA3. We agree with the Commissioner that the starting-point is that there is an inherent and weighty public interest in the maintenance of confidences. In particular, we must and do adopt the approach set out in paragraphs 66-68 of the judgment of the Court of Appeal in Prince of Wales v Associated Newspapers [2006] EWCA Civ 1776, [2008] Ch 57 :

66 What is the position where the disclosure relates to "information received in confidence?" The authors of *The Law of Privacy and the Media*, edited by Sir Michael Tugendhat and Iain Christie, in their Second Cumulative Supplement (2006), para 6.111 express the view that it would be surprising if this consideration was ignored. We agree. It is a factor that article 10(2) recognises is, of itself, capable of justifying restrictions on freedom of expression.

67 There is an important public interest in the observance of duties of confidence. Those who engage employees, or who enter into other relationships that carry with them a duty of confidence, ought to be able to be confident that they can disclose, without risk of wider publication, information that it is legitimate for them to wish to keep confidential. Before the Human Rights Act 1998 came into force the circumstances in which the public interest in publication overrode a duty of confidence were very limited. The issue was whether exceptional circumstances justified disregarding the confidentiality that would otherwise prevail. Today the test is different. It is whether a fetter of the right of freedom of expression is, in the particular circumstances, "necessary in a democratic society". It is a test of proportionality. But a significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence that are created between individuals. It is not enough to justify publication that the information in question is a matter of public interest. To take an extreme example, the content of a budget speech is a matter of great public interest. But if a disloyal typist were to seek to sell a copy to a newspaper in advance of the delivery of the speech in Parliament, there can surely be no doubt that the newspaper would be in breach of duty if it purchased and published the speech.

68 For these reasons, the test to be applied when considering whether it is

necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. The court will need to consider 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.

201 By contrast, however, the particular concern mentioned at paragraph 70 of the Court of Appeal's judgment in that case is of less significance in the present case. Aspects of celebrities' personal lives are of interest to many members of the public, and resultant inroads on their privacy can be particularly intrusive. This case, however, is about advocacy correspondence. The biography shows how very different that correspondence is from an intrusive obsession with personal details. The causes sought to be advanced by Prince Charles, as described in the biography, fulfil the description given in the Clarence House website and in Prince Charles's annual reviews: seeking to make a difference. They may or may not concern topics which others find interesting, but the biography shows that they are highly likely to have potential public importance at both a practical and a constitutional level.

202 It would be unreal to contend that Prince Charles is not a public figure. Neither the Commissioner nor the Departments advance such a contention. There is, however, in our view a strong air of unreality about their contention that his birth gave him no choice as to whether to engage in advocacy correspondence. The analogy made by Mr Fordham with a hereditary peer was in that regard compelling: some may feel impelled to intervene for the public good as they see it, either publicly or behind the scenes. Others may not. Applying the Strasbourg case-law we see no basis for saying that when Prince Charles does so his actions must be characterised as "truly personal." On the contrary they are, on his own description, all motivated by a desire to put the "Great" back in Great Britain.

203 It was said by the Commissioner and the Departments that four factors (the education convention, preparation for kingship, the risk of public misperceptions, and the risk of a chilling effect on frankness) all gave added weight to the public interest in confidentiality. For reasons given earlier we do not consider that these four factors are likely, in the absence of special circumstances, to give rise to a substantial public interest in non-disclosure of advocacy correspondence. The same is true on the question whether they add to the existing public interest in maintaining confidentiality and privacy. There may be special circumstances in relation to particular documents which give particularly strong weight to concerns of confidentiality and privacy. In the absence of such special circumstances, we conclude that the public interest in concerns about confidentiality and privacy will, as regards advocacy correspondence, not generally be substantially higher than will normally be the case when applying the principles described by the Court of Appeal at paragraphs 66 to 68 of its judgment in *Prince of Wales v Associated Newspapers* [2006] EWCA Civ 1776, [2008] Ch 57.

: General aspects of the overall balance

204 The main features of the submissions in this regard are summarised in section J8 of OA3. A prominent feature of the submissions for Mr Evans concerned what was described as the Commissioner's "exceptionality" approach. That approach had been taken both in the context of the [section 41](#) exemption and more generally when the public interest balance arose for consideration. It was described by Mr Evans as a "self-direction in law" by the Commissioner, involving "a special 'threshold' which requires a 'very strong set of public interest arguments' or 'an exceptional case'". The Commissioner's "exceptionality" approach was said to be wrong because the test is proportionality not exceptionality.

205 The arguments for the parties on the Commissioner's "exceptionality" approach were sometimes advanced specifically in the context of [section 41](#) and at other times were more general or focused on a different exemption. However the essential point made by the Commissioner and the Departments was a general one: what the Commissioner had done was an exercise in proportionality, an exercise in which he had concluded that the public interest in favour of non-disclosure was so great that in order to balance it the public interest in disclosure would require public interest arguments that could properly be described as very strong or exceptional. We doubt whether using the term "exceptional" was a helpful way of approaching the matter. In context, however, it seems to us clear that the Commissioner was doing no more than to use the term as a shorthand for the consequence of his conclusion that the public interest in favour of non-disclosure was very strong. Adopting the term as a shorthand involved no error of law. The real question concerns the Commissioner's assessment of the comparative weight of the factors favouring disclosure and non-disclosure.

206 We turn to how the factors favouring disclosure and non-disclosure are to be weighed against each other. Our discussion thus far has focused on the weight to be given to individual factors. Below we analyse what has been said by the parties about the way the balance should be struck, seeking so far as possible to avoid repeating submissions which were concerned with the weight of an individual factor on its own. Here, too, the arguments were sometimes advanced specifically in the context of [section 41](#) and at other times were more general or focused on a different exemption.

207 It has been suggested in these arguments that in principle the public interest balance may be different for different exemptions. Where there might be some special consideration in relation to a particular exemption we examine this in section K below. In the light of that examination, however, we conclude that the Commissioner was right to say in closing oral submissions that in the circumstances of the present case, as regards the exemptions claimed by the Departments, such differences as exist will not make a difference to the outcome. When assessing the public interest balance for the purposes of each exemption we take an approach under which we aggregate all public interests in non-disclosure. We reach our conclusion on the overall balance by assessing the weight of their cumulative effect against the weight we give to the public interests in disclosure.

208 From the arguments described above at least one point emerges on which there is consensus. This concerns the position of those who have dealings with government in a context where they have a commercial interest in the outcome that they seek to promote. In the ordinary course, in the absence of special circumstances, they must expect that communications between them and government, even though they took

place on a confidential basis, may at some point after the event be disclosable under the Act and the Regulations. That is because, applying the principles set out by the Court of Appeal in *Prince of Wales v Associated Newspapers Ltd*, the public interest in transparency and accountability warrants this.

209 It is because they assert that Prince Charles does not have a commercial interest in the outcomes that he seeks to promote, and because they identify particular considerations affecting Prince Charles, that the Commissioner and the Departments are able to assert that public interest considerations warrant giving correspondence between ministers and Prince Charles greater protection from disclosure than would be afforded to correspondence with those who have dealings with government in a context where they have a commercial interest in the outcome that they seek to promote. However the assertion that Prince Charles should be in a different position because he does not have a commercial interest in the outcomes that he seeks to promote is, in our view, an assertion which lacks a sound basis. Advocacy correspondence will in general be likely to concern matters which affect either or both of public policy and the public purse. As regards such matters the public interest in knowing what views have been urged upon government, and what interests of charitable enterprises have been promoted, is likely to be at least as great as it would be in a commercial context. Indeed it may be even greater in a context where the advocacy seeks to drive forward a charitable purpose, for charities may receive major fiscal benefits. It is in our view unlikely to be significantly less where the motivation for promoting a particular view is altruistic, and indeed may well be significantly greater where the altruism forms part of a concerted campaign.

210 Turning to the particular considerations said to affect Prince Charles, the Commissioner's analysis identified a need for exceptionally strong arguments in favour of disclosure. This analysis is dependent upon substantial weight being given (a) to an education convention going beyond its previously identified scope or alternatively to an element of preparation for kingship in parts of the disputed information not falling within the education convention; (b) to the danger of "misperception" by the public of Prince Charles's political neutrality and other matters; and (c) to a "truly personal" characterisation of the disputed information. For reasons given in sections J4, J5, and J7 none of these matters, as regards advocacy correspondence, is likely in the absence of special circumstances (for example, information falling within the true scope of the education convention, or which is properly to be regarded as part of preparation for kingship) to give rise to weighty public interest considerations favouring non-disclosure. We are not persuaded that they warrant giving correspondence between ministers and Prince Charles greater protection from disclosure than would be afforded to correspondence with others who have dealings with government in a context where those others are seeking to advance the work of charities or to promote views. The Commissioner also relied upon a risk that disclosure will have a chilling effect on frankness of communication between Prince Charles and ministers. For reasons given in section J6 this risk does not carry substantial weight, and thus does not of itself warrant giving correspondence between ministers and Prince Charles greater protection from disclosure than would be afforded to correspondence with others who have dealings with government in a context where they have an interest that government should take a particular course.

211 The Departments' contentions relied upon similar factors. In addition, they placed

great reliance initially on a contention that the education convention had an even broader scope than was identified by the Commissioner. In closing submissions this became a contention which urged that Prince Charles's advocacy correspondence had an important constitutional role, and it mattered not whether it fell within a constitutional convention. For reasons given in the same sections of our judgment none of the Departments' contentions persuades us that, in the absence of special circumstances, as regards advocacy correspondence it is appropriate to give correspondence between ministers and Prince Charles greater protection from disclosure than would be afforded to correspondence with others who have dealings with government in a context where those others are seeking to advance the work of charities or to promote views.

212 In the context of a notional action by Prince Charles complaining of breach of confidence or invasion of privacy we must place the burden of proof on Mr Evans. He must show that the breach of confidence or invasion of privacy would be in the public interest. Doing so, we are for the reasons given above persuaded that in the absence of special circumstances, as regards correspondence between Prince Charles and ministers in a context where Prince Charles is seeking to advance the work of charities or to promote views, there would generally be a public interest defence to such an action.

213 Thus far our analysis has not taken account of specific factors associated with Prince Charles which may add to the public interest in disclosure. Even without such factors our conclusion is, for the reasons given above, that the overall public interest balance will clearly, in the absence of special circumstances, be in favour of disclosure as regards correspondence between Prince Charles and ministers in a context where Prince Charles has an interest that government should take a particular course.

214 In our view there are factors associated with Prince Charles which strongly tilt the balance even further in favour of disclosure. One group of factors concerns the importance of his charitable enterprises, as discussed in section J3 above. Their range of activities is so widespread that they may potentially affect many aspects of the work of the Departments. Similarly Prince Charles's non-charitable advocacy activities – limiting ourselves in this judgment to those which are public – have the potential to affect many aspects of the work of the Departments. Important constitutional issues are raised by his advocacy activities, as discussed in section J2 above. Those issues have the potential to arise in relation to all advocacy correspondence. We do not seek to place these factors in order of importance. Each adds significantly to the balance in favour of disclosure. They lead us to conclude that in general terms the balance is likely to be not only clearly but also strongly, and sometimes very strongly, in favour of disclosure.

K. Entitlement, exemptions and exceptions

Entitlement, and exemptions, under the Act

215 There was no dispute that the information requested fell within the Act. Issues arose as to whether particular information fell within the Regulations. General issues in this regard were canvassed at open hearings and are dealt with at section K5 below. Issues about particular documents are dealt with in the annexes to this judgment. At a late stage the Departments raised an issue as to the scope of the requests: we discuss

it in section L below.

216 In response to Mr Evans's requests under the Act the Departments claimed exemption under section 41 (which confers absolute exemption for information obtained by the department from any other person if disclosure of that information to the public would constitute an actionable breach of confidence: see section K2 below). The Departments also claimed exemption under section 37 (which confers no more than a qualified exemption in this case: see section K3 below). They added both in their letters refusing disclosure and in their response to these appeals that they were entitled to rely on section 40 so far as it confers absolute exemption for personal data whose disclosure would contravene the data protection principles (see section K4 below).

217 In response to Mr Evans's requests under the Regulations the Departments relied on regulation 12(5)(f) (a qualified exception for information meeting certain conditions where disclosure of the information would adversely affect the interests of the person who provided the information: see section K6 below). The Departments also relied on regulation 13 (an absolute exemption for personal data in certain circumstances: see section K7 below).

218 The Departments maintained that for similar reasons they were under no obligation to provide the requested lists and schedules, whether under the Act or under the Regulations (see section K8 below).

Section 41: information provided in confidence

219 Our initial discussion of section 41 and the Commissioner's conclusions on it will be found at section E3 above. We note in section J7 above that where the section 41 threshold requirements are met it provides an absolute exemption for disputed information whose disclosure would amount to an actionable breach of confidence in the broad sense used in section 41, covering both rights of confidentiality and rights of privacy. As explained above, however, disclosure would not be actionable if the breach of confidence or invasion of privacy is shown to be in the public interest. Thus although the exemption under section 41 is absolute, it will involve consideration of a public interest test very similar to that for qualified exemptions, the principal difference being that it is the person seeking the information who must show that disclosure is in the public interest rather than the other way round. Our conclusions in that regard are set out in section J8 above.

220 In this section of our judgment we analyse the submissions on whether the section 41 threshold requirements are met. The relevant provisions of section 41 are:

Information provided in confidence

(1) Information is exempt information if-

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

221 The main features of the submissions relevant to the scope of section 41 are summarised in section K2 of OA3.

222 We deal first with the contention for Mr Evans that section 41 only applies to information which the department elicited, rather than merely received. Much reliance is placed by Mr Evans on the use of the word "obtained" rather than "received from" or "provided by". The submission is undermined by the fact that the heading to section 41 uses the word "provided". In any event, as a matter of everyday use of the English language, the distinction between these various expressions appears to us to be too slight to draw the inference suggested merely as a matter of natural meaning of the words used. The meaning of "obtained" in other statutory provisions cannot simply be read across to section 41, for in particular provisions this word will take its colour from the context.

223 Turning to the context as regards section 41, we do not need to refer to Hansard in order to conclude that Parliament did not use the word "obtained" in the sense suggested by Mr Evans. If Mr Evans were right, an unsolicited letter to a government minister headed "Private and Confidential" could not fall within section 41. It would be surprising if the words used in section 41 had that result, for such a letter could contain information whose disclosure would cause very grave damage to the sender. If section 41 did not cover such a case, then disclosure would be automatic. Of course it is possible that some other exemption may arise in a particular case, but it cannot be assumed that this will be so. To expose a provider of confidential or private information to the risk of grave damage – with no opportunity for consideration of a public interest balance – would seem to us to be an unreasonable result. It is not necessary to interpret section 41 as having such an unreasonable result, and we think it would be wrong to do so.

224 That leaves the Departments' complaint that the Commissioner was wrong to hold that letters written by ministers to Prince Charles fall within section 41(1)(a) only to the extent that they reflect the actual views or opinions communicated by Prince Charles. The Departments submit that the section should be construed as including rights of confidentiality and privacy as to both the general subject-matter of Prince Charles's letters and the fact that Prince Charles wrote particular letters on particular dates to particular ministers. Here both the Commissioner and Mr Evans disagree with the Departments and rely on what is perceived to be the natural meaning of the words used in section 41. For similar reasons to those described in the preceding paragraph, we think that this stance pays insufficient regard to the context. It is not difficult to think of circumstances where both (1) a particular individual has communicated during a particular period of time with a minister on the express basis that either the mere fact, or the subject matter, of the communication is highly confidential, and (2) disclosure of this would cause grave damage to that individual. When the words used are construed in context, it does not seem to us to be necessary to interpret section 41 as having such an unreasonable result, providing no opportunity for consideration of a public interest balance. The words "information ... obtained by the public authority from any other person (including another public authority)" can in our view be construed as including both the general subject-matter of a communication and the fact that the communication took place. It is consonant with the scope and nature of the exemption

in section 41 to construe that section in this way.

225 For these reasons we conclude first, that Mr Evans is wrong to say that the Commissioner construed the threshold section 41 requirements too broadly, and second, that the Departments are right to say that he construed them too narrowly.

Section 37: communications with the royal family

226 Our initial discussion of section 37 and the Commissioner's conclusions on it will be found at section E1 above. The Commissioner considered this exemption only in relation to those parts of the correspondence which were not exempt under section 41. Those parts – comprising the whole of the rest of the correspondence – were, the Commissioner held, exempt under section 37, because the public interest favoured the withholding of the information from disclosure. For the reasons given in section J8, we have concluded that in general the public interest balance is very different. All parties accept that the disputed information falls within section 37 in the sense that it “relates to... communications with ... members of the royal family”. The Departments advance a contention that we should 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.

227 The main features of the submissions in this regard are summarised in OA3 at section K3. We are not persuaded by the submissions for the Departments. The observations they rely upon were in a context of truly exceptional cases where the Act had framed an exemption in a way which specifically corresponded with a long recognised category of cases where there was an entitlement to insist that information be not disclosed. We can see that in such cases there are likely to be public interest considerations of a general nature and of very great weight. We are less sure that it is right to read into the Act an implicit intention that the public interest balance should be assumed to involve a good reason against disclosure, or that the cases in question do indeed involve the approach advanced on behalf of the Departments in the present case. It is not necessary to decide those questions, and we do not seek to do so. The reason is that section 37 – at least as regards the heir to the throne – does not specifically correspond with a long recognised category of cases where there was an entitlement to insist that information be not disclosed.

Section 40: personal information

228 Our initial discussion of section 40 will be found at section E2 above. Section 40 had not been addressed in the decision notices because the Commissioner's conclusions on sections 37 and 41 made this unnecessary. There was no objection by Mr Evans to it being relied upon by the Departments in answer to these appeals. Only the first data protection principle, set out in Schedule 1 to the Data Protection Act 1998 (“DPA”) was relied upon. This states:

“Personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless—(a) at least one of the conditions in Schedule 2 is met...”

229 For present purposes we need set out only the condition found in paragraph 6(1) to Schedule 2 :

6(1) The processing is necessary for the purposes of the legitimate interests pursued by the data controller or by the third party or parties to whom the data

are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

230 The main features of the submissions in this regard are summarised in OA3 at section K4.

231 We do not need to decide whether the disputed information constitutes personal data of Prince Charles. If it does, we agree with the Commissioner as to the matters to be taken into account. When they are taken into account, for the reasons given in section J8, there is no contravention of the first data protection principle. In these circumstances it is unnecessary to go into other matters canvassed in argument, and we think it preferable not to do so.

232 Personal data of others may need to be considered under [section 40](#) . In our conditionally suspended annex and closed annex we examine the extent to which this arises.

Entitlement under the Regulations

233 The Regulations apply to “environmental information” as defined in [regulation 2\(1\)](#) :

namely any information in written, visual, aural, electronic or any other material form on–

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

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

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

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

234 The Commissioner's conclusions as to the scope of the Regulations are

summarised in OA3 at section B6. There were differences between the Commissioner and the Departments as to the extent to which the disputed information fell within the Regulations. The Commissioner contended that these differences could only be addressed by reference to the actual content of the disputed information. Accordingly we heard oral submissions on this issue in closed session.

235 Parts of the oral submissions dealt with the principles which govern how one goes about deciding what constitutes environmental information for the purposes of the Regulations. The Commissioner and the Departments identified relevant extracts from the transcript, and these extracts were supplied to Mr Evans. What emerged from the submissions was as follows:

- (1) The European Court of Justice made it clear in the *Glawischnig v Bundesminister für Soziale Sicherheit 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.
- (2) The Departments and the Commissioner agreed that the judgment remained accurate in relation to the current Directive.
- (3) In *Omagh District Council v Information Commissioner* (EA/2010/0163) the First-tier Tribunal was concerned with information about land with a memorial upon it, and a process which could lead to that memorial being removed. The tribunal held that while the information had a context which was cultural and historical, nonetheless it was sufficiently closely related to the specified environmental factors to constitute environmental information.
- (4) In *Easter v Information Commissioner and New Forest National Park Authority* (EA/2009/0092, decided 14 May 2010) it was submitted to the First-tier Tribunal that planning matters would always fall within the definition of environmental information. The tribunal said that it would not accept this proposition unequivocally. It nevertheless concluded that information relating to a decision in that case - not to take enforcement action in respect of a listed building within a national park - was information about the state of the land or landscape within [regulation 2\(1\)\(a\)](#) and was information on a measure affecting or likely to affect the factors and elements referred to in [regulation 2\(1\)\(a\) and \(b\)](#).

236 Mr Evans made no observations on the extracts supplied in this regard.

Regulation 12(5)(f): adverse effect on provider's interests

237 Our initial discussion of [Regulation 12\(5\)\(f\)](#) and the Commissioner's conclusions on it will be found at section E4 above. In this regard an issue arose between Mr Evans and the Commissioner on the one hand and the Departments on the other. It was similar to the issue between the same parties on [section 41](#) which we describe in section K2 above. The Commissioner held, and Mr Evans agrees, that information is only "provided" by Prince Charles within [regulation 12\(5\)\(f\)](#) 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 him. The Departments however contended that the same principles apply as to whether information fell within the scope of [regulation 12\(5\)\(f\)](#) as apply under [section 41](#) .

238 The main features of the submissions in this regard are summarised in OA3 at section K6.

239 We consider that the words of the regulation when read in context have the wider meaning contended for by the Departments. Our reasons for this conclusion are essentially the same as those set out in section K2 above in relation to the similar issue arising under [section 41](#) .

240 The arguments before us assumed that disclosure would adversely affect Prince Charles, and accordingly the only remaining issue on [regulation 12\(5\)\(f\)](#) is whether, after applying a presumption in favour of disclosure, the Departments have shown that the public interest balance is against disclosure. It is not necessary for us to discuss what is meant in this regard by "a presumption in favour of disclosure". For the reasons given in section J8 above, we have no doubt that even without such a presumption that, in the absence of special circumstances, the balance will generally be clearly and strongly in favour of disclosure as regards correspondence between Prince Charles and ministers in a context where Prince Charles is seeking to advance the work of charities or to promote views.

Regulation 13: personal data

241 Our initial discussion of [regulation 13](#) and the Commissioner's conclusions on it will be found at section E5 above.

242 The parties agree that for [Regulation 13](#) we should take the same approach as for [section 40](#) . On that footing we reach the same conclusions as are set out in section K4 above.

Lists and schedules under the Act and the Regulations

243 We summarise at sections B5 and B9 of OA3 the Commissioner's conclusions as regards the requests for lists and schedules under the Act and the Regulations. The closing skeleton argument for Mr Evans indicated that these requests will not need to be considered if we accepted his arguments on the substance of the correspondence. In the result we have in broad terms reached the conclusions sought by Mr Evans on the substance of the correspondence. Accordingly it is not necessary for us to discuss the parties' contentions as regards lists and schedules. We do not set them out here, or seek to analyse them: if we are wrong in our broad conclusions as to the arguments on the substance, then it seems to us that the correct conclusion as regards lists and schedules will depend upon the reasoning adopted in reaching a different conclusion on the substance of the correspondence.

L. Scope of the requests

244 An issue which emerged during the hearings concerned the scope of Mr Evans's requests; specifically, whether they should be taken to include correspondence written by and sent in the name of a Private Secretary (or Assistant Private Secretary), and correspondence sent to a Private Secretary (or Assistant).

245 The main features of the submissions in this regard are summarised in OA3 at

section L.

246 Our approach is that where a letter is said to be outside the scope of the request, the mere fact that it was originally identified as one of the letters falling within the request should not debar a Department from explaining that it was mistaken. The mistake will not in itself have caused any prejudice to Mr Evans. That said, however, the fact that the Department on receipt of the request considered that the letter in question fell within it may well offer some support for it being reasonable to conclude that the letter did indeed do so.

247 On this basis it seems to us that the principle that we should adopt is common ground. It is that we should look at the substance. If a particular letter is in substance one which is going from Prince Charles to a minister then it is within the request. If, on the other hand, it is in substance going from a private secretary to a private secretary then it is not.

248 The issue is how one applies that principle. The Departments and the Commissioner accept that if Prince Charles is named as the author, then the letter falls within the request even if someone else signs it on his behalf. They say, however, that if someone else is named as the author then the letter is not within the request. We think that is too narrow an approach. Take, for example, a letter from a private secretary to a private secretary which said, "The minister is aware of Prince Charles's interest in this topic, and I enclose a note on which the minister would welcome his views." In our view a communication of that kind would in substance be a letter from the minister to Prince Charles.

249 In general it seems to us that as a matter of ordinary use of the English language a request for correspondence between X and Y is likely in context to mean that what is sought is correspondence sent by X, or someone on X's behalf, to Y or someone on Y's behalf, along with correspondence sent by Y, or someone on Y's behalf, to X or someone on X's behalf. For reasons explained in the conditionally suspended annex, we have found nothing in the relevant context to warrant a different approach. This is, in our view, essentially the same thing as asking, would a Departmental official responding to the request reasonably regard the document in question as within the category of correspondence between Prince Charles and a minister in the Department?

M. Analysis of the disputed information

250 Arrangements have been made for our analysis of the disputed information to be set out in the closed annex and the conditionally suspended annex.

N. Conclusion

251 For the reasons given in this judgment, along with those set out in the closed annex and the conditionally suspended annex, we unanimously allow these appeals. As indicated earlier, we have given directions so that a decision can be made identifying information to be disclosed to Mr Evans, along with the terms of substituted decision notices.



EXHIBIT D

Halsbury's Laws of England/Crown and Crown Proceedings (Volume 29 (2014))/1. The Crown and Royal Family/(5) The Royal Family/(iii) The Heir or Heiress Apparent/34. Status and privileges of an Heir Apparent and his wife.

34. Status and privileges of an Heir Apparent and his wife.

The person of a male Heir Apparent and the chastity of his wife during coverture are protected by the law of treason¹. These provisions extend to the male Heir Apparent whether he is the first-born son or not, unless he is a collateral².

The Heir Apparent and his wife occupy the same legal status as private citizens³ apart from (1) the special privileges which he enjoys as Duke of Cornwall⁴; (2) the right of precedence enjoyed by all children of the reigning monarch⁵; and (3) the restrictions as to marriage imposed upon certain members of the royal family⁶.

1 See the Treason Act 1351; and **CRIMINAL LAW** VOL 26 (2016) **PARA** 419.

2 3 Co Inst 8, 9.

3 Thus it seems that at common law the Prince of Wales could sue and be sued in the ordinary manner: YB 21 Edw 3, Mich pl 46. See also 1 Hen 5, Trin pl 2. For an instance of a suit in the ordinary form against the Princess of Wales see *Princess of Wales v Earl of Liverpool* (1819) 3 Swan 567 at 569. As to limitation of actions against the Duke of Cornwall see **LIMITATION PERIODS** VOL 68 (2016) **PARA** 903.

4 As to these privileges see **PARA** 232 et seq.

5 See **PARA** 37.

6 See **PARA** 39.

U.S. COURT OF APPEALS CASE NOS. 2017-1878

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

In re: SC LICENSING, LLC,

Appellant.

On Appeal from The United States Patent & Trademark Office, Trademark Trial &
Appeal Board, Ser. No. 85/135,970

CORRECTED OPENING BRIEF OF APPELLANT SC LICENSING, LLC

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

In re SC Licensing, LLC v. _____

Case No. 17-1878

CERTIFICATE OF INTEREST

Counsel for the:

(petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

SC Licensing, LLC

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
SC Licensing, LLC	SC Licensing, LLC	Liliput and Co, LLC
		RA Licensing, LLC

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

Susan Hwang, Esq. of Sheppard Mullin Richter & Hampton, LLP

FORM 9. Certificate of Interest

**Form 9
Rev. 10/17**

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47.4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

None

10/17/2017

Date

/s/Paul A. Bost

Signature of counsel

Paul A. Bost

Printed name of counsel

Please Note: All questions must be answered

cc: _____

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STATEMENT OF RELATED CASES

This case was not previously before the Court of Appeals for the Federal Circuit or any other appellate court under the same or similar title. Appellant is unaware of any case to be pending in this or any other court that will directly affect or be directly affected by this Court's decision in this case.

STATEMENT OF JURISDICTION

The Trademark Trial and Appeal Board (“Board”) had jurisdiction over the underlying *ex parte* proceedings based on 15 U.S.C. § 1070.

On March 31, 2017, the Board entered an order refusing registration of Appellant’s application to register SC & Design (“Appellant’s mark”) in Classes 20, 21, and 24, Ser. No. 85/135,970 (the “Application”) under 15 U.S.C. §1052(b) (the “Order”).

The Federal Circuit has jurisdiction over the appeal of the Order under 28 U.S.C. § 1295(a)(4)(B) and 15 U.S.C. § 1071(a).

Appellant filed timely a Notice of Appeal on April 4, 2017.

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Did substantial evidence support the Board's determination that the Prince of Wales' Feathers (the "POW Badge") is an "other insignia of a foreign nation" under 15 U.S.C. § 1052(b) ("§ 2(b)")?



2. Did the Board err in determining that that the POW Badge is an "other insignia of a foreign nation" under § 2(b)?

3. Did substantial evidence support the Board's determination that Appellant's SC & Design mark is a simulation of the POW Badge?

4. Did the Board err in determining that Appellant's SC & Design mark is a simulation of the POW Badge?

STATEMENT OF THE CASE

This Court is asked to decide whether Appellant’s mark is a simulation of an “other insignia of a foreign nation,” namely, the United Kingdom, within the meaning of § 2(b) so as to bar it from registration. Specifically, the Board refused registration of Appellant’s mark (depicted below) on the grounds that it constitutes a simulation of the POW Badge, which Badge the Board held qualifies for protection as an “other insignia of a foreign nation” under § 2(b):

<u>Appellant’s Mark</u>	<u>POW Badge</u>
	

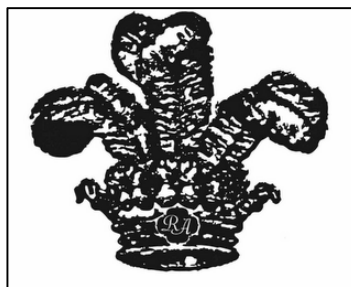
Appellant now appeals the Order on the following grounds. First, the Office did not meet its burden of establishing that the POW Badge is an “other insignia of a foreign nation” within the purview of § 2(b). Second, the POW Badge is the personal property and badge of the Prince of Wales or a badge of the Welsh people and, thus, outside the scope of “other insignia” protected under § 2(b). Third, the POW Badge should not be enforced against Appellant’s mark because it conflicts with Appellant’s previously acquired trademark rights in at least one mark substantially identical to Appellant’s mark. Fourth, when Appellant’s mark and

the POW Badge are compared according to the appropriate standard, Appellant's mark cannot be held to be a simulation of the POW Badge.

Appellant and Appellant's Marks

Appellant produces home décor and houseware products under the well-known brand SHABBY CHIC, made famous by Appellant's founder Rachel Ashwell. The SHABBY CHIC brand signifies a romantic, relaxed and comfortable style and aesthetic, influenced by Ms. Ashwell's roots and background in design. In connection with its successful SHABBY CHIC brand, Appellant used Appellant's mark and filed the Application. Appellant's use of Appellant's mark, or marks similar thereto, date back at least as early as June 2003.

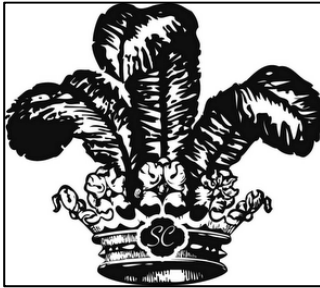
Appellant owned a valid registration of an almost identical mark during 5 years of the prosecution of this Application, specifically Reg. No. 2,898,987 shown below:



Appx0002. That registration was canceled on June 15, 2015. *Id.*

Prosecution History of the Application

On September 22, 2010, Shabby Chic Brands, LLC¹ applied to register Appellant’s mark, as depicted below, on an intent-to-use basis for a variety of goods in Classes 20, 21, and 24:



Appx0019-24. Appellant claimed ownership of prior Reg. No. 2,898,987 of RA & Design, which mark is depicted immediately below and was registered on November 2, 2004, and claimed acquired distinctiveness of the SC & Design mark under Section 2(f) of the Lanham Act based on acquired distinctiveness. *Id.*

<u>RA & Design</u>	<u>Appellant’s Mark</u>

¹ On June 20, 2013, Shabby Chic Brands, LLC, Appellant’s predecessor in interest, assigned the Application to Appellant, which assignment was recorded with the Office on July 2, 2013 at Reel 005062/Frame 0766. Except where specifically noted, the term “Appellant” as used herein refers to Appellant and its predecessor in interest.

On January 16, 2011, the examining attorney assigned to the Application issued an office action requiring amendment of the identification of goods on the ground that certain of the wording was unacceptable as indefinite. Appx0029-32. On June 14, 2011, Appellant filed its response to this office action, amending the identification of goods. Appx0033-37.

On July 25, 2011, the examining attorney issued an office action making final the requirement to further amend and reclassify the identification of goods. Appx0042-45. On January 17, 2012, Appellant filed a request for reconsideration amending and reclassifying its identification of goods. Appx0046-51. Also, on January 18, 2012, Appellant filed a notice of appeal, which appeal the Board instituted that same day. Appx0052-53. The Board suspended the appeal and remanded the application back to the examining attorney to consider Appellant's request for reconsideration. Appx0054-57.

On February 27, 2012, the examining attorney approved the Application for publication. The next day, the Board terminated the appeal. Appx0066-69.

On May 6, 2012, the Application was withdrawn from publication. In an office action issued that day, the examining attorney explained that the Commissioner's Office determined that Appellant had made an unnecessary claim of acquired distinctiveness under Section 2(f) of the Lanham Act. Appx0070-72. The examining attorney stated that Appellant could request to withdraw the claim

or it would remain in the Application record and be printed on the registration certificate. *Id.* On October 11, 2012, Appellant deleted the claim of acquired distinctiveness. Appx0073-74.

On November 8, 2012, the Application was approved for publication. Appx0087. On January 22, 2013, the Application was published, and, on March 19, 2013, a notice of allowance issued for the Application. Appx0088-92.

On September 19, 2013, Appellant filed a first request for extension of time to file a statement of use, and, on September 21, 2013, the Office issued a notice of approval of extension request. Appx0099-102, Appx0108. On March 18, 2014, Appellant filed a second request for extension of time to file a statement of use, and, on April 15, 2014, the Office issued a notice of approval of extension request. Appx0109-13, Appx0119.

On June 18, 2014, the examining attorney issued an office action stating that the Application was withdrawn from publication and the notice of allowance issued on March 19, 2013 was withdrawn. Appx0131-34. The examining attorney stated that registration of the Application was refused under § 2(b), on the ground that Appellant's mark resembled an insignia of a foreign nation, namely, the design depicted in U.S. Ser. No. 89/001,177 and described by the United Kingdom as the

“Official Emblem of the Prince of Wales”² in its identification for protection filed through the International Bureau. The design is depicted below and referred to herein as the POW Badge. *Id.*



On December 18, 2014, Appellant filed its response to the office action, arguing that Appellant’s mark did not consist of, comprise, or simulate the POW Badge. Appellant pointed out that there were material visual differences between Appellant’s mark and the POW Badge. Appellant also pointed out that the Office has issued more than a thousand registrations for marks that include the fleur-de-lis design, an element of many flags, coat of arms, and insignias, and attached exemplar certificates of registrations reflecting the same. Appx0135-79.

On February 18, 2015, the examining attorney issued an office action making final the refusal to register the Application under Section 2(b). Included with the office action were, among other things, printouts from the Prince of

² Cease and desist letters sent from Buckingham Palace refer to the design as “the Prince of Wales Three Feathers Badge.” Appx0194.

Wales' website (princeofwales.gov.uk) and the British Monarchy's website (royal.gov.uk), as well as a printout of a news article regarding the Prince of Wales' policing efforts related to unauthorized use of the POW Badge. Appx0185-202.

On August 18, 2015, Appellant responded to the final refusal by filing a request for reconsideration. Appellant reiterated that Appellant's mark was uniquely associated with Appellant's founder Rachel Ashwell and the SHABBY CHIC brand and that it was not a simulation of an insignia of a foreign nation. Appellant also submitted 243 third party registrations of crown designs. Appx0203-590. Appellant also filed a notice of appeal with its request for reconsideration. Appx0591-92.

On December 7, 2015, the examining attorney denied Appellant's request for reconsideration. The examining attorney attached thereto another copy of the above-mentioned news article regarding the Prince of Wales' policing efforts related to unauthorized use of the POW Badge. Appx0596-604. The news article repeatedly relied upon by the examining attorney contains the following statements:

- Quoting a cease & desist letter from Buckingham Palace: "I would ask that you take immediate steps to remove the Prince of Wales Three Feathers badge from items in this range of jewellery [sic] and confirm to me in writing that you have taken these necessary steps."

- Quoting Tim Duke, Chester Herald at London’s Royal College of Arms, which oversees coats of arms and heraldry: “That is the badge of the Prince of Wales, or more strictly speaking, the Heir Apparent. ... He can allow it to be used by other people. That’s the purpose of a badge. It’s distinct from a coat of arms and a crest.”
- “As well as being used in the royal heraldry, the badge has come to symbolise [sic] Wales.”
- Quoting a recipient of cease and desist letters: “At first I just thought it was a joke, and then I saw the envelope had a postmark from Buckingham Palace. Everyone I’ve seen since has said it’s ridiculous. They’d have to write to thousands of businesses across Wales. And are they allowed to anyway? Prince Charles has inherited the symbol. It’s more than 600 years old and he’s allowed to use it by the people of Wales, not the other way around.” Appx0596-604.

On March 22, 2016, Appellant timely filed its appeal brief; the examining attorney filed her appeal brief on June 1, 2016; and Appellant filed a reply brief on June 21, 2016. On January 11, 2017, the Board convened oral argument on Appellant’s appeal. Appx0655. On March 31, 2017, the Board issued its *precedential* opinion upholding the examining attorney’s refusal to register the Application, published as *In re Shabby Chic Brands, LLC*, 122 USPQ2d 1139 (TTAB 2017). Appx0001-15. This timely appeal followed. Appx0671-88.

SUMMARY OF THE ARGUMENT

The Board’s affirmation of the examining attorney’s refusal to register the Application must be reversed.

First, the Board erred in holding that the POW Badge is an “other insignia of a foreign nation” falling within § 2(b)’s scope of protection. The Office failed to meet its burden of establishing that the POW Badge is an insignia of national or governmental authority. The Office did not submit any evidence that the Prince of Wales has any monarchical, executive, legislative, judicial, military or other authority. On the contrary, the Prince of Wales’ function is undisputedly ceremonial. Also, the United Kingdom’s designation of the POW Badge for protection pursuant to Article 6*ter* of the Paris Convention for the Protection of Industrial Property (the “Paris Convention”) is not proof of anything, much less proof that the POW Badge is the type of insignia protected by § 2(b). Furthermore, the Paris Convention submission is accepted without meaningful examination by the Office and without any examination of compliance with § 2(b).

Also, the evidence of record establishes that the Prince of Wales treats and enforces the POW Badge as a personal badge and property right, not as an insignia of governmental or national authority. Trademarks and certification marks, like the POW Badge, fall outside the scope of § 2(b).

Second, the Office’s enforcement of the POW Badge against Appellant conflicts with Appellant’s prior-established rights in Appellant’s mark or a mark substantially identical thereto. Specifically, as of the date the United Kingdom sought protection of the POW Badge pursuant to Article 6*ter* of the Paris

Convention, Appellant owned a registration on the Principal Register of a mark nearly identical to Appellant's mark for goods substantially identical to those identified in the Application and another registration that included the previously registered crown design in it. As of the date Appellant filed the Application and during the first 5 and 6 years, respectively, of prosecution thereof, said registrations were viable and incontestable. In refusing registration to Appellant's mark based on the POW Badge, the Office compromised Appellant's prior-established trademark rights in violation of the Paris Convention and the express terms for protection of the POW Badge as communicated by the Office upon receipt of the United Kingdom's request for protection of the POW Badge.

Third, the Board applied the incorrect standard for determining whether Appellant's mark constitutes a simulation of the POW Badge. The Board assessed the similarity of the marks according to their respective overall commercial impressions. However, the term "simulation" calls for application of a standard of similarity higher than that applied in likelihood of confusion cases. When the appropriate standard is applied, there can be no doubt that Appellant's mark is not a simulation of the POW Badge.

For the above reasons, the decision of the Board should be reversed.

ARGUMENT

I. STANDARD OF REVIEW

The Federal Circuit reviews “the Board’s legal conclusions, including its interpretation of the Lanham Act, without deference.” *In re City of Houston*, 731 F.3d 1326, 1330 (Fed. Cir. 2013). The Federal Circuit “must affirm the [Board’s] factual determinations unless they are arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence.” *Citigroup, Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 1349 (Fed. Cir. 2011), citing *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1327 (Fed. Cir. 2000). “Evidence is substantial if a ‘reasonable person might find that the evidentiary record supports the agency’s conclusion.’” *Citigroup*, 637 F.3d at 1349, citing *On-Line Careline v. Am. Online*, 229 F.3d 1080, 1085 (Fed. Cir. 2000).

On an *ex parte* appeal to the Board, it is the Office’s burden to establish that a mark should be barred from registration under § 2. *See In re Berman Bros. Harlem Furniture Inc.*, 26 USPQ2d 1514, 1515 (TTAB 1993) (“The burden is on the Examining Attorney to submit sufficient evidence to establish that the term sought to be registered falls within the proscription of the statute.”) Only if the Office can establish a prima facie showing that the mark should be barred from registration does the burden shift to the applicant to “rebut the prima facie case with ‘competent evidence.’” *In re Squaw Development Co.*, 80 USPQ2d 1264,

1271 (TTAB 2006), citing *In re Gyulay*, 820 F.2d 1216, 1217 (Fed. Cir. 1987).

Likewise, all “contradictions in the evidence . . . should be resolved in applicant’s favor.” *In re MC S.r.l.*, 88 USPQ2d 1378, 1381 (TTAB 2008) (considering a § 2(a) refusal).

II. THE POW BADGE IS NOT AN OTHER INSIGNIA OF A FOREIGN NATION WITHIN THE PURVIEW OF § 2(b)

The Board erred in holding that the POW Badge falls within the protections of 15 U.S.C. § 1052(b), which prohibits registration of trademarks that “*consist[] of or comprise[] the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof.*” (emphasis added.) There is no dispute that the POW Badge is neither a flag nor a coat of arms and that the question at bar is whether the POW Badge constitutes the type of insignia protected from registration under § 2(b).

The rule for determining whether material constitutes an “other insignia” within the scope of § 2(b) is articulated in *In re U.S. Dep’t of the Interior*, 142 USPQ 506 (TTAB 1964). There, the Board refused to “apply[] a broad dictionary definition of ‘insignia.’” *Id.* at 507. Instead, based on the principle of *ejusdem generis*, the Board interpreted “other insignia” narrowly:

[T]he wording “or other insignia of the United States” must be restricted in its application to insignia of the same general class as “the flag or coats of arms” of the United States. Since both the flag and coat or arms are emblems of national authority it seems evident that other

insignia of national authority such as the Great Seal of the United States, the Presidential Seal, and seals of government departments would be equally prohibited registration under Section 2(b).

Id. This interpretation has been incorporated into the Trademark Manual of Examining Procedure (“TMEP”): “The wording ‘other insignia’ should not be interpreted broadly, but should be considered to include only those emblems and devices that also represent governmental authority and that are of the same general class and character as flags and coats of arms.” TMEP § 1204.02(a).

In *Interior*, the Board ultimately ruled that the applicant’s mark – the “insignia of the ‘National Park Service’” – was not an insignia of the same general class as flags or coats of arms. Instead, “department insignia which are merely used to identify a service or facility of the Government are not insignia of national authority and that they therefore do not fall within the general prohibitions of this section of the Statute.” *Interior*, 142 USPQ at 507.

Subsequent decisions have consistently interpreted “other insignia” narrowly. In *U.S. Navy v. U.S. Manufacturing Co.*, the Board rejected opposer’s arguments that the applicant’s USMC mark constituted “other insignia” under § 2(b):

Clearly under this test the initials of the Marine Corps, which is part of the Navy, which itself is within the Department of Defense, cannot be construed as an “other insignia of the United States” under Section 2(b) of the Lanham Act. The letters “USMC” are nothing like a flag

or coat of arms. These types of insignia are pictorial in nature, they can be described, but cannot be pronounced. Even if the letters could be construed to be an insignia, opposer has not shown that they would be seen as an insignia of the United States. Opposer blurs the distinction between its arguments on this point and its argument that the letters falsely suggest a connection with symbol under Section 2(a) of the Act, but the record is clear that, just as in [*Interior*], these letters identify people and things associated with a particular agency within a department of the executive branch of the government, rather than function as an insignia of national significance representing the authority of the government or the nation as a whole.

2 USPQ2d 1254, 1256-57 (TTAB 1987).

Likewise, in *Heroes Inc. v. The Boomer Esiason Hero's Foundation Inc.*, the Board held that the plaintiff's mark, which incorporated a depiction of the U.S. Capitol building, did not include "other insignia" as prohibited under § 2(b):

The Capitol building may evoke certain sentiments among members of the public, but such a message-conveying function -- assuming one exists -- is incidental to the building's primary function: to provide a place for the legislative branch to carry out its business. Since there is no evidence before the Court that the Capitol building was "formally adopted to serve as an emblem of governmental authority" as flags and coats of arms are, the Capitol building is not of the "general class and character as flags and coats of arms," see *Trademark Manual of Examining Procedure* Section 1204, and therefore is not an "insignia of the United States." See *Liberty Mut. Ins. Co. v. Liberty Ins. Co. of Texas*, 185 F.Supp. 895, 896 (E.D. Ark. 1960) (the Statue of Liberty is not an insignia of the United States).

43 USPQ2d 1193, 1197 (TTAB 1997).

A. The Office Did Not Meet its Burden of Establishing that the POW Badge Was an Other Insignia of the United Kingdom Protected Under § 2(b)

Under the relevant law and based on the facts of record, the Office has not met its prima facie burden of establishing that the POW Badge is an “other insignia of a foreign nation” within the purview of § 2(b). The Order summarizes the Office’s showing as follows: “Based on [1] its long association with the heir apparent to the British throne, dating back to the fourteenth century, and [2] its designation by the Government of the United Kingdom as the official emblem of the Prince of Wales, we find that the Prince of Wales’ emblem is an ‘insignia of national authority’ on par with a coat of arms as found in Section 2(b).”

Appx0006-7. Neither fact supports the Board’s holding.

1. The POW Badge’s Long Association With the Prince of Wales, the Heir to the Throne, Does Not Render It an Other Insignia of National or Governmental Authority Protected by § 2(b)

The Board tacitly assumes that the Prince of Wales himself, as the heir to the throne, has national or governmental authority -- but the record is devoid of any evidence supporting this assumption. There is no evidence of record establishing that the Prince of Wales wields *any* national authority in the United Kingdom, much less national authority remotely comparable to the authority reflected in “the Great Seal of the United States, the Presidential Seals, and seals of [U.S.] government departments.” *Interior*, 142 USPQ at 507. There is no evidence of

record that the Prince of Wales has any monarchical, legislative, executive, judicial, military, or other authority.

Instead, it is both well-established and well-known that the Prince of Wales lacks any national or governmental authority in the United Kingdom. “The Heir Apparent and his wife occupy the same legal status as private citizens apart from (1) the special privileges which he enjoys as Duke of Cornwall; (2) the right of precedence enjoyed by all children of the reigning monarch; and (3) the restrictions as to marriage imposed upon certain members of the royal family.” *Halsbury's Laws of England* (5th Ed, 2014) vol 29, para 34. Likewise, in *Evans v. Information Commissioners*, [2012] UKUT 313 (United Kingdom), 2012 WL 12296555, the Prince of Wales’ lack of authority was reaffirmed. In *Evans*, it was confirmed that the “tripartite convention” – that is, the monarch’s “right to be consulted, the right to encourage, and the right to warn” – is the exclusive right of the monarch, not the heir apparent:

[I]t is the constitutional role of the monarch, not the heir to the throne, to encourage or warn government. Accordingly, it is fundamental that advocacy by Prince Charles cannot have constitutional status . . . It would be inconsistent with the tripartite convention to afford constitutional status to the communication by Prince Charles, rather than the Queen, of encouragement or warning which ministers might then take account of . . . It was not suggested that Prince Charles, at a stage when he is neither king nor regent, plays any part in the tripartite convention. Indeed Professor Brazier agreed, in response to questions from Mr Fordham, that the

tripartite convention is “the sovereign's only.” It does not apply to the heir to the throne. Professor Brazier accepted that in the terms of the tripartite convention it would collapse an important distinction if it were said to apply to the heir to the throne.

Instead, the Prince of Wales serves only a cultural and ceremonial function.

As set forth on the “Royal Duties” page of the Prince of Wales’ official website:

The main part of The Prince of Wales's role as Heir to The Throne is to support Her Majesty The Queen as the focal point for national pride, unity and allegiance and bringing people together across all sections of society, representing stability and continuity, highlighting achievement, and emphasising [sic] the importance of service and the voluntary sector by encouragement and example.

See concurrently-filed Motion for Judicial Notice, Ex. A. The frequently asked questions page of the same website (which website was relied upon by the examining attorney (Appx.0187-88)) notes that the Prince of Wales’ giving of approval for certain government bills is merely a ceremonial convention:

Why is The Prince of Wales asked for his approval on various Government bills? It is a long established convention that The Prince, as Duke of Cornwall, is asked by Parliament to provide consent to those bills which Parliament has decided would affect Duchy of Cornwall interests. The same process is followed with regards to The Queen providing consent to bills that would affect Crown interests. In modern times, neither the Sovereign nor the Duke of Cornwall has ever refused to consent to any bill affecting Crown or Duchy of Cornwall interests. Every instance of The Prince’s consent having been sought and given to legislation is a matter of public record.

See concurrently-filed Motion for Judicial Notice, Ex. A.

Finally, the POW Badge does represent national or government authority merely because the Prince of Wales is a member of the royal family and the heir to the throne. *Interior* and its progeny make clear that insignia, like the POW Badge, that identify “people and things associated with a particular agency within a department of the executive branch of the government” do not “function as an insignia of national significance representing the authority of the government or the nation as a whole.” *U.S. Navy*, 2 USPQ2d at 1256-57. This clearly applies to the POW Badge: it identifies a person within the royal family, but not the royal family itself, much less the United Kingdom as a whole. Indeed, the Welsh people believe that the POW Badge signifies them, and the Prince of Wales is allowed by the Welsh people to use it. Appx0600, Appx0603.

2. The United Kingdom’s Designation of the POW Badge for Protection Pursuant to Article 6^{ter} of the Paris Convention Does Not Automatically Subject it to Protection Under § 2(b)

There is no authority supporting the Board’s holding that an insignia is protected under § 2(b) merely because it has been designated for protection pursuant to Article 6^{ter} of the Paris Convention. In doing so, the Board effectively presumes that any material designated pursuant to the Paris Convention falls within the purview of § 2(b). This constitutes error. The United Kingdom’s identification of the POW Badge for protection pursuant to the Paris Convention constitutes

nothing more than its subjective belief that the POW Badge is subject to protection under Article 6*ter* of the Paris Convention. It is not evidence of anything else, much less that the POW Badge is an “other insignia of a foreign nation” protected under § 2(b).

Importantly, the Paris Convention is not self-executing. Instead, it is only animated and enforced in the U.S. as enshrined in legislation enacted by Congress. *See International Finance Corp. v. Bravo Co.*, 64 USPQ2d 1597, 1603-04 (TTAB 2002). While the rights articulated in the Paris Convention are coextensive with those implemented in U.S. law as a whole, Article 6*ter* of the Paris Convention and § 2(b) are not coextensive.³ On the contrary, the former is significantly broader than the latter. Article 6*ter* allows for member nations and international intergovernmental organizations to designate for protection “armorial bearings, flags, and other State emblems, of the countries of the Union, official signs and hallmarks indicating control and warranty adopted by them, and any imitation from a heraldic point of view,” as well as names and abbreviations of international intergovernmental organizations. Paris Convention, Article 6*ter* (1)(a), (b). § 2(b), on the other hand, limits its protections to flags, coats of arms, and other insignia of a similar ilk. As explained above, § 2(b) has been interpreted to include not all

³ The Order admits as much: “The United States had implemented its obligations under Article 6*ter*, **in part**, through Section 2(b).” Appx0005 (emphasis added.)

insignia, but only insignia that represent national or governmental authority, neither of which is a requirement for protection under Article 6*ter* of the Paris Convention. In sum, a member country's designation of material for protection pursuant to Article 6*ter* of the Paris Convention does not, *per se*, mean that such material is encompassed within the scope of § 2(b). The Paris Convention, Article 6*ter*, does not trump the requirements of U.S. Law, namely § 2(b) of the Lanham Act. The Board's holding otherwise constitutes error.

The Board's holding is all the more suspect given the lack of scrutiny paid by the Office to material submitted for protection in the U.S. pursuant to Article 6*ter* of the Paris Convention. "When the USPTO receives notifications from the IB under Article 6 *ter*, the USPTO searches its records for conflicting marks, although the requests are not subjected to a full examination by an examining attorney or published for opposition." TMEP § 1205.02 (emphasis added.) This is in stark contrast to the Office's rigorous review of applications for registration. Nothing about the Office's procedure for handling submissions of material pursuant to Article 6*ter* suggests that such material should be afforded any presumption of protectability under the Paris Convention, much less § 2(b). There is no scrutiny by the Office of an Article 6*ter* application to determine if the submission meets the requirements of § 2(b).

B. The POW Badge is the Prince of Wales' Personal Property and Badge, or a Badge of the Welsh People, Not an Other Insignia of a Foreign Nation

The evidence of record plainly establishes that the POW Badge is personal property and a badge of the Prince of Wales, not an insignia of the United Kingdom within the purview of § 2(b). In letters demanding the cessation of unauthorized use of the POW Badge, the Prince of Wales has referred to the POW Badge as his “personal property.” Appx0599, Appx0602. Both the Crown and representatives of the Prince of Wales have referred to the POW Badge as his “personal insignia” (Appx0189, Appx0601) or as his “badge.” Appx0195. The Office’s evidence of record states that the Prince of Wales “may give his personal permission for it to be used in the same way that a royal warrant is issued.” Appx0196.

Likewise, the Prince of Wales treats the POW Badge as a trademark or a certification mark, that is, a property right that he owns and controls. The record is replete with evidence of the Prince of Wales seeking to enforce his rights in the POW Badge against unauthorized users of the POW Badge. (Appx0193-97, Appx0599-604.) The Board acknowledges this:

[T]he record establishes that the Prince of Wales has the right to control the use of the emblem: “The Prince is also one of three members of the Royal Family able to grant Royal Warrants of appointment to companies. The company is then entitled to display The Prince of Wales’s Feathers on their products.” (Appx0011.)

Importantly, evidence of record introduced by the Office establishes that the Prince of Wales' ability to authorize others to use the POW Badge distinguishes it from a coat of arms: "He can allow it to be used by other people. That the purpose of a badge. **It's distinct from a coat of arms and a crest.**" Appx0195 (emphasis added.)

Far from establishing that it is a symbol of national authority, the fact that the Prince of Wales polices unauthorized use of the POW Badge shows that it is a personal badge and property right, not a symbol of a foreign nation. Similarly, the Prince of Wales' granting of permission or license to use the POW Badge with certain goods or services to reflect their association or affiliation with the Prince of Wales indicates that the POW Badge is not a symbol of national or governmental authority. Rather, the POW Badge is a trademark or certification mark that the Prince of Wales believes he owns and controls. Likewise, the evidence of record establishes that the POW Badge's trademark function distinguishes it from a coat of arms or other insignia protected under § 2(b). Accordingly, the Board's holding that the POW Badge is "comparable to a coat of arms" (Appx0004) is clearly erroneous.⁴

⁴ In support of this statement, the Board refers to the "Titles and Heraldry" page of the Prince of Wales' official website. Appx0004, Appx0187. But nothing on this website suggests that the POW Badge and the Prince of Wales' coat of arms are equivalents or serve the same role. Appx0187.

Moreover, the Prince of Wales’ treatment of the POW Badge as his personal property and trademark or certification mark causes it to fall outside of the types of “other insignias of a foreign nation” protected under § 2(b). This is because “other indicia” protected under § 2(b), by definition, cannot function or be protected as a trademark. *See In re Houston*, 101 USPQ2d 1534, 1539 (TTAB 2012) (“ . . . Congress instead opted to prevent commercial exploitation of such insignia by a complete ban on registration for any use of such indicia in commerce. That is the plain meaning of [§ 2(b)].”) In other words, § 2(b) not only prohibits registration of any indicia which “consists of or comprises the flag or coat of arm or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof,” it effectively rules that any such indicia cannot function or be protected as a trademark. *See Renna v. County of Union, N.J.*, 88 F. Supp.3d 310, 320 (D.N.J. 2014) (“I am persuaded that Section 2 declares certain marks to be unregistrable because they are inappropriate subjects for trademark protection . . . To put it another way, a mark is not denied registration under Section 2 because of some quirk of the registration process; it is deemed unregistrable because it is not a suitable, protectable mark.”)⁵ In treating and

⁵ Similarly, a trademark infringement and unfair competition claim cannot be based on material that is not subject to registration under § 2. *See Bangkok Imp. & Exp. v. Jamtan African Am. Mkt. Corp.*, 2016 U.S. Dist. LEXIS 81245, at *9 (S.D.N.Y. June 17, 2016) (“[W]hile § 43(a) permits a cause of action for a mark that a plaintiff failed to register, no cause of action lies where that mark

protecting the POW Badge as his personal property and badge, the Prince of Wales acknowledges that the POW Badge is not the type of unregistrable, unprotectable material identified in § 2(b).

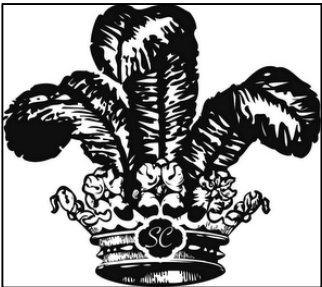
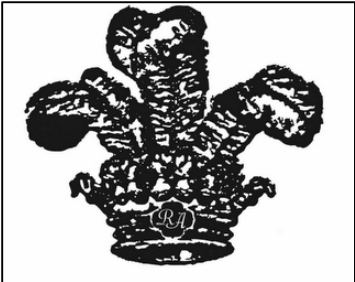
III. THE POW BADGE MAY NOT BE ENFORCED AGAINST APPELLANT’S MARK BECAUSE IT CONFLICTS WITH APPELLANT’S PREVIOUSLY ACQUIRED TRADEMARK RIGHTS

On or around April 13, 2006, the Office processed a September 12, 2005 request from the United Kingdom – made via the World Intellectual Property Organization (“WIPO”) – to protect the POW Badge pursuant to the Paris Convention. Therein, the Office identified its obligations under the Paris Convention with respect to this request: “We are requested, as members of the Paris Convention bound by the Stockholm Act, to honor requests for protection **if the official insignia does not conflict with previously acquired trademark rights in the United States.**” *See* concurrently-filed Motion for Judicial Notice, Ex. B (emphasis added.) This instruction is consistent with and derived from the language of the Paris Convention itself, which restricts protection of all emblems, other than member state flags, against marks registered more than two months after WIPO receives the request for protection: “In the case of State emblems other than flags, and of official signs and hallmarks of the countries of the Union, and in the

could not otherwise be registered pursuant to § 2's standards”); *In re Tam*, 808 F.3d 1321, 1344, n.11 (Fed. Cir. 2015) (“[C]ourts have suggested that § 43(a) is only available for marks that are registrable under § 2.”)

case of armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations, these provisions shall apply only to marks registered more than two months after receipt of the communication provided for in paragraph (3), above.” Paris Convention, Article 6ter(6).

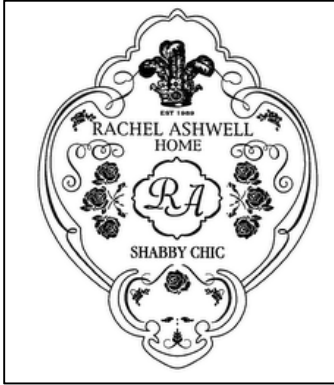
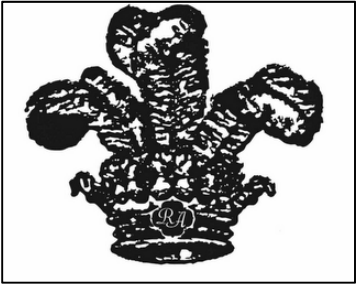
As of September 12, 2005, the effective date on which protection of the POW Badge was sought, Appellant had registered its RA & Design Mark on the Principal Register for – like Appellant’s mark at issue – goods in Classes 20 and 24. The RA & Design Mark is almost identical to Appellant’s SC & Design mark at issue:

<u>Appellant’s Mark</u>	<u>RA & Design Mark</u>
	

At the time Appellant filed the Application and during the first 5 years of prosecution of the Application, Appellant’s registration of the RA & Design mark was valid, subsisting, and incontestable. Moreover, Appellant specifically claimed ownership of this registration in its Application.

Likewise, as of September 12, 2005, Appellant had registered its RACHEL ASHWELL HOME RA SHABBY CHIC EST. 1989 & Design (“RA Shabby Chic

Design”) mark on the Principal Register for goods in, *inter alia*, Classes 20, 21, and 24. The design portion of this mark includes a depiction of the design at issue:

<u>RA Shabby Chic Design</u>	<u>RA & Design Mark</u>
	

At the time Appellant filed the Application and during the first 6 years of prosecution of the Application, the registration of the RA Shabby Chic Design was valid, subsisting, and incontestable.

By enforcing the POW Badge against Appellant’s mark, the examining attorney unlawfully compromised Appellant’s U.S. trademark rights acquired before September 12, 2005, the effective date on which protection of the POW Badge was sought. Under the principles set forth in *Morehouse Mfg. Corp. v. J. Strickland and Co.*, 407 F.2d 881, 884-85 (CCPA 1969) and its progeny, Appellant’s mark and its RA & Design Mark and the crown design shown in the RA Shabby Chic Design are substantially identical marks used for the same or

substantially identical goods.⁶ Thus, as of September 12, 2005 and the Application's filing date, Appellant's predecessor in interest had trademark rights in substantially identical marks to the Appellant's mark at issue. By refusing registration to Appellant's mark based on the POW Badge, the Office effectively compromised Applicant's previously acquired trademark rights. This contravenes the Paris Convention and the express instruction of the Office, that is, "to honor requests for protection *if* the official insignia does not conflict with previously acquired trademark rights in the United States." (emphasis added.)

IV. APPELLANT'S MARK IS NOT A SIMULATION OF THE POW BADGE

A. The Board's Comparison of Appellant's Mark's and the POW Badge's Respective Overall Commercial Impressions Applies the Incorrect Standard for Determining if Appellant's Mark is a Simulation of the POW Badge

§ 2(b) prohibits registration of any mark that "consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, **or any simulation thereof.**" (emphasis added.) The Board held that the term "simulation," as used in § 2(b), "is used . . .

⁶ *Morehouse* holds that an "opposer cannot be damaged . . . by the issuance to the applicant of a second registration where applicant already has an existing registration of the same mark for the same goods." *Id.* at 884. As applied to this situation, and as accounted for in Article 6ter(6) of the Paris Convention, the United Kingdom cannot be injured by registration of Appellant's mark when at least the RA & Design Mark and specifically the crown feature of the RA Shabby

in its usual and generally understood meaning, namely to refer to something that gives the appearance or effect or has the characteristics of an original item.”

Appx0007, citing *In re Advance Indus. Sec., Inc.*, 194 USPQ 344, 346 (TTAB 1977). In further reliance on *Advance Indus.*, the Board held that when determining if a mark is a simulation of an insignia protected under § 2(b), the “[f]ocus must be on general recollection of the [emblem] by purchasers, and a comparison of it with applicant’s mark.” *Id.* Consequently, the Board proceeded to compare the “overall commercial impressions” of Appellant’s mark and the POW Badge. Appx0008-10.

The Board’s comparison of the overall commercial impression of Appellant’s mark and the POW Badge was erroneous for not reflecting the higher standard of similarity called for by § 2(b)’s use of the term “simulation.” Likewise, *Advance Indus.* and its progeny apply the incorrect standard for determining whether a mark constitutes a simulation under § 2(b).

Legal opinions dating back to around the time of the enactment of the Lanham Act define “simulation,” as used in the U.S. Code, as follows:

Webster's New International Dictionary defines the word “simulate” as follows: “Simulate: to assume the mere appearance of without the reality; to assume the signs or indications of, falsely, to counterfeit, feign, imitate; as, to

Chic Design were already registered on the Principal Register as of the time it sought protection of the POW Badge.

simulate insanity or loyalty; some moths simulate leaves.”

In the Shorter Oxford English Dictionary, the word is defined as follows: “Simulate; to assume falsely the appearance or signs of (anything), to feign, pretend, counterfeit, imitate; to profess or suggest (anything) falsely. b. To have the external features of (1666). c. Biol. Mimic v. 5 (1876) 2. intr. To pretend or feign (1823) 1. A government * * * in word and action simulating reform Arnold. b. If purely artificial it (a vault) doth most lively s. nature (1661).”

When called upon to interpret the word, courts have given to it a definition which corresponds with that of the lexicographers. They have taken it to mean the assumption by some one [sic] or something of an appearance which was feigned, false, deceptive, or counterfeit.

U.S. v. Peppas, 13 F. Supp. 669, 670-71 (S.D. Cal. 1936) (emphasis added).

Thus, a “simulation” under § 2(b) is not simply material conveying the same commercial impression of a flag, coat of arms, or other insignia, but material that assumes the appearance of a flag, coat of arms, or other insignia in a manner that is feigned, false, deceptive, or counterfeit. Courts have consistently opined that the showing of similarity to support a finding of counterfeiting is higher than that necessary to support a likelihood of confusion. *See It’s a 10, Inc. v. Beauty Elite Grp., Inc.*, 110 USPQ2d 1116, 1127 (S.D. Fla. 2013) (“The test for whether marks are ‘substantially indistinguishable’ is ill-defined by the applicable caselaw. [citation omitted.] Nevertheless, the test for whether marks are substantially

indistinguishable is more rigorous than the test for likelihood of confusion”; marks at issue not substantially indistinguishable because they “contain different words, and their text appears in different colors and different fonts”); *GMA Accessories, Inc. v. BOP, LLC*, 765 F. Supp.2d 457, 471-72 (S.D.N.Y. 2011) (substantially indistinguishable “requires a closer degree of similarity than is required for traditional trademark infringement . . . [I]t must, at the very least, mean be [sic] closer than the traditional standard for infringement, ‘colorable imitation’; the marks CHARLOTTE and CHARLOTTE SOLNICKI not substantially indistinguishable.)

Furthermore, in applying the likelihood of confusion standard for determining if a mark is a “simulation,” the Board identifies avoiding consumer confusion as one of the purposes motivating the protections afforded certain indicia under § 2(b). Similarly, the Board upholds its finding by positing the potential of consumer confusion: “[i]t is possible that consumers, upon viewing Applicant's mark on the identified goods, may believe that Applicant has been granted such a Royal Warrant signifying that its products are associated with or approved by the Prince of Wales.”⁷ But consumer perception of, and potential confusion caused by,

⁷ The Board cites no support for this position, as the Office did not make of record any evidence reflecting that royal warrants are granted for products moving in U.S. interstate commerce, much less that the POW Badge is protectable as a trademark in the U.S. or has acquired any secondary meaning in the U.S.

Appellant's mark vis a vis the POW Badge is irrelevant to § 2(b), which prohibits registration of a mark comprising or consisting of § 2(b) indicia "regardless of whether confusion would result." *In re District of Columbia*, 101 USPQ2d 1588, 1598 (TTAB 2012), *aff'd sub nom.*, *In re City of Houston*, 731 F.3d 1326 (Fed. Cir. 2013) (emphasis in original.) In fact, in *District of Columbia*, the Board specifically rejected the notion that guarding against consumer confusion is the motivating purpose behind § 2(b):

[A]pplicant's narrow focus on confusion is misplaced. The prevention of confusion or deception is not the only concern of Trademark Act § 2. That section sets out a number of grounds for refusal of registration that have nothing to do with confusion. For example, Trademark Act § 2(a) prohibits registration of immoral or scandalous matter, [footnote omitted] and Section 2(e) sets out a variety of subject matter which is not registrable because — for various reasons — it is not considered to be a trademark — at least not without a showing of distinctiveness.



In fact, if prevention of confusion were the "central purpose" of Trademark Act § 2(b), it would be superfluous, because registration of marks which would cause confusion is prohibited under Trademark Act § 2(d), and Trademark Act § 2(a) prohibits registration of marks which would be deceptive or falsely suggest a connection with others.

Id. Clearly, whether Appellant's mark is likely to be confused with the POW Badge is irrelevant to determining whether it is a "simulation."

In sum, the appropriate standard for determining whether a mark is a “simulation” of a flag, coat of arms, or other insignia is higher than the standard applied by the Board, which applied the standard relevant for determining a likelihood of confusion.⁸ The standard for simulation is more akin to the standard of determining a counterfeit mark, e.g., substantially indistinguishable.

B. Appellant’s Mark is Not a Simulation of the POW Badge When the Correct Test for Assessing Similarity is Applied

Appellant’s mark is not merely a reproduction of or substantially indistinguishable from the POW Badge. This can be gleaned by simply reviewing the designs.

<u>Appellant’s Mark</u>	<u>POW Badge</u>
	

⁸ The applicant in *In re Waltham Watch Co.*, like Appellant here, argued that use of the term “simulation” in § 2(b) mitigated in favor of applying a higher standard for determining similarity between a mark and flag, coat of arms, or other insignia. 179 USPQ 59, 59 (TTAB 1973). There, however, the applicant argued that a mark could only be a simulation if applicant was found to have adopted it with an “intention or purpose to deceive.” *Id.* This should be distinguished from Appellant’s argument, which advocates for assessing whether material is a “simulation” according to a higher standard of similarity than that applied in likelihood of confusion cases, but does not require a showing of scienter.

First, Appellant's mark and the POW Badge include, respectively, different literal elements. Appellant's mark includes the letters "SC," Shabby Chic's initials, on the band of the crown. The POW Badge, on the other hand, includes "ICH DEIN," German for "I serve," on a suspended, unfurling banner.

Second, Appellant's mark depicts a fanciful, baroque crown with floral embellishments, whereas the POW Badge depicts a much simpler coronet, adorned with jewels and alternating crosses and fleur-de-lis.

Third, the quills of the feathers depicted in the POW Badge prominently extend below the coronet. The feathers depicted in Appellant's mark, on the other hand, do not include visible quills.

Fourth, the feathers depicted in the POW Badge mark are decidedly lighter – in color and weight – than the heavy feathers depicted in Appellant's mark. Likewise, the ends of the feathers depicted in Appellant's mark fall more naturally than the uni-directional manner in which the ends of the feathers fall in the POW Badge.

In sum, Appellant's mark and the POW Badge are sufficiently distinct such that they cannot be reasonably determined to be substantially indistinguishable, much less mere reproductions.

V. CONCLUSION

Based on the foregoing, Appellant requests the Court's reversal of the Board's decision refusing registration of the Application pursuant to §2(b). The POW Badge is not the type of "other insignia" protected under § 2(b). Also, enforcement of the POW Badge against Appellant's mark impermissibly conflicts with Appellant's previously obtained trademark rights. Finally, when the correct standard for comparing Appellant's mark and the POW Badge is applied, there can be no doubt that Appellant's mark is not a simulation of the POW Badge.

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER &
HAMPTON LLP

Dated: October 17, 2017

By /s/Jill M. Pietrini
Jill M. Pietrini
Attorneys for Appellant SC Licensing, LLC

PROOF OF SERVICE

I, LaTrina Martin, declare as follows:

I am employed in Los Angeles County, Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is Sheppard, Mullin, Richter & Hampton LLP, 1901 Avenue of the Stars, Suite 1600, Los Angeles, CA 90067-6055. On October 17, 2017, I caused the following document:

CORRECTED OPENING BRIEF OF APPELLANT SC LICENSING, LLC

including any and all exhibits, to be electronically filed with the Clerk of Court using the CM/ECF system, which will effectuate service of said document upon the following counsel of record in this action addressed as follows:

Thomas W. Krause
Nathan K. Kelley
Christina Hieber
Mary Beth Walker

Office of the Solicitor – U.S. Patent & Trademark Office

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made and that the foregoing is true and correct.

Executed on October 17, 2017, at Los Angeles, California.

/s/LaTrina Martin
LaTrina Martin

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE
REQUIREMENTS**

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 7,960 words, excluding the parts of the brief exempted by the Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER &
HAMPTON LLP

Dated: October 17, 2017

By /s/Jill M. Pietrini
Jill M. Pietrini
Attorneys for Appellant SC Licensing, LLC

SMRH:484262922.3

This Opinion is a
Precedent of the TTAB

Hearing: January 11, 2017

Mailed: March 31, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Shabby Chic Brands, LLC
—

Serial No. 85135970
—

Jill M. Pietrini of Sheppard Mullin Richter & Hampton LLP,
for Shabby Chic Brands, LLC.

Stephanie M. Ali, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

—
Before Zervas, Shaw, and Kuczma
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

Shabby Chic Brands, LLC (“Applicant”) seeks registration on the Principal
Register of the following mark,



Serial No. 85135970

for a variety of furniture and decorative housewares, in International Class 20; household and kitchen utensils, in International Class 21; and textile goods, in International Class 24.¹ The description of the mark reads: “The mark consists of a design of an ornate, feathered crown.” The initials “SC” appear on the front of the crown, and color is not claimed as a feature of the mark. Applicant claims ownership of two prior registrations, Registration Nos. 2898987 and 2967641, now expired, for the following related marks for similar goods:



2



3

The Trademark Examining Attorney refused registration of Applicant’s mark under Section 2(b) of the Trademark Act, 15 U.S.C. § 1052(b), on the grounds that the proposed mark includes a simulation or design that resembles a governmental insignia of the United Kingdom, namely, the official emblem of the Prince of Wales,

¹ Application Serial No. 85135970 was filed on September 22, 2010, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

² Registration No. 2967641, issued November 2, 2004, cancelled on June 5, 2015, for failure to renew.

³ Registration No. 2967641, issued July 12, 2005, cancelled on February 19, 2016, for failure to renew.

Serial No. 85135970

as depicted in the designation filed by the Government of the United Kingdom in accordance with the Paris Convention, shown below:



4

The case is fully briefed and the Board conducted a hearing on January 11, 2017.

We affirm the refusal to register.

Analysis

Section 2(b) of the Trademark Act provides, in relevant part, that,

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

* * *

(b) Consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof.

15 U.S.C. § 1052(b).

The issue before us involves two questions. First, is the Prince of Wales' emblem an insignia of a foreign nation? Second, if so, does Applicant's mark consist of or comprise the insignia, or a simulation thereof? We address each question in turn.

⁴ Image from Serial No. 89001177, filed September 12, 2005. Discussed in more detail *infra*.

Serial No. 85135970

A. *Whether the Prince of Wales' emblem is an insignia of a foreign nation*

We begin with an examination of whether the Prince of Wales' emblem falls within the protections of Section 2(b) of the Trademark Act. Applicant, for the first time at oral hearing, argues that the Prince of Wales' emblem is not a coat of arms or other insignia of a foreign nation and therefore, a Section 2(b) refusal is inappropriate. We disagree.

The Prince of Wales is a member of the British royal family and is heir to the throne of the United Kingdom.⁵ According to the "Titles and Heraldry" page of the Prince of Wales' official website, the emblem at issue here has a long association with the Prince of Wales and is described as comparable to a coat of arms:

The Prince is strongly identified with his badge The Prince of Wales's Feathers, the use of which dates back to the 14th Century and the time of Edward, The Black Prince, who was the first Prince of Wales.

* * *

In addition to the feathers, The Prince has a coat of arms with long historical links with the heraldry of his ancestors.⁶

Moreover, the Government of the United Kingdom identified the emblem as "[t]he official emblem of the Prince of Wales" when it notified the World Intellectual Property Organization (WIPO) in 2005, under the framework of the Paris convention, that the Prince of Wales emblem is a 'state emblem' of the United Kingdom.⁷ WIPO

⁵ [Http://www.princeofwales.gov.uk/the-prince-of-wales/titles-and-heraldry](http://www.princeofwales.gov.uk/the-prince-of-wales/titles-and-heraldry), Office Action of February 13, 2015, TSDR p. 2.

⁶ *Id.*

⁷ Serial No. 89001177, Office Action of June 18, 2014, TSDR pp. 2-3.

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transmitted the notification to the United States and the other Paris Union Members under the framework provided for in Article 6*ter* of the Paris Convention for the Protection of Industrial Property⁸ for the protection of “armorial bearings, flags, and other State emblems, of the countries of the Union, official signs and hallmarks indicating control and warranty.”⁹

Since the Paris Convention is not-self executing in the United States, domestic legislation is required to implement the treaty. *In re Rath*, 402 F.3d 1207, 74 USPQ2d 1174, 1176 (Fed. Cir. 2005). The United States has implemented its obligations under Article 6*ter*, in part, through Section 2(b). *See generally In re District of Columbia*, 101 USPQ2d 1588 (TTAB 2012), *aff'd sub nom. In re City of Houston*, 731 F.3d 1326, 108 USPQ2d 1226 (Fed. Cir. 2013); *see also* Trademark Manual of Examining Procedure (TMEP) § 1205.02 (Jan. 2017). The notification process that the Government of the United Kingdom used to communicate its emblem is designed to assist Paris Union Members in identifying which emblems the notifying member wishes to be considered for protection under the Convention. Once the United States received the emblem notification, the USPTO assigned it a serial number specifically identifying the entry as “non-registration data” and entered it into the USPTO search database.¹⁰ This non-registration data is included in the USPTO’s search records to assist Examining Attorneys when considering possible statutory refusals; the

⁸ International Convention for the Protection of Industrial Property, Mar. 20, 1883, as revised at Stockholm on July 14, 1967 (“Paris Convention”) available at http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html.

⁹ Article 6*ter* of the Paris Convention.

¹⁰ Serial No. 89001177, Office Action of June 18, 2014, TSDR pp. 2-3.

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information about the designation should be discovered in a search of the records. *See* TMEP § 1205.02.

To be clear, Serial No. 89001177 in the USPTO's search database is the designation of the emblem from the Government of the United Kingdom under Article 6*ter*, but is not considered a U.S. registration. This designation provides notice to those searching the USPTO database that the Government of the United Kingdom identifies the emblem of the Prince of Wales as a State emblem. As a result, such a designation may form the basis of a refusal to register in the United States under Sections 2(a) or 2(b) of the Trademark Act, depending upon the nature and use of the mark, but it would not form the basis of a refusal under Section 2(d).

The wording "other insignia" found in Section 2(b) has not been interpreted broadly, but is considered to include only those emblems and devices that also represent such authority as, and that are of the same general class and character as, flags and coats of arms of the United States, of states or municipalities, or of foreign nations. *See In re U.S. Dept. of the Interior*, 142 USPQ 506, 507 (TTAB 1964) ("Since both the flag and coat of arms are emblems of national authority it seems evident that other insignia of national authority such as the Great Seal of the United States, the Presidential Seal, and seals of government departments would be equally prohibited registration under Section 2(b).").

Based on its long association with the heir apparent to the British throne, dating back to the fourteenth century, and its designation by the Government of the United Kingdom as the official emblem of the Prince of Wales, we find that the Prince of

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Wales' emblem is an "insignia of national authority" on par with a coat of arms as found in Section 2(b). *Id.* Accordingly, we find that the Prince of Wales' emblem as depicted in Serial No. 89001177 is an insignia of a foreign nation.

B. Whether Applicant's mark consists of, comprises, or is a simulation of the Prince of Wales' emblem

Because there are differences between Applicant's mark and the Prince of Wales' emblem, we find Applicant's mark does not "consist[] of or comprise[]" the emblem. Instead, we consider whether Applicant's mark is a "simulation" of the emblem. Regarding the meaning of the term "simulation," as used in Section 2(b), the Board has stated:

In determining this issue, it is our opinion that the term "simulation" is used in the context of Section 2(b) of the Statute in its usual and generally understood meaning, namely to refer to something that gives the appearance or effect or has the characteristics of an original item. (Webster's Third New International Dictionary, Unabridged Edition, 1965). Whether or not a simulation exists in a proceeding of this character must necessarily be one of first impression gathered from a view of such mark without a careful analysis and side-by-side comparison with [the emblem].

Focus must be on general recollection of the [emblem] by purchasers, and a comparison of it with applicant's mark.

In re Advance Indus. Sec., Inc., 194 USPQ 344, 346 (TTAB 1977). Conversely, the incorporation in a mark of individual or distorted features that are merely suggestive of flags, coats of arms or other insignia does not bar registration under Section 2(b). See *In re Waltham Watch Co.*, 179 USPQ 59, 60 (TTAB 1973) ("[A]lthough the flags depicted in applicant's mark incorporate common elements of flag designs such as

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horizontal or vertical lines, crosses or stars, they are readily distinguishable from any of the flags of the nations alluded to by the examiner.”).

The Prince of Wales’ emblem is described in greater detail on the Prince’s website as comprising “three silver (or white) feathers rising through a gold coronet¹¹ of alternate crosses and fleur-de-lys [sic]. The motto ‘Ich Dien’ (I serve) is on a dark blue ribbon beneath the coronet.”¹² Notably, some variation in the representation of the emblem appears to be permitted:

The rules of heraldry allow limited variations in the depiction of the badge. The spines or quills of the feathers can be of gold, instead of white or silver, and the coronet - usually studded with emeralds and rubies, can also feature small sapphires.

The arrangement of the motto ribbon can vary, but is usually shown in front of the two outer feathers and behind the centre one.¹³

When we compare Applicant’s mark with the emblem as shown above, we note several differences. The most obvious difference is that the banner and wording “Ich Dien” are absent from Applicant’s mark which, in contrast, has the initials SC on the front of the crown. In addition, the quill ends of the feathers are not visible below the crown in Applicant’s mark as they are in the Prince of Wales’ emblem; the crowns are of slightly different designs; and the feathers too are arranged slightly differently. Nevertheless, when we compare overall commercial impression, we find that the

¹¹ A coronet is “a small or lesser crown usually signifying a rank below that of a sovereign.” <https://www.merriam-webster.com/dictionary/coronet>.

¹² <http://www.royal.gov.uk/ThecurrentRoyalFamily/ThePrinceofWales/Emblems.aspx>, Office Action of February 13, 2015, TSDR p. 4.

¹³ *Id.*

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similarities outweigh these differences. Applicant's mark features two of the most dominant elements of the Prince of Wales' emblem: the crown and three feathers design. Applicant's mark is more than a combination of "common elements" that might be found in heraldry. *See Waltham Watch Co.*, 179 USPQ at 60 (Incorporation of common elements of flag designs insufficient to depict simulation of flags of Switzerland and Great Britain). That is, both Applicant's mark and the Prince of Wales' emblem create the same overall impression, that of a heraldic crown with three large feathers extending up from the crown. In addition, given the fact that some variation in the representation of the Prince of Wales' emblem is permitted, it is possible that consumers viewing Applicant's mark would ascribe any differences between Applicant's mark and the emblem to such permitted variation. Accordingly, we find that Applicant's mark is a "simulation" of an insignia of a foreign nation because it "gives the appearance or effect or has the characteristics of the original item," namely, the Prince of Wales' emblem. *See Advance Indus. Sec.*, 194 USPQ at 346.

Applicant, relying on *Advance Industrial Security*, nevertheless argues that consumers are unlikely to believe that Applicant's mark has any association or connection with the Prince of Wales:

[C]onsumers will understand that Applicant's SC & Crown Design mark is a design associated with Applicant's famous SHABBY CHIC mark. . . . Applicant's crown and feather design resembles a house brand, rather than the Prince of Wales Emblem or any other official governmental insignia. The overall commercial impression conveyed by Applicant's mark is *not* that of a trademark owner trying to convince a viewer of a false association with a

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government, a governmental entity, or other official designation.¹⁴

Advance Industrial Security does not compel a different outcome. In that case, the Board found the mark ADVANCE SECURITY with an eagle design, below left, was not a simulation of the Coat of Arms of the United States, below right, so as to bar registration under Section 2(b).



In comparing these marks, the Board found that the overall commercial impression of the applied-for mark differed from the Coat of Arms:

[T]he mark proposed for registration is not merely an eagle and shield design with its distinct differentiations from the Coat of Arms, but it is in fact a triangular shield design in gold and brown with the words “ADVANCE SECURITY” predominately displayed in the upper central portion of the mark which creates an overall commercial impression distinctly different from the Coat of Arms per se.

Id. at 346. Here, we find the differences between Applicant’s mark and the Prince of Wales’ emblem are minor, and the similarities outweigh those differences to convey a similar overall commercial impression.

¹⁴ Applicant’s Br., p. 8-9, 15 TTABVUE 11-12.

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Moreover, the record establishes that the Prince of Wales has the right to control the use of the emblem: “The Prince is also one of three members of the Royal Family able to grant Royal Warrants of appointment to companies. The company is then entitled to display The Prince of Wales’s Feathers on their products.”¹⁵ It is possible that consumers, upon viewing Applicant’s mark on the identified goods, may believe that Applicant has been granted such a Royal Warrant signifying that its products are associated with or approved by the Prince of Wales.

Applicant argues that its ownership of two cancelled registrations, for a nearly identical mark and a mark incorporating Applicant’s crown design, establishes that it is “illogical to deny registration of Applicant’s SC & Design mark given the Office’s prior approval of the same or substantially indistinguishable design in Applicant’s prior registrations.”¹⁶ This argument is unpersuasive. The existence of prior registrations does not overcome evidence that a mark is now unregistrable. It is well settled that we must assess each application on its own record at the time registration is sought, and that we are not bound by the decisions of Examining Attorneys in other cases. *In re Cordua Rests., Inc.*, 823 F.3d 594, 600, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016) (“The PTO is required to examine all trademark applications for compliance with each and every eligibility requirement . . . even if the PTO earlier mistakenly registered a similar or identical mark suffering the same defect.”); *see also In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“[D]ecisions

¹⁵ [Http://www.princeofwales.gov.uk/the-prince-of-wales/titles-and-heraldry](http://www.princeofwales.gov.uk/the-prince-of-wales/titles-and-heraldry), Office Action of February 13, 2015, TSDR p. 2.

¹⁶ Applicant’s Br., p. 11, 15 TTABVUE 14.

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regarding other registrations do not bind either the agency or this court.”); *In re Boulevard Entm’t Inc.*, 334 F.3d 1336, 67 USPQ2d 1475, 1480 (Fed. Cir. 2003) (“The fact that, whether because of administrative error or otherwise, some marks have been registered even though they may be in violation of the governing statutory standard does not mean that the agency must forgo applying that standard in all other cases.”).¹⁷

In arguing that it is illogical to refuse registration in light of Applicant’s prior registration of similar marks, Applicant also points to the Trademark Examining Operation’s Consistency Initiative. The Consistency Initiative is a program developed to aid in the consistent examination of trademark applications as compared to co-pending applications and recent registrations.¹⁸ The program began as a pilot and was eventually made permanent.¹⁹ Under the program,

Applicants may submit a Request [for Consistency Review] when a substantive or procedural issue has been addressed in a significantly different manner in different cases, subject to the following provisions:

(1) the Request is based on co-pending applications or an application and a registration owned by the same legal entity or a successor in interest (e.g., assignee);

¹⁷ In addition, the record here reflects that the evidence available to the Examining Attorney to establish the refusal under Section 2(b) with respect to the Prince of Wales’ emblem in this application is different from that which was available when the marks in the prior registrations were examined in 2003. In particular, a search of the USPTO’s database then would not have returned the Prince of Wales’ emblem claimed as a state emblem of the United Kingdom in Serial No. 89001177 because it was filed in 2005.

¹⁸ [Http://www.uspto.gov/web/trademarks/notices/Consistency_Notice_Final.doc](http://www.uspto.gov/web/trademarks/notices/Consistency_Notice_Final.doc), September 29, 2008.

¹⁹ [Https://www.uspto.gov/trademark/trademark-updates-and-announcements/consistency-initiative](https://www.uspto.gov/trademark/trademark-updates-and-announcements/consistency-initiative), December 4, 2012.

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- (2) the registration(s) involved was issued less than five years prior to the date of the Request;
- (3) at least one of the applications in the Request is in a pre-publication status at the time of the Request; and
- (4) the allegedly inconsistent treatment has already occurred.²⁰

Applicant states that “[t]he present situation is exactly the type of situation the Consistency Initiative is intended to address, namely, Applicant’s prior registrations for the same mark for the same goods dictate registration of the present application.”²¹

Applicant’s reliance on the Consistency Initiative is misplaced for a number of reasons. First, even if the Board were the proper forum in which to complain about treatment of the involved application under the Initiative, Applicant has not indicated that it actually submitted a Request for Consistency Review as required by the program. Second, Applicant’s prior registrations are not encompassed by the program inasmuch as they have been cancelled and also were issued more than five years prior to the examination of Applicant’s mark in the present application. Third, the Office specifically retains the right to determine what constitutes the proper examination of a given case, regardless of the nature of the request, and has explained: “Requesters should note, however, that subsequent action taken by the Office may differ from that requested. Alternatively, the Office may determine that

²⁰ *Id.*

²¹ Applicant’s Br., p. 12, 15 TTABVUE 15.

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different handling of the cases is appropriate, and no action will be taken.”²² Thus, it is not clear that the Section 2(b) refusal would have been withdrawn had Applicant filed a Request. Lastly, the Consistency Initiative is a program developed to aid the examination by the Trademark Examining Group and decisions made under the Initiative are not binding on the Board. Although we recognize that “consistency is highly desirable,” *In re Omega SA*, 494 F.3d 1362, 83 USPQ2d 1541, 1544 (Fed. Cir. 2007), consistency in examination is not itself a substantive rule of trademark law, and a desire for consistency cannot overcome the requirements of the statute. *See Cordua*, 118 USPQ2d at 1635. For these reasons, we find that the Consistency Initiative does not dictate registration of the present application.

Applicant further argues that it is entitled to registration because the USPTO has registered hundreds of “other ‘royal’ looking [crown] designs” and “more than one thousand marks incorporating the fleur-de-lis design.”²³ We disagree. None of the numerous third-party marks Applicant made of record combine both a crown and feathers to the same degree of similarity with the Prince of Wales’ emblem as does Applicant’s mark. Applicant’s argument that its mark has co-existed with the Prince of Wales’ emblem for 13 years without confusion or objection from the Prince of Wales is equally unpersuasive.²⁴ Section 2(b) is an absolute bar to registration, thus, absence of confusion is irrelevant and a lack of objection from the Prince of Wales

²² <https://www.uspto.gov/trademark/trademark-updates-and-announcements/consistency-initiative>, December 4, 2012.

²³ Applicant’s Br., p. 12, 15 TTABVUE 15.

²⁴ Applicant’s Reply Br., p. 8, 18 TTABVUE 8.

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plays no part. *See In re District of Columbia*, 101 USPQ2d at 1598 (“[R]ather than simply being a special case of confusion, registration of governmental insignia is prohibited by Trademark Act § 2(b) *regardless* of whether confusion would result.”).

In sum, the record in this case convinces us that Applicant’s mark is a simulation of an insignia of a foreign nation; the bar against its registration is absolute under the Trademark Act; and Applicant’s invocation of the Trademark Examining Group’s Consistency Initiative before the Board is procedurally improper.

Decision: The refusal to register Applicant’s mark under Section 2(b) of the Trademark Act is affirmed.