

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 June 2017

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the public authority for copies of correspondence and communications between HRH Prince Andrew, the Duke of York, and the Prime Minister, in relation to public roles for the Duke of York's daughters. The public authority neither confirmed nor denied holding information within the scope of the complainant's request in reliance on sections 37(2) and 40(5)(b)(i) FOIA.
2. The Commissioner has concluded that the public authority was entitled to rely on section 37(2).
3. No steps are required.

Request and response

4. The complainant submitted a request for information to the public authority on 22 December 2016 in the following terms:

"I would like to request the following information under the Freedom of Information Act.....

Please treat any environmental information as a request for information under the Environmental Information Regulations (EIRS)

Please note that the reference to His Royal Highness Prince Andrew should include the Prince himself and or his private office and or anyone specifically acting on his behalf.

Please note that the reference to the Prime Minister should include the relevant holders of that office and or their private offices and or anyone acting specifically on their behalf.

1....Since 1 January 2015 has Prince Andrew exchanged correspondence and communications (including emails) with the Prime Minister which relates to his daughters the Princesses Beatrice and Eugenie. Please note that I am only interested in that correspondence and communications which relate to the Princesses' actual and future public role; their constitutional roles and positions; their titles; their accommodation and the issue of them being funded by the tax payer.

2....If the answer is yes can you please provide copies of this correspondence and communications including emails. Please note that I am interested in receiving both sides of the correspondence and communication...."

5. On 24 January 2017 the public authority advised the complainant as follows: "Information you have requested is exempt under section 37(1)(ac) of the Freedom of Information Act (the Act), which relates to communications with or on behalf of Members of the Royal Family. The exemption at section 37(1)(ac) of the Act is subject to a public interest test and the Cabinet Office has not yet reached a decision on whether the balance of the public interest favours neither confirming nor denying if information is held."¹

¹ Clearly, the more accurate explanation should have been that the public authority had relied on the neither confirm nor deny provision at section 37(2) FOIA, and not the exemption from disclosure at section 37(1)(ac).

6. It consequently advised the complainant in the same letter that it was relying on section 10(3) FOIA in order to extend the time to consider where the balance of the public interest lies.²
7. On 21 February 2017 the public authority issued its substantive response to the request. It explained that it was responding under the FOIA and the EIR. In terms of the EIR, the public authority advised that it could neither confirm nor deny whether it held any information within the scope of the request by virtue of regulation 13(5)(a) EIR (personal data). In terms of the FOIA, it advised that it could neither confirm nor deny whether it held any information within the scope of the request by virtue of sections 37(1)(ac) (communications with or on behalf of other Members of the Royal Family), and 40(2) (personal data).³
8. On 13 March 2017 the complainant requested an internal review of the public authority's decision. He submitted that "the Duke of York does not enjoy any special exemption under either the FOI Act or the Environmental Information Regulations..."
9. On 24 March 2017 the public authority wrote to the complainant with details of the outcome of the internal review. It explained that having considered the wording/subject matter of the request, the review had concluded that the EIR was not engaged. Therefore, regulation 13(5)(a) should not have been applied. The review however upheld the decision to neither confirm nor deny whether the public authority held any information within the scope of the request in reliance on sections 37(1)(ac) and 40(2).

Scope of the case

10. The complainant contacted the Commissioner on 27 March 2017 in order to complain about the public authority's handling of his request. However, although he has expressed dissatisfaction with "the Cabinet Office's failure to disclose the information I believe it holds", the public authority's position is that it can neither confirm nor deny whether it holds information within the scope of the request.

² A public authority may extend "until such a time as is reasonable" the time taken to determine where the balance of the public interest lies in relation to an exemption/exclusion that is not absolute (ie not subject to the public interest test).

³ More accurately, the public authority has relied on sections 37(2) and 40(5)(b)(i) FOIA.

11. Furthermore, although he noted that HRH Prince Andrew is not exempt from either the FOIA or the EIR, he did not specifically challenge the public authority's decision to consider his request under the terms of the FOIA alone.
12. Therefore, the scope of the Commissioner's investigation was to determine whether the public authority was entitled to neither confirm nor deny whether it holds information within the scope of the request in reliance on the exclusions contained at sections 37(2) and 40(5)(b)(i).
13. Consequently, nothing in this notice should be taken to either indicate that the public authority holds, or does not hold, information within the scope of the complainant's request.

Reasons for decision

14. Section 1(1) FOIA provides two rights to applicants. They are:
 - a) The right to be informed in writing by the public authority whether or not it holds the information requested by the applicant, and
 - b) If so, the right to have that information communicated.
15. Both these rights are subject to other provisions in the FOIA.
16. The right in section 1(1)(a) is commonly referred to as a public authority's duty to either "confirm or deny" whether it holds information requested by an applicant.
17. There are a number of exclusions in the FOIA from the duty to confirm or deny enshrined in section 1(1)(a). Section 37(2) (communications with Members of the Royal Family) and section 40(5)(b)(i) (personal data) are two of such exclusions.

Section 37(2)

18. The Commissioner initially considered the applicability of this exclusion to the complainant's request.
19. Section 37 FOIA states:

"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)."

20. The public authority's position is that confirming or denying whether it holds information within the scope of the request would itself reveal information relating to the Duke of York which would otherwise be exempt on the basis of section 37(1)(ac).
21. It is clear from section 37 that information is exempt on the basis of section 37(1)(ac) if it relates to communications with other members of the Royal Family (ie other than those mentioned in paragraphs a to ab).
22. Section 37(2) is also clear that a public authority is excluded from the duty to confirm or deny whether it holds information which is, or if it were held by the public authority would be, exempt from disclosure.
23. The Commissioner is satisfied that issuing a confirmation or denial as to whether the information requested is held would reveal information that would otherwise be exempt under section 37(1)(ac) on the basis that it relates to communications with a member of the Royal Family not mentioned in section 37(1)(a) to (ab). She is also satisfied that the information requested would, if it were held by the public authority, be exempt on the basis of section 37(1)(ac) for the same reason.
24. The Commissioner has therefore concluded that the public authority was entitled to rely on the exclusion at section 37(2) as the basis for neither confirming nor denying whether it held information within the scope of the request.

Public interest test

25. As mentioned, the exclusion at section 37 from the duty to comply with section 1(1)(a) is subject to the public interest test set out in section 2(1)(b) FOIA. The Commissioner must therefore also consider whether in all the circumstances of the case, the public interest in maintaining the exclusion outweighs the public interest in confirming or denying whether the public authority holds information within the scope of the complainant's request.

Public interest arguments in favour of compliance with section 1(1)(a)

26. The complainant submitted that there was a strong public interest in complying with the request (ie the duty to confirm or deny) given "the well informed press speculation" that the Duke of York has been lobbying extensively on behalf of his daughters.
27. The public authority acknowledged that there is a public interest in understanding the roles of members of the Royal Family, and specifically in confirming or denying whether it holds correspondence from the Duke of York within the scope of the request.

Public interest arguments in favour of maintaining the exclusion at section 37(2)

28. The public authority however explained that the diplomatic and goodwill work carried out by members of the Royal Family is dependent upon the maintenance of the confidentiality of their communications with public authorities. It argued that confirming or denying that information within the scope of the request is held could undermine this principle.
29. In reference to the complainant's submission above on the public interest in complying with the request, the Commissioner referred the public authority to an article published on the BBC website at: <http://www.bbc.co.uk/news/uk-38269963> which contains an official statement by the Duke of York denying media claims of a split in the Royal Family over the future roles of his daughters. The Commissioner asked the public authority to consider whether there was a strong public interest in complying with the request in light of the media speculation and the Duke's statement in response given that it could inform views on the veracity of the statement. She also asked the public authority to consider whether relying on the exclusion from the duty to confirm or deny simply increases the level of speculation and is therefore not in the public interest.
30. The public authority pointed out that the Duke of York's statement explicitly states that the speculation is unfounded and noted that there

is no official information in the public domain in support of the speculation. It submitted that it was the view only of the complainant that such speculation is “well informed”. It noted that the media articles relating to the speculation provide no official sources or evidence for the claims reported.

31. The public authority conceded that the terms of the request are broad and the Duke of York’s statement does not relate directly to them. It submitted however that the fact there has been unfounded media speculation relating to the future roles of the Duke of York’s daughters, which has been officially denied, should not serve as a justification for undermining the maintenance of confidentiality in communications with a member of the Royal Family.
32. Finally, in response to the suggestion that not complying with the request might serve to increase media speculation and would not be in the public interest, the public authority argued that while media reporting on the Royal Family might be of interest to the public, it is not equivalent to what would be in the public interest.

Balance of the public interest

33. The Commissioner accepts that the effectiveness of the established constitutional relationship between Government and the Royal Family is dependent upon the maintenance of the confidentiality of their communications with Government. Consequently, she considers that there is a significant public interest in not undermining the constitutional relationship between the Royal Family and Government. Complying with the request is likely to undermine the relationship.
34. She slightly disagrees with the public authority’s suggestion that while media reports might be of interest to the public, this has little bearing on public interest considerations. In the circumstances of this case, the Commissioner considers that there was a public interest in addressing media speculation concerning the extent and nature of the Duke of York’s involvement in discussions (if any) regarding future roles for his daughters, and this is precisely what the Duke’s statement did.
35. Nevertheless, she accepts that in the absence of any credible sources or evidence to the contrary, the public interest in complying with the request despite the official statement issued by the Duke of York carries less weight than the significant public interest in not undermining the principle of confidentiality of communications, and of information relating to communications, between the Royal Family and Government.
36. The Commissioner has therefore concluded that on balance, in all the circumstances of the case, the public interest in maintaining the

exclusion outweighs the public interest in complying with the duty to confirm or deny whether the public authority holds information within the scope of the request.

37. In light of this decision, the Commissioner has not considered the applicability of section 40(5)(b)(i).

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

39. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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