

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 7 March 2024

**Public Authority:** Cabinet Office

**Address:** 70 Whitehall  
London  
SW1A 2AS

#### **Decision (including any steps ordered)**

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1. The complainant has requested a copy of the file PREM 19/2472, "ROYAL FAMILY. Career of Prince Andrew, Duke of York". The Cabinet Office withheld the file on the basis of section 40(2) (personal data) and 41(1) (information provided in confidence) of FOIA.
2. The Commissioner's decision is that these exemptions only provide a basis to withhold some of the information contained within the file.
3. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.
  - Provide the complainant with a copy of the information identified in the confidential annex to this decision notice.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. The complainant submitted the following request to the Cabinet Office on 24 February 2022:

'Please release this file [PREM 19/2472. ROYAL FAMILY. Career of Prince Andrew, Duke of York] which is now over 30 years old, much of the information is in the public domain and there is a strong public interest'.
6. The Cabinet Office contacted the complainant on 24 March 2022 and confirmed that it held the requested information but considered this to be exempt from disclosure on the basis of section 37(1)(b) of FOIA and needed additional time to consider the balance of the public interest test.
7. The Cabinet Office responded on 21 October 2022 and explained that it had concluded that the requested information was exempt from disclosure on the basis of sections 40(2) and 41(1) of FOIA.
8. The complainant requested an internal review on 24 October 2022. The Cabinet Office responded on 1 December 2022 and upheld the application of sections 40(2) and 41(1).

## Scope of the case

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9. The complainant contacted the Commissioner on 22 December 2022 in order to complain about the Cabinet Office's decision to withhold the requested file. His grounds of complaint to support his case are set out below.
10. The Commissioner is conscious that he has previously issued a decision notice concerning a separate request for this file.<sup>1</sup> That decision notice was based simply on the content of the Cabinet Office's refusal notice and internal review and found that section 40(2) applied to the entirety of the file. In contrast, when investigating this present case the Commissioner has had sight of the withheld information and submissions from the Cabinet Office regarding its application of the exemptions.

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4025387/ic-231182-m4k9.pdf>

## Reasons for decision

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### Section 40(2) – personal data

11. The Cabinet Office applied section 40(2) to all of the information contained within the file.
12. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
13. In this case the relevant condition is contained in section 40(3A)(a)<sup>2</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
14. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
15. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

### Is the information personal data?

16. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

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<sup>2</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

19. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
20. The Cabinet Office argued that all of the information on the file is the personal data of the Duke of York.
21. The Commissioner agrees with this assessment and accepts that all of the information on the file is the personal data of the Duke of York.

**Would disclosure contravene principle (a)?**

22. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

23. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
24. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.
25. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”<sup>3</sup>.

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<sup>3</sup> Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second

26. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
27. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

#### Legitimate interests

28. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
29. The complainant noted that the file is over 30 years old, that much of the information is in the public domain and that there is a strong public interest in disclosure of the information given that the Duke of York is a public figure and of legitimate interest.
30. The Cabinet Office acknowledged that there is legitimate interest in the requested information (albeit it did not accept that the withheld information was in the public domain).

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sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

31. The Commissioner agrees that there is a legitimate interest in the disclosure of the requested information and that this limb of the test is met.

Is disclosure necessary?

32. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
33. The Cabinet Office acknowledged that disclosure would be necessary to meet the legitimate interest being pursued by the request and there would be no other means of meeting that request.
34. The Commissioner also agrees with this assessment and therefore accepts that this limb of the test is met.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

35. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
36. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
37. The complainant's arguments regarding the legitimate interest in disclosure are set out above.
38. The Cabinet Office argued that disclosure of the information would be unfair, given the reasonable expectations of the Duke of York and the consequences of disclosure.

39. With regard to assessing such reasonable expectations, the Cabinet Office noted that one factor is whether information of the nature requested is already in the public domain, and the source of such a disclosure(s). It explained that none of the information contained in the file is in the public domain. The Cabinet Office argued that given that the right to privacy has not been waived by any of the parties to the correspondence, it is reasonable to argue that disclosure would go against the Duke of York's reasonable expectations that the personal information relating to him would not be processed in this way. In support of this position the Cabinet Office emphasised the nature of communications relating to Members of the Royal Family and government, which has historically and necessarily taken place under an expectation of confidence, give rise to this expectation.
40. With regard to the consequences of disclosure, the Cabinet Office argued that the Duke of York would suffer damage or distress if it were to disclose the information. The Cabinet Office argued that apart from the injury to his right as a data subject, disclosure would result in a breach of the Duke of York's privacy. This would be unfair since the same considerations apply to Members of the Royal Family as would apply to any other individual, who would not expect their personal data to be released to the public in such a way.
41. Furthermore, the Cabinet Office argued that if any Member of the Royal Family or their advisers came to doubt the presumption that communications with the Prime Minister are confidential, they and their advisers would be more circumspect in their communications and would be deprived of opportunities to convey their views on other topics in the course of the established constitutional relationship and channel of communications between government and the Royal Family. The Cabinet Office argued that the public interest in preserving this constitutional position outweighs the general public interest considerations in favour of disclosure.
42. The Cabinet Office argued that since no official information has been made public, it would be reasonable to suggest that disclosure would cause distress to the Duke of York.
43. Furthermore, the Cabinet Office argued that disclosure would breach the Duke of York's rights under Article (8)(1) of the European Convention on Human Rights (ECHR) as given effect by the Human Rights Act 1998 (HRA). Article 8(1) protects the right to respect for a person's family life, private life, home and correspondence. The Article 8 right is qualified; where the authority can show that its action (interference with the right) is lawful, necessary and proportionate in order to meet the legitimate aims laid out in Article 8(2), which are to: protect national security, protect public safety, protect the economy, protect health or morals,



prevent disorder or crime, or protect the rights and freedoms of other people. The Cabinet Office argued that none of these legitimate aims apply and therefore disclosure would be unlawful, unnecessary, and disproportionate, and so interfering in the Duke of York's Article 8 rights would not be justified.

44. In summary, the Cabinet Office argued that insofar as the public may be interested in the information contained in the file, this is not the same as suggesting that there is an overriding necessity to disclose the information to meet the legitimate interest being pursued in the request. In the Cabinet Office's view it was difficult to detect the overriding legitimate interest and benefit to the public in disclosing the information. Rather, if the necessity test were met, the Cabinet Office argued that disclosure would so prejudice the privacy and the confidentiality to which the Duke of York was entitled that it would not be warranted.
45. In reaching a decision on the balance of legitimate interests, the Commissioner notes that there is a range of information contained within the file. For some of this information the Commissioner accepts that disclosure of it could result in a genuine infringement into the privacy of the Duke of York, and he would be unlikely to expect that such information would be disclosed. For such information, in the Commissioner's view there is also a limited legitimate interest in its disclosure. As a result, for this information the Commissioner has therefore concluded that there is an insufficient legitimate interest to outweigh the Duke of York's fundamental rights and freedoms. Therefore, for such information the Commissioner considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful. This information is therefore exempt from disclosure on the basis of section 40(2) of FOIA.
46. However, for the remaining information in the file the Commissioner is not persuaded that its disclosure would result in a particularly significant infringement of privacy to the Duke of York given the content of the information itself. In respect of the reasonable expectations of the Duke of York for such information, the Commissioner recognises the established convention that communications relating to Members of the Royal Family and government, have taken place under an expectation of confidence. However, in the Commissioner's view it is important to take into account the passage of time and age of the information, as well as its content, when assessing the validity of such expectations. He does not consider it to be sustainable to argue that the expectation is that any such communications will always remain confidential. In this case the information in question is, as the complainant noted, over 30 years old. In addition, whilst the Commissioner accepts that there is still arguably an expectation that more personal aspects of such correspondence are treated confidentially – and thus to disclose these



would be broadly be against the Duke's expectations - he does not consider this to be the position for all of the information falling within the scope of the request. Furthermore, for such information the Commissioner also considers that there is a significant legitimate interest in its disclosure.

47. As a result, for such information the Commissioner has determined that there is a sufficient legitimate interest in disclosure to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of this information would be lawful.
48. In reaching this decision the Commissioner has noted the Cabinet Office's argument at paragraph 41 that disclosure of the information could deprive members of the Royal Family opportunities to convey their views in the course of the established constitutional relationship and channel of communications between government and the Royal Family. The Commissioner does not consider this argument to be relevant to the considerations under section 40; in his view such an outcome would not result in an invasion of the privacy of the Duke of York which is what, in the context of this request, this exemption is concerned with. Rather, such arguments are ones potentially relevant to other exemptions, eg section 36(2)(c), the effective conduct of public affairs or the public interest assessment in respect of the sub-sections of section 37(1) which are qualified.
49. Furthermore, the Commissioner notes the Cabinet Office's position regarding disclosure of the information and HRA. The Commissioner's position, as outlined in his section 40 guidance, is that the considerations involved in assessing the data protection legitimate interests assessment are similar when assessing whether an interference with a right in the HRA is necessary. Therefore, if the legitimate interests assessment is met, then disclosure is unlikely to contravene the HRA. The Commissioner considers this to be the position in this request.
50. Even though it has been demonstrated that disclosure of some of the requested information under FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
51. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
52. The requirement for transparency is met because as a public authority, the Cabinet Office is subject to FOIA.

53. As a result, for some of the information, the Commissioner has decided that the Cabinet Office has failed to demonstrate that the exemption at section 40(2) is engaged.
54. In summary the Commissioner has found that section 40(2) only applies to some of the information falling within the scope of the request. The Commissioner has set out in greater detail in the confidential annex why he has reached these findings. The Commissioner cannot include such analysis in the this decision notice because such analysis has to refer to the content of the withheld information itself.

### **Section 41 – information provided in confidence**

55. The Cabinet Office explained that it was relying on section 41(1) of FOIA to withhold information provided to it by Buckingham Palace on behalf of the Duke of York and to correspondence received from the Ministry of Defence relating to the Duke of York's training and career.
56. However, the Commissioner has only considered the application of this exemption to information which he has already concluded is not exempt from disclosure on the basis of section 40(2).
57. Section 41(1) states that:

“(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.”
58. Therefore, for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.
59. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:
  - whether the information had the necessary quality of confidence;
  - whether the information was imparted in circumstances importing an obligation of confidence; and,

- whether an unauthorised use of the information would result in detriment to the confider.

60. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

Was the information obtained from another person?

61. With regard to the requirements of section 41(1)(a), the Commissioner accepts that the information, as described above at paragraph 55, was provided to the Cabinet Office by a third party. Therefore the Commissioner is satisfied that section 41(1)(a) of FOIA is clearly met.

Does the information have the necessary quality of confidence?

62. In the Commissioner's view information will have the necessary quality of confidence if it is not otherwise accessible and it is more than trivial.

63. The Cabinet Office explained that it was satisfied that the information had the necessary quality of confidence. In support of this it explained that is a matter of constitutional convention that communications from, or relating to, Members of the Royal Family are provided to the government in confidence and will be treated as confidential. The information dates from a time when there was no intention of access to government information, other than a limited number of relevant records being opened at The National Archives in line with the then 'thirty year rule'. There was therefore no expectation that the information would be disclosed. The information is not in the public domain, and is not otherwise accessible, and therefore confidentiality has not been waived.

64. In view of the above the Commissioner accepts that the information has the quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

65. The Cabinet Office explained that all the incoming correspondence was communicated with an implicit expectation of confidence. As noted above, the constitutional convention of confidentiality is also one of the circumstances importing a duty of confidence. The individuals to whom the confidence is owed therefore had a legitimate expectation that the information would be held in confidence and not placed in the public domain.

66. Again, the Commissioner accepts this assessment and therefore this limb is also met.

Would disclosure be of detriment to the confider?

67. The Cabinet Office explained that the Commissioner has noted that identifying a detriment will not always be a prerequisite to an actionable breach of confidence. It was confident that there would be detriment to the Duke of York to whom the communications relate. In this context, the Cabinet Office argued that detriment need only be to the extent that an individual is shown the information that the person to whom the duty is owed would not want to be seen. The Cabinet Office argued that the Duke of York would have no reasonable expectation of this, and disclosure would be a breach of confidence.
68. In the Commissioner's view the detriment resulting from the disclosure of the information to which he is considering this exemption is likely to be limited. This is given both the content and age of the information. However, as noted, the Commissioner has accepted that identifying a detriment will not always be a prerequisite to an actionable breach of confidence.

Is there a public interest defence to the disclosure of the information?

69. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under FOIA). British courts have historically recognised the importance of maintaining a duty of confidence, so it follows that strong public interest grounds would be required to outweigh such a duty.
70. However, disclosure of confidential information where there is an overriding public interest is a defence to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the Cabinet Office could successfully rely on such a public interest defence to an action for breach of confidence in this case.
71. For its part, the Cabinet Office explained that it was satisfied that it could not rely upon a defence that an overriding public interest justified breaching its duty of confidence. It noted that the courts have presumed in favour of maintaining confidences and that this can only be superseded by an overriding public interest in disclosure, such as the revelation of iniquity, fraud or a necessity to protect the public from harm. The Cabinet Office accepted that although other public interest factors may justify a breach of confidence, those referred to are the conventional public interests which have been accepted as defences by the courts. The Cabinet Office argued that the information does not

reveal any of those factors and absent of this, it follows that there is no such overriding public interest in disclosure. The Cabinet Office explained that it was confident that the public interest in justifying a breach of confidence is insufficient to override the presumption in favour of maintaining confidences.

72. Whilst the Commissioner considers that there is likely to be a limited detriment if the information in question was disclosed, he does accept that there is a wider public interest in preserving the principle of confidentiality. Furthermore, although the Commissioner considers there to be a public interest in disclosure of information regarding the Duke of York's career, as discussed above in the context of section 40(2) of FOIA, he does not consider that this provides an adequate public interest defence to a breach of confidence. The Commissioner therefore accepts that the information described at paragraph 55 is exempt from disclosure on basis of section 41(1) of FOIA.

## **Right of appeal**

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73. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

74. 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.
75. 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**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
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