

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 April 2024

Public Authority: The National Portrait Gallery
Address: St Martin's Place
London
WC2H 0HE

Decision (including any steps ordered)

1. The complainant has requested information between the National Portrait Gallery and the Duke and Duchess of Sussex. The National Portrait Gallery ('the Gallery') refused the request, citing section 37(1)(ac) (communications with His Majesty and the awarding of honours).
2. The Commissioner's decision is that the Gallery is entitled to withhold the requested information under section 37(1)(ac).
3. The Commissioner does not require further steps.

Request and response

4. On 4 October 2023, the complainant made the following request:

"Please note that the reference to the Duke or Duchess of Sussex in the questions below should be taken to mean the Duke and or Duchess themselves (acting either individually or together); any representatives and or employees of the couple's Archewell initiative(s) and or any other employee or representative (including but not limited to agents and or publicists and or legal representatives) who are corresponding and communicating on behalf of the Duke and or Duchess of Sussex.

Please note that the reference to correspondence and communications in the questions below should include all traditional forms of

correspondence and communication including letters, faxes and memos; all emails irrespective of whether they were sent and or received through private and or public accounts, all telephone text messages, all Gmail messages and all messages sent through encrypted messaging services including but limited to WhatsApp.

Please note that I am interested in receiving actual copies of correspondence and communication rather than just excerpts from that correspondence and communication. Copies of letters should include the letter head, all other design features and the signatures. Similarly emails and other messages should be copies and disclosed as received. If the gallery feels the need to redact material from any correspondence and communication, can it redact the material where it appears. That way I will be able to judge the extent and location of any redaction.

Please note that the reference to representations in the questions below should be taken to mean any artwork (whether on display and or in storage). These representations will include but will not be limited to portraits and or paintings and or drawings and or prints and or sketches and or etchings and or photographs and or video film.

Please note that I am only interested in information generated between 4 October 2022 and the present day.

1. During the aforementioned period have the Duke and or Duchess of Sussex written to and or communicated with the National Portrait Gallery. Please note that I am only interested in that correspondence and communication which either mentions and or in any way relates to any of the following. If the answer is yes, please provide copies of this correspondence and communication.

i) Existing representations in the NPG's collection which feature the Duke and Duchess of Sussex together.

ii) Existing representations in the NPG's collection which feature just the Duke of Sussex.

iii) Existing representations in the NPG's collection which feature just the Duchess of Sussex.

iv) The idea of any new representations of the Duke and or Duchess of Sussex being added to the NPG's collection.

v) Nicky Philips' 20210 portrait of the princes William and Harry.

2. During the aforementioned period did the National Portrait Gallery write to and or communicate with the Duke and or Duchess of Sussex.

Please note that I am only interested in that correspondence and communication which mentions and or in any way relates to any of the points in question one. If the answer is yes, can you, please provide a copy of this correspondence and communication.”

5. The Gallery responded on 28 November 2023 and refused to provide the requested information, citing section 37(1)(ac) (Communications with His Majesty etc) and section 40(2) (personal information).
6. The complainant requested an internal review on 2 December 2023, on the grounds that the Duke and Duchess of Sussex aren't members of the royal family and therefore section 37 can't apply.
7. The Gallery provided its internal review outcome on 29 January 2024. It upheld its previous position.

Scope of the case

8. The Commissioner considers that the scope of his investigation is to determine whether the Gallery was correct to withhold the requested information.
9. It's applying section 37(1)(ac) to all withheld information and section 40(2) to specific information.
10. The Commissioner will therefore consider section 37(1)(ac) first and, depending on his findings, might go onto consider section 40(2).

Reasons for decision

Section 37 - communications with His Majesty and the awarding of honours

11. Section 37(1)(ac) states:

“(1) Information is exempt if it relates to...

(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)...”

12. Section 37(1)(a) and (ab) refers to the Sovereign, the heir to the throne, the second in line to the throne, or anyone who has

subsequently acceded to the throne or become heir to, or second in line to.

13. Section 37(1)(ac) therefore, refers to communications with any other members of the Royal Family. Whereas section 37(1)(a) and (ab) are absolute exemptions, section 37(1)(ac) is a qualified exemption, which means it is subject to the public interest.
14. The complainant is concerned that 'The Duke and Duchess of Sussex are no longer working members of the Royal Family...while they continue to hold their titles, they do not carry out any official duties on behalf of either the Royal Family and or the British government.'
15. The Commissioner's guidance states, 'there is no strict legal definition of the term 'Royal Family'. Generally, you should take it to mean all individuals who are entitled to hold the title of 'Majesty' or 'Royal Highness' and their spouses.'
16. The Commissioner's guidance also states, 'If you are in any doubt about the status of the individual concerned, you should consult the website of the British Monarchy (www.royal.gov.uk)¹ as this contains an official list of the current members of the Royal Family.'
17. The Commissioner notes that the Duke and Duchess of Sussex are listed on the British Monarchy's website and their profile contains multiple statements regarding their 'decision to step away last year as **working** members of The Royal Family' (emphasis added by the Commissioner).
18. The Commissioner understands that The Duke of Sussex remains a Prince and fifth in line to the throne and have kept their royal titles as the Duke and Duchess of Sussex.
19. The Commissioner acknowledges that the couple aren't referred to as his or her royal highness. However, for the purposes of section 37 of FOIA there is no requirement for any member of the Royal family to be working in order for the exemption to be engaged.
20. Section 37(1)(ac) also covers information communications made or received by an individual on behalf of other members of the Royal Family.

¹ [The official website of the Royal Family | The Royal Family](#)

21. Looking at the withheld information, which is emails between the Gallery and representatives of the Archewell² foundation, a non profit organisation created by the Duke and Duchess of Sussex, the Commissioner considers the exemption is engaged. Therefore, he's gone onto consider the balance of the public interest.

Public interest test

Factors in favour of disclosure

22. The Gallery has identified 'the underlying element of openness and transparency' that FOIA represents and that would be met through disclosure of the withheld information.
23. It also acknowledges 'a specific public interest in the Royal Family and the nature of their discussions with publicly-funded organisations.'
24. The complainant believes there is a public interest in how the Duke and Duchess of Sussex are celebrated by the Gallery and whether the Duke and Duchess are lobbying for their portraits to be displayed in the Gallery.

Factors in favour of maintaining the exemption

25. The Gallery believes 'there is a strong public interest in preserving the confidentiality of communications with members of the Royal Family and the Royal Household' and disclosure of such information 'could undermine the Royal Family's willingness to engage with public authorities in similar discussions, resulting in a chilling effect.'
26. It concluded:

"The National Portrait Gallery is the national museum responsible for the history of British Portraiture. Our mission is to maintain a collection of portraits of the most eminent persons in British history, of other works of art relevant to portraiture and or documents relating to those portraits and other works of art. The Royal Family are a significant part of British culture and the Gallery needs to be able to have conversations with its members to achieve this goal."

² [The Archewell Foundation | The Archewell Foundation](#)

Balance of the public interest

27. The public interest test means ascertaining whether disclosure or not is in the public good, it's not what is of interest to the public or the private interests of the requester.
28. The Commissioner understands that the status of the Duke and Duchess of Sussex as royals, or non-working royals, is of interest to the complainant and others. However, this isn't what the withheld information is about.
29. Furthermore, the withheld information doesn't show the Duke or Duchess lobbying for their portraits to be displayed in the National Gallery and, whether they are or not, can be ascertained without the disclosure of the withheld information.
30. On this occasion, the Commissioner considers the withheld information meets no public interest that the complainant has identified but it does have the potential to cause the chilling effect referred to in paragraphs 25 and 26. It is within the public interest to allow the Gallery to be as robust as possible in its negotiations with the Royal Family, so it can continue to maintain its portrait collection.
31. Therefore, the Commissioner has determined that the balance of the public interest lies in maintaining the exemption. Therefore, the Commissioner doesn't need to go onto consider the Gallery's application of section 40.

Right of appeal

32. 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

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

33. 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.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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Cheshire
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