

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

### **Decision notice**

**Date:** 9 September 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 information concerning the conferring of the title of Duke of Edinburgh upon HRH Prince Edward by HM The King.
2. The Cabinet Office initially confirmed that they held information within scope of the request but that this was exempt from disclosure in its entirety under section 37(1)(b)(information relating to the conferring by the Crown of any honour or dignity) of FOIA. At internal review, the Cabinet Office applied section 42(1)(legal professional privilege) to some of the withheld information and also provided a neither confirm nor deny (NCND) response under section 35(3) as to whether they held any information relating to Law Officers' advice.
3. During the course of the Commissioner's investigation the Cabinet Office applied section 37(1)(a)(communications with the Sovereign) to some of the withheld information and section 40(2)(third party personal data) to the names of junior civil servants.
4. The Commissioner's decision is that section 42(1) is engaged to some of the withheld information and that the public interest favours maintaining the exemption to the respective information. The Commissioner has found that section 37(1)(a) applies to some of the withheld information (this being an absolute exemption) and that section 37(1)(b) applies to the remainder of the withheld information to which that was applied and the balance of the public interest favours maintaining that exemption. The Commissioner has also found that sections 40(2) and 35(3) were

correctly applied by the Cabinet Office and that in respect of the latter the public interest favours maintaining the NCND response.

## **Request and response**

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5. On 19 April 2023, the complainant wrote to the Cabinet Office and requested information in the following terms:

'Please may I request any information you hold about the conferring of the Dukedom of Edinburgh on HRH The Duke of Edinburgh (the most recent creation of that title) and in particular any information you hold about this conferring being a dukedom for life rather than a hereditary dukedom and the legal, parliamentary and constitutional effects of that distinction (including entitlement to sit in the House of Lords).'

6. The Cabinet Office provided a response to the request on 19 May 2023. They confirmed that they held the information requested but that this was exempt from disclosure under section 37(1)(b) of FOIA (information relating to the conferring by the Crown of any honour or dignity).

7. In respect of the public interest test, the Cabinet Office stated that they appreciated, 'the importance of transparency in government, which encourages public interest in and interaction with, the work of government'. However, they contended that:

'Not disclosing information relating to the conferring of honours and dignities ensures that applications are handled in confidence. Confidentiality, therefore, ensures that decisions about the awards of honours continue to be taken on the basis of full and honest information about each individual case'.

8. The Cabinet Office stated that they had determined that in all the circumstances of the case the public interest in maintaining section 37(1)(b) outweighed the public interest in disclosing the requested information.

9. However, the Cabinet Office provided the complainant with the following information regarding the bestowal of the title:

'In March 2023, His Majesty King Charles III conferred the Dukedom of Edinburgh upon The Prince Edward, Earl of Wessex and Forfar. Dukedoms of this nature are conferred by The Sovereign in a personal capacity, not on the advice of Government. Since the title merged into the Crown upon King Charles' succession, it was available to be conferred on different terms than which it was originally created.

Following the House of Lords Act 1999, Members of The Royal Family

who were peers ceased to be members of the House of Lords. As a peerage for life conferred outside of the Life Peerages Act, there is no right to sit in the House of Lords that accompanies the bestowal of the title Duke of Edinburgh and no writs will be issued’.

10. The complainant requested an internal review on 1 July 2023. He advanced the following arguments in favour of the public interest balance favouring disclosure of the information:
  - The honour is a unique one that has not been given for some time – i.e. a non-hereditary dukedom and life peerage outside the Life Peerages Act. Its standalone nature increases the public interest in disclosure. It also makes any ‘chilling effect’ on future honours less likely to be problematic, as very few (if indeed any) individuals will be under active consideration for such an honour (unlike the normal birthday and new year honours lists to which that consideration may be more relevant).
  - The honour was conferred by the King without the advice of government. This again emphasises it is not like the ‘decisions’ for other people or the ‘applications’ for others mentioned earlier in the Cabinet Office response. The public interest does not apply in the same way to an honour conferred in this way. The Cabinet Office appear to have treated this like the conferral of any other honour without specifically setting out why the public interest is outweighed in this case of this specific non-hereditary dukedom for a member of the Royal Family.
  - Government discussion of the honour may be relevant to the constitutional relationship between the Royal Family and government and the legislature. This increases public interest in disclosure.
  - There may be some information the public interest favours disclosing and some not – rather than a blanket application across all the information the Cabinet Office holds.
11. The Cabinet Office provided the complainant with their internal review on 17 November 2023, more than five months later. The review simply noted that they appreciated, ‘the importance of transparency in government which encourages public interest in and interaction with the work of government’, but that, ‘withholding information relating to the conferring of honours and dignities ensures that such conferrals are handled in confidence’.
12. In addition to upholding the application of section 37(1)(b), the Cabinet Office advised that during the internal review they had identified additional information within scope of the request. They stated that this

information related to legal advice and was exempt from disclosure under section 42(1) (legal professional privilege) of FOIA. The Cabinet Office stated that the public interest in disclosure of this particular information was outweighed by the safeguarding of openness in all communications between client and lawyer, in order to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.

13. The Cabinet Office also neither confirmed nor denied whether they held information covered by section 35(1)(c) of FOIA (Law Officers' advice), stating that 'section 35(3) and section 2(1)(b) together provide that the duty to confirm or deny does not arise in respect of information which is exempt (or would be exempt) under section 35(1)(c) if the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether or not this [dept] holds the information'. The Cabinet Office confirmed that, in the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighed the public interest in disclosing whether or not they held such information.

## **Scope of the case**

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14. The complainant contacted the Commissioner on 5 January 2024 to complain about the way his request for information had been handled.
15. The complainant advised the Commissioner that he did not agree with how the Cabinet Office had applied the public interest test in relation to sections 37(1)(b) and 42(1).
16. During the course of the Commissioner's investigation, the Cabinet Office advised that in addition to the above exemptions, they were also applying section 37(1)(a)(information relating to communications with or on behalf of the Sovereign) and section 40(2)(third party personal data) to some of the withheld information.
17. The Commissioner considers that the scope of his investigation is to determine whether the Cabinet Office were correct to withhold the requested information.

## **Reasons for decision**

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### **Section 37(1)(a) – Communications with the Sovereign**

18. Section 37(1)(a) of FOIA states:

'(1) Information is exempt information if it relates to –

- (a) communications with the Sovereign’.
19. The exemption also covers communications made or received by a person or organisation who is acting on behalf of the Sovereign or the Heir to the Throne, for example, HRH’s private secretary or a representative of Buckingham Palace. It is also an absolute exemption and not subject to the public interest test<sup>1</sup>.
  20. The Commissioner notes that the exemptions at section 37 are generally interpreted broadly and section 37(1)(a) provides an exemption from disclosing information if it covers communications with or on behalf of the Sovereign. Such information includes communications from the Sovereign’s Private Office. Therefore, communications, and information relating to those communications, made or received by a person who is acting on behalf of the Sovereign, engage the exemption.
  21. The Cabinet Office advised the Commissioner that they were applying this exemption to **some** of the withheld information.
  22. Having had sight of the withheld information, the Commissioner is satisfied that section 37(1)(a) is engaged to those parts of the information to which the Cabinet Office have applied the exemption.

## **Section 42 – legal professional privilege**

23. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
24. There are two categories of legal professional privilege (LPP): advice privilege and litigation privilege.
25. In submissions to the Commissioner the Cabinet Office advised that **some** of the withheld information attracted legal advice privilege. The Cabinet Office confirmed that the confidential communications were made for the dominant purpose of obtaining and giving legal advice. The Cabinet Office advised that the respective communications were between professional legal advisers in the Cabinet Office Legal Advisers division of the Government Legal Department who were acting in their professional capacity, and officials in the Cabinet Office, and officials in

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/communications-with-his-majesty-and-the-awarding-of-honours-section-37/>

the Crown Office and in the Ministry of Justice who were working on the Letters Patent<sup>2</sup>.

26. The Cabinet Office advised that although some of the email chains contained updates on the situation rather than being explicit requests for, or provision of, legal advice, they considered that they were still covered by LPP. The Cabinet Office noted that The Practical Law Company practice note on LPP says:

'In any lawyer/client relationship there will be a continuum of communication between a lawyer and the client. Where information is passed between the two as part of that continuum, aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A communication from the client may end with a specific request asking for advice, but even if it does not, it will usually be implied in the relationship that the lawyer will at each stage (whether or not specifically asked) tender appropriate advice (Balabel and another v Air India [1988] Ch 317).

27. The Cabinet Office confirmed that none of the withheld information covered by section 42(1) has been made public, and had not been shared outside of Cabinet Office Legal Advisers, the Cabinet Office or the Crown Office. They were therefore satisfied that the privilege attached to the respective information has not been waived.
28. Having had sight of the relevant parts of the withheld information, the Commissioner is satisfied that it is subject to legal advice privilege.

### **Public interest test**

29. Section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in disclosure of the information is equal to or stronger than the public interest in maintaining the exemption.

30. In submissions to the Commissioner the complainant contended that:

'The decision in relation to which the legal advice was sought (i.e. the conferral of the honour) has been completed. There is no need for a safe space for this advice. The matter is not live, nor is it related to advice that protects the rights of individuals. There should be no chilling

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<sup>2</sup> This is the instrument that conferred the title of Duke of Edinburgh

effect in relation to safeguarding legal communications where the context of those legal communications is exceptionally rare’.

31. The complainant further contended that:

‘The unique nature of the honour and the need to scrutinise government decision making in relation to its conferral (and in particular its legal ramifications) means public interest favours disclosure, even if the factors asserted by the Cabinet Office are present. Without disclosure of the advice sought, it is not possible to see with any transparency how and why a dukedom for life was conferred’.

32. The complainant also noted that in their internal review, the Cabinet Office had relied upon a general statement about the nature of legal communications, and asserted that they had not demonstrated why the public interest in this specific case favoured the non-disclosure of the legal advice. The complainant stated that if the Cabinet Office ‘cannot demonstrate specific factors about this honour and about this legal advice, then it should be assumed the balance favours disclosure’.

33. In submissions to the Commissioner, the Cabinet Office acknowledged the public interest around the bestowal of the title in question. They recognised that disclosure of advice from lawyers would help individuals to understand the legal context for the advice provided. The Cabinet Office stated that:

‘There is a public interest in public authorities and senior officials being accountable for the quality of their decision-making. Ensuring that the advice was given on the basis of good quality advice is part of that accountability. Release of the information covered by section 42 would help demonstrate this to the public’.

34. The Cabinet Office advised the Commissioner that there is information on the conferral of the title on the Royal website<sup>3</sup>, and in their original response to the request they had provided an explanation of the position in relation to the conferral of the Dukedom of Edinburgh (that it was available to be conferred on different terms than which it was created) and that the conferral was not accompanied by a right to sit in the House of Lords.

35. The Cabinet Office contended that the transparency and accountability in favour of disclosure of the withheld information had to be weighed against the factors in favour of maintaining the exemption.

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<sup>3</sup> [The King confers The Dukedom of Edinburgh upon The Prince Edward | The Royal Family](#)

36. In submissions to the Commissioner, the Cabinet Office advised that they fundamentally disagreed with the complainant's contentions. They submitted that the potential disclosure of the legal advice should not be viewed in isolation. They stated that:

'The advice concerns the conferral of the title of Duke of Edinburgh. It involves, amongst other things, the discussion of the Sovereign's power in this area and the content of the Letters Patent conferring the honour. Cabinet Office Legal Advisers frequently advise the Cabinet Office and the Crown Office on the conferral of a variety of appointments and honours by the Sovereign, many of which are high profile and therefore may be of general interest to members of the public. They also frequently advise on the content of a variety of Letters Patent and other instruments approved by the Sovereign (for appointments/honours and other very significant constitutional matters).'

37. The Cabinet Office contended that disclosure of the relevant information would have a very detrimental impact on the Cabinet Office and Crown Office being able to obtain and receive full and frank legal advice on these matters in the future. 'Disclosure of the advice would be harmful to the open and collaborative way in which Cabinet Office Legal Advisers advise the Cabinet Office and Crown Office'.

38. The Cabinet Office drew the Commissioner's attention to the recent First-tier Tribunal judgement in *National Highways Ltd v Information Commissioner and Dr Emma Tristram* [2023] UKFTT (EA/2022/0416), which discussed the application of the public interest test for information attracting LPP. The Commissioner notes that that case concerned the application of regulation 12(5)(b), the course of justice exception under the Environmental Information Regulations 2004, but the Tribunal's findings have similar application to section 42 of FOIA.

39. In the *National Highways* case, the FTT noted that LPP is not simply one public interest to be weighed in the balance like any other, but that 'LPP carries a different order of weight from that attached to other exemptions'. The FTT stated that:

'The fact that a particular plan or project is significant and may have a severe impact on particular groups or communities or on public finances, cannot begin to justify the disclosure of privileged advice. If the law were otherwise, LPP would long ago have become a dead letter. What the case law shows is that any arguable attempt to circumvent LPP must rest on a specific factor or circumstance relating to the advice, not to the wider project or controversy with which the advice is concerned'.

40. In submissions to the Commissioner, the Cabinet Office cited the judgement of the Upper Tribunal in *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC), noting that it was binding on the



Commissioner and submitting that the judgement should be considered alongside their own arguments, to enable a consistent decision to be made on the circumstances of the present case.

41. The Cabinet Office noted that the Commissioner had accepted these general arguments in his decision notice IC-165131-P8G1 (20 February 2024)<sup>4</sup>. In this recent case the Commissioner upheld the decision of the Cabinet Office to withhold legal advice relating to the Government's issuing of COVID-19 vaccine exemption certificates. A key factor in the Commissioner's decision in that case was that, at the time of the request, the legal advice was relatively recent and the policy to which the advice related was live and current.
42. In submissions to the Commissioner, the Cabinet Office contended that LPP plays a crucial role in the justice system and as the FTT had stated in the *National Highways* case, 'a compelling reason has to be shown to justify denying any public body the right to rely on its protection in any particular case'. The Cabinet Office advised the Commissioner that they did not consider 'the complainant's personal view' to be a compelling reason in this case and they contended that 'the unique nature of the conferral does not justify the disclosure of privileged legal advice'.
43. The Cabinet Office noted that at the time of the complainant's request, the advice was relatively recent, and stated that disclosure would depart from the cardinal principle that LPP will protect the confidentiality of legal advice, unless there is a weighty and compelling reason to the contrary. Furthermore, the Cabinet Office submitted that:

'If information regarding the seeking, giving and content of legal advice were to be disclosed in the context of this request, legal professional privilege would be waived in respect of that information. Therefore, the Cabinet Office would not be able to claim privilege for the disclosed material and its ability to protect the UK Government's position might be adversely affected'.
44. The Cabinet Office cited the following comments of the UT in the *DCLG* case:

'LPP has an in-built weight derived from its historical importance, it is a greater weight than inherent in the other exemptions to which the balancing test applies, but it can be countered by equally weighty

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<sup>4</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4028703/ic-165131-p8g1.pdf>

arguments in favour of disclosure. If the scales are equal disclosure must take place'.

45. In the present case, the Cabinet Office advised the Commissioner that they considered that the balance of the public interest factors favoured maintaining the exemption because 'there is no compelling reason to the contrary and disclosure would be likely to erode the confidential 'safe space' in which legal advice is sought and provided'. They therefore contended that disclosure would not be in the public interest.

#### *Commissioner's assessment*

46. In respect of the Cabinet Office's contention as to the waiver of LPP that would take place if the relevant parts of the withheld information were to be disclosed, the Commissioner would note that arguments about waiver have no relevance in this context<sup>5</sup>. This is because FOIA is concerned with disclosures to the world at large rather than disclosures to a limited audience. In an FOIA context, LPP will only have been lost if there has been a previous disclosure to the world at large and the information can therefore no longer be considered confidential. In this case the Commissioner recognises that the information requested by the complainant has not previously been disclosed to the world at large.
47. The Commissioner would not entirely agree with the FTT's assertion in the *National Highways* case cited by the Cabinet Office. The underlying issue or controversy to which legal advice was sought or provided may well have a bearing on the public interest weight of the legal advice itself, and thus be a factor in favour of disclosure.
48. This was recognised by the Tribunal in *Mersey Tunnel Users' Association (MTUA) v Information Commissioner and Merseytravel* (EA/2007/0052). In that case the Tribunal held as follows:

'We are not persuaded that the public interest in maintaining the exemption is as weighty as in the other cases considered by the Tribunal; and in the opposing scales, the factors that favour disclosure are not just equally weighty, they are heavier. We find, listing just the more important factors, that considering the amounts of money involved and the numbers of people affected, the passage of time, the absence of litigation, and crucially, the lack of transparency in the authority's actions and reasons, that the public interest in disclosing the information clearly outweighs the strong public interest in maintaining the

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<sup>5</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-42-legal-professional-privilege/#lost>

exemption, which is all the stronger in this case because the opinion is still live'.

49. In *DBERR v O'Brien v Information Commissioner* [2009] EWHC 164 QB Wyn Williams J stated that:

'The proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure **(including the underlying public interests which favoured disclosure)** (Commissioner's emboldening) were of equal weight at the very least'. Furthermore, in any consideration of the competing public interest factors attached to information which is subject to section 42, the outcome in those cases where it is deemed that the public interest balance lies in favour of disclosure, is not to 'circumvent' LPP, i.e. to somehow avoid or work around it, but rather to fully acknowledge and accept that LPP attaches to the respective information, but to recognise that the public interest case for disclosure is equal to, or stronger than, the case for maintaining the exemption.

50. However, these qualifications notwithstanding, the Commissioner entirely agrees and accepts that LPP carries a strong inbuilt public interest.

51. The UT in the *DCLG* case referenced the previous findings of the Information Tribunal in *Rosenbaum v Information Commissioner and House of Lords Appointments Commission* (EA/2008/0035). In that case the Tribunal stated that:

'The Tribunal does not agree with Mr Rosenbaum that LPP merits only 'some weight'. From the cases referred to above, this Tribunal is satisfied that LPP has an in-built weight derived from its historical importance, it is a greater weight than inherent in the other exemptions to which this balancing test applies, but it can be countered by equally weighty arguments in favour of disclosure. If the scales are equal, disclosure must take place'.

52. In the *DCLG* case the UT noted that the weight which should properly be given to the exemption in any event, by reason of the risk that disclosure would weaken the confidence of public bodies and their advisers in the efficacy of LPP, may vary from case to case. The UT noted that, 'if, for example, the requested information is very old, or relates to matters no longer current, a disclosure may damage that confidence to a lesser extent than if the information was recent, or relates to matters still current'. The UT also stated that, 'although a

heavy weight is to be accorded to the exemption, it must not be so heavy that it is in effect elevated into an absolute exemption'.

53. In the present case the Commissioner notes, as the complainant has correctly contended, that the matter to which the legal advice relates – namely the conferral of the title of Duke of Edinburgh on HRH Prince Edward, was no longer live at the time of the request (the announcement of the conferral of the title having been made on 10 March 2023). However, it is the case that at the time of the request the legal advice was of very recent provenance, being only several weeks old.
54. In arguing that there is no need for a safe space for this advice, the complainant has also asserted that the matter with which it is concerned is not related to advice that protects the rights of individuals. However, that is not correct. The conferral of the title of Duke of Edinburgh is, as the Cabinet Office have stated, a matter of personal prerogative of HM The King, and affects and concerns HRH Prince Edward. Whilst both are clearly high profile and public figures, that does not mean that they have no right to privacy in respect of confidential legal advice which concerns them. This case is not one whereby, as in the *Mersey Tunnel* case, there are '*no personal overtones at all*'. In that case the Tribunal held that if the issues addressed in the advice do not affect individuals significantly, there is less inbuilt weight attaching to the exemption. Clearly, the issue addressed in the advice which is the subject of the present case, has a very significant and personal significance to HRH Prince Edward.
55. Whilst the Commissioner does not agree with the complainant's contention that there should be no risk of chilling effect in relation to safeguarding LPP where the context of the legal communications is exceptionally rare, he does consider that the degree and impact of that risk can be reduced where the subject/issue is very specific and discrete. As the Cabinet Office has accepted, the conferral giving rise to the relevant legal advice is unique in nature, making the circumstances in which the legal advice was provided in this case exceptionally case specific.
56. In respect of the Cabinet Office's contention that the potential disclosure of the legal advice in this case should not be viewed in isolation, the Commissioner accepts that Cabinet Office Legal Advisers will frequently advise the Cabinet Office and the Crown Office on the conferral of a variety of appointments and honours by the Sovereign. However, each of those conferrals will necessarily be case specific, and few, if any, are likely to entail consideration of the unique issues which surround the conferral of the title in this case. Consequently, the Commissioner is somewhat unpersuaded by the Cabinet Office's general contention that disclosure in this case would have '*a very detrimental impact*' on the

Cabinet Office and Crown Office being able to obtain and receive full and frank legal advice '*on these matters*' in the future.

57. However, in some respects in particular of the Cabinet Office's submissions on this point the Commissioner would agree and accept that disclosure would have a significant chilling effect. This is detailed in a Confidential Annex to this notice as to refer to it here would effectively disclose some of the withheld information.
58. The complainant contends that even if the factors asserted by the Cabinet Office are present, the unique nature of the honour and the need to scrutinise Government decision making in relation to its conferral, and in particular its legal ramifications, means that the public interest favours disclosure. However, this overlooks some important contextual information which the Cabinet Office provided in their original response to the request.
59. In that response the Cabinet Office advised that Dukedoms of this nature are conferred by The Sovereign in a personal capacity and not on the advice of Government. That is to say, the decision to confer the title of Duke of Edinburgh upon HRH Prince Edward, was the personal prerogative of HM The King and not a decision taken by the Government. Furthermore, the Cabinet Office confirmed that as a peerage for life conferred outside of the Life Peerages Act 1958, the title of Duke of Edinburgh does not bestow any right to sit in the House of Lords.
60. If the conferral of the title on HRH Prince Edward had been a Government decision, and if the conferral had bestowed a right to sit in the House of Lords, the Commissioner considers that the public interest weight of disclosure of the legal advice would have been potentially compelling, since there would have been a clear and strong public interest in transparency and accountability of a Government decision that gave scope for a member of The Royal Family to participate in and influence the scrutiny of Government legislation, and consequently the everyday lives of the public.
61. However, this conferral was not made in such circumstances and does not have that effect. The conferral was made in the personal and not the Executive prerogative of HM The King, and that the Sovereign has such a personal prerogative is well established. For example, during discussions about the possibility of HM Queen Elizabeth II giving the Duke of Edinburgh a princely title in 1955, the Lord Chancellor, Viscount Kilmuir considered whether the Queen should act on formal advice. He concluded that it would be '*expedient*' that, 'in this matter She should have the advantage of receiving formal advice, although it is a matter

that touches Her so personally that no objection, in my opinion, could be taken if She declined to act upon the advice'<sup>6</sup>.

62. The Commissioner nevertheless recognises and accepts that the conferral and the legal issues surrounding the same is one of constitutional significance and interest, particularly to constitutional historians, given how rare such conferrals have been made. That being the case, the Commissioner recognises and accepts that the legal advice concerning the conferral carries some legitimate public interest weight in transparency (less so accountability as the decision to confer the title was the personal prerogative of HM The King and not the Government). However, as the Cabinet Office have correctly stated, the conferral of the title has had no significant impact on the lives of citizens. The Commissioner considers that this fact alone substantially limits the public interest weight in disclosure of the relevant information, both in terms of transparency and accountability.
63. Whilst the Commissioner considers that the sensitivity of the legal advice in this case is less than which is often carried by information subject to LPP, given that the matter to which it relates was not live at the time of the request and the unique/standalone nature of the conferral, he also recognises that the advice was of extremely recent provenance at the time of the request.
64. In addition to the public interest surrounding the issue to which the legal advice relates, the Commissioner has considered the significance of the actual advice (i.e. its content) and what it would reveal, were it to be disclosed. The Commissioner does not consider, for reasons which he explains in the Confidential Annex, that disclosure of the legal advice would appreciably serve some of the public interest arguments which the complainant has advanced.
65. The complainant has contended that disclosure of the withheld information is necessary in order to understand the legal ramifications of the conferral. However, the Commissioner does not consider that any such ramifications would extend beyond this very specific and rare conferral. It is clear that the title conferred to HRH Prince Edward is a non-hereditary life peerage which does not carry any right to sit in the House of Lords (the Commissioner considers that if the conferral had

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information (namely that concerning legal advice) is also exempt from disclosure under section 42. The Commissioner has addressed the application of section 42 above, and so his public interest consideration below is concerned with those parts of the withheld information to which section 42 does **not** apply but to which section 37(1)(b) is engaged.

### **Public interest test**

72. Section 37(1)(b) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has therefore to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

#### Public interest in maintaining the exemption

73. In submissions to the Commissioner, the Cabinet Office contended why they considered that the public interest favoured maintaining the exemption to those parts of the withheld information which were in scope of this exemption. Some of the arguments provided by the Cabinet Office cannot be included in this decision notice because they would reveal the content of the withheld information. Therefore, parts of the Cabinet Office submissions are addressed in the Confidential Annex to this notice. However, the Commissioner has endeavoured to include in this notice as much of the Cabinet Office case for maintaining the exemption as possible.

74. With regard to the fact that the conferral of this particular title had already been made at the time of the complainant's request in April 2023, the Cabinet Office noted that the exemption protects information that relates to the conferral by the Crown of **any** honour or dignity. 'It does not follow, therefore, that the exceptional nature of the conferral and the timing of it in relation to the request, takes precedence over the need for confidentiality in the provision of advice relating to the conferral'.

75. The Cabinet Office stated that they appreciated the importance of transparency in Government that encourages public interest, and the public's awareness of how the honours system works, and the way in which decisions are taken. 'We recognise that the decision to confer a title on a Member of the Royal Family has a public significance. Generally, our view is that it is in the public interest that the process of awarding of honours and dignities is accountable and transparent'.

76. The Cabinet Office recognised that, 'the usual Honours List process and the House of Lords appointment process are not directly relevant in this case', and acknowledged that, 'the conferral in question does not fall within the usual honours process'. However, the Cabinet Office stated that they do not accept that the unique nature of the conferral increased



the public interest in disclosure of information relating to it. They noted that the conferral of the title in question, and those of other Members of the Royal Family, 'is a decision for The King personally, and is not taken on the advice of the Government'.

77. The Cabinet Office stated that they were strongly of the view that there is no strong countervailing public interest that outweighs maintaining the exemption, stating:

'The awarding of the title in question has no significant impact on the lives of citizens, and although there is a general public interest in transparency within the honours system, we consider there is a stronger public interest in officials being able to give and receive advice of the highest quality in relation to honours and dignities'.

78. The exceptional nature of the conferral, in the Cabinet Office's view, 'does not negate concerns about the need for confidentiality around the consideration of the conferral of honours or dignities, including in this case'. The Cabinet Office contended that there is a strong public interest in maintaining confidentiality around the award of individual titles. They contended that:

'Those giving advice need freedom to offer advice, and this has to take place without fear of the potential or public discussion of decisions made in this case. For example, disclosure would be likely to invite judgements about whether the advice was sufficiently comprehensive. The effect of this would be to undermine the efficacy of the provision of advice within this process'.

79. The Cabinet Office further stated:

'We consider that the provision of such advice on the constitutional issues arising from the award of a title (even if, as in this case, it does not relate to the suitability of a proposed recipient of an honour or dignity) when given in the safe space, contributes to the integrity of the process and contributes to effective decision-making. This information, whilst specific to the circumstances surrounding the conferral in question, is of relatively recent provenance and its release would erode the safe space in which sensitive advice of any kind can be provided freely'.

80. The Cabinet Office also contended that the information's public interest value, in respect of understanding how these titles are conferred, was limited.

#### Public interest in disclosing the information

81. In submissions to the Commissioner, the complainant contended that in responding to his request, the Cabinet Office should have 'considered

the application of the public interest test in relation to a request for information on the specific conferral of the unique honour of a dukedom for life, rather than a request for information on the general conferral of honours'. The complainant was of the view that the arguments which he had made were specific to the information requested, whereas the Cabinet Office had, 'not demonstrated why section 2(2)(b) is engaged in all the circumstances of this case'.

82. The complainant noted that his request did not only concern a single specific and unique honour, the conferral of a dukedom for life, but also concerned the, 'legal, parliamentary and constitutional effects of a distinction between a dukedom for life and a hereditary peerage – not simply the honour conferral decision itself'.
83. In submissions to the Commissioner the complainant advised that 'only 31 people in the entire history of Britain have ever been given a life peerage outside the terms of the Appellate Jurisdiction Act 1876 and the Life Peerages Act 1958. These numbers should be contrasted with the larger numbers of hereditary peers and the many tens of thousands of people granted honours in the modern and standard Birthday and New Year Honours Lists'.
84. Until the 2023 conferral of the Dukedom of Edinburgh, the complainant asserted that, 'there is no apparent record that any life peerage outside the Appellate Jurisdiction Act 1876 or the Life Peerages Act 1958 has been created. Similarly, there is consequently also no apparent record of any new life peerage higher than the rank of baron or baroness'.
85. Noting that the Cabinet Office had not identified any other example in their response and advising that nor do the House of Lords Library Briefing Papers, the complainant noted that, 'it should therefore be the case that, since the Victorian era, no person has received an honour like the Dukedom of Edinburgh that is the subject of this request and, in all of history, only 31 people have done so'. The complainant stated that the honour which is the subject of his request, a dukedom for life, should therefore be considered an exceptionally rare honour, and one that is extremely unlikely to be conferred on any other individual.
86. The complainant contended that, 'transparency in government is of paramount importance, as is encouraging public interest in and interaction with the work of government. This is particularly true when the government takes unique and strange decisions – such as the conferral of a dukedom for life by the Crown. This is something that has not been done since at least the Victorian era and, even before then, has only been done exceptionally rarely'.

87. The complainant further contended:

'Ensuring conferrals are handled in confidence is not relevant (or at least of significantly reduced relevance) in the context of the conferral of a dukedom for life. This is a unique honour and not one for which individuals will regularly be considered. The implications of granting a dukedom for life are more significant than the conferral of standard honours in the usual biannual Honours Lists. A dukedom for life is not an honour that is considered in those Lists, nor is it considered for appointments to the House of Lords (as it is outside the Acts mentioned above). The usual biannual Honours Lists and usual House of Lords appointment process should therefore be unaffected by the disclosure of any information in relation to this honour, given its unique nature'.

88. The complainant contended that the 'safe space' argument advanced by the Cabinet Office did not apply in this case, as the honour had already been conferred and active consideration of any other individual for such a unique honour should not be relevant.

89. With regard to the 'chilling effect', the complainant noted that the Commissioner's guidance stated that, 'routine disclosure' could create this by eroding confidentiality. However, given the extremely rare nature of the honour in this case, the complainant contended that it could not be considered 'routine' as a result. The complainant contended that:

'The chilling effect appears most relevant to disclosure of honours that are routinely granted – knighthoods, MBEs, life peerages under the Life Peerages Act, to give a few – it should not be relevant to the conferral of a dukedom for life. The ICO guidance also draws attention to nominees and the nomination part of the process for honours – but a dukedom for life conferred on a brother of His Majesty The King does not involve a standard nominee/nomination arrangement like the other standard honours'.

90. Finally, the complainant stated that the Cabinet Office had not made any distinction between any of the information it held within scope of the request, instead applying a blanket refusal to disclose anything.

#### *Balance of the public interest arguments*

91. The Commissioner recognises and accepts that, in order for the honours system to operate effectively and efficiently, it is important that there is a degree of confidentiality and a safe space for those involved in the process to freely and frankly discuss nominations. The Commissioner also accepts that if views, opinions and commentary about nominations that are provided in confidence, were later disclosed into the public domain, it would be likely to result in individuals in the future being less willing to make similar contributions and/or provide less candid

comments and input. The Commissioner considers that disclosure of information that may adversely impact on this confidentiality, and in turn harm the effectiveness of the honours system, would not be in the public interest.

92. However, the Commissioner considers that the above general and well established principles have less application and public interest weight in the context of this specific case. As the complainant has contended and the Cabinet Office accepted, the usual Honours List process and the House of Lords appointment process are not '*directly*' relevant in this case and the conferral in question does not fall within the usual honours process. The Commissioner considers that these facts inevitably lessen, to some degree, the strength of the public interest usually attached to protecting the confidentiality of honours related information.
93. The Commissioner does not consider, however, that the unique nature of the conferral and the way in which it was made, entirely negates or removes the need for, and importance of, confidentiality in respect of the discussions surrounding the same. The Commissioner has noted those parts of the Cabinet Office submissions on this point which are contained in the Confidential Annex, and accepts that disclosure of the information in this case would have some chilling effect, albeit not to the extent usually present in honours related cases, given the exceptional rarity of the type of conferral concerned in this case.
94. Whilst the Commissioner accepts that the issue to which the discussions in this case related was no longer live at the time of the request, the discussions were extremely recent (i.e. weeks old). The Commissioner considers that this proximity significantly increases the sensitivity of the withheld information, particularly within the confidential context of honours related information concerning individuals.
95. In terms of the public interest weight and strength of the information withheld under section 37(1)(b), the Commissioner would note that those parts of the withheld information as a whole which might be concerned with any '*legal*' effects of a distinction between a dukedom for life and a hereditary peerage, would be exempt under section 42(1) and the Commissioner has addressed that exemption above.
96. With regard to the public interest weight and value of the information withheld under section 37(1)(b), and what public interest benefit or purpose would be served by disclosure, the Commissioner notes that in his request for information about the conferral, the complainant particularly asked for information about the title being a dukedom for life rather than a hereditary dukedom, and 'the legal, parliamentary and constitutional effects of that distinction (including entitlement to sit in the House of Lords)'.

97. The Commissioner considers that key aspects of these legitimate public interest questions have already been publicly and appropriately addressed, including through the original response to the request. As the Cabinet Office stated in that response, 'as a peerage for life conferred outside of the Life Peerages Act, there is no right to sit in the House of Lords that accompanies the bestowal of the title Duke of Edinburgh and no writs will be issued'. As the conferral was made under HM The King's personal prerogative, and not as a result of a Government decision, and as the conferral has no practical or significant impact on the lives of citizens, the Commissioner considers that the public interest strength and weight of the withheld information should not be overstated and is not compelling.
98. In making this assessment, the Commissioner fully recognises and accepts that information relating to the conferral and the legal and constitutional questions or issues arising from the same, is not without a notable and legitimate public interest, especially given how exceptionally rare such conferrals are in the history of the UK. However, given the very limited real world impact and effect of this particular conferral, its exceptional nature notwithstanding, the Commissioner is of the view that whilst the withheld information would doubtless be of particular interest to constitutional historians and experts, and to a lesser extent the public as a whole, its actual public interest weight and value is limited.
99. Ultimately, this conferral was a personal decision of HM The King, which bestowed upon his younger brother a title which for decades has been closely associated in the public mind with the famous youth awards programme founded in the UK in 1956 by the late Prince Philip, the previous holder of the Duke of Edinburgh title. In that regard, the conferral clearly has both personal and representative significance to both HM The King and HRH Prince Edward<sup>9</sup>.
100. The Commissioner recognises and appreciates that any such exercise of the monarch's personal prerogative, particularly an exceptionally rare one such as this conferral, does not take place in a constitutional vacuum, and will of course carry a public interest from that perspective. However, given that this conferral can more accurately be described as ceremonial rather than consequential, the Commissioner is not persuaded that the public interest which the withheld information carries, is sufficient to outweigh the public interest in protecting the confidentiality of information relating to honours in respect of specific

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<sup>9</sup> [King Charles gives Prince Edward 'Duke of Edinburgh' title | Monarchy | The Guardian](#)

persons. That is especially so where, as here, such information was of extremely recent provenance at the time of the request.

101. The Commissioner therefore finds that the public interest in the information withheld under this exemption is outweighed by the public interest in maintaining section 37(1)(b) to the same. However, in the specific circumstances of this case, the Commissioner finds the margin of the public interest balance to be narrower in the information solely exempt under section 37(1)(b) than it is in respect of the information to which section 42(1) applies.

### **Sections 35(3) and 35(1)(c) – Law Officers’ advice**

102. Section 35(3) provides that the duty to confirm or deny whether information is held does not arise in relation to information which is (or would be if held) exempt from disclosure under section 35(1) of FOIA.

103. Section 35(1)(c) provides that information held by a Government department is exempt from disclosure if it relates to ‘the provision of advice by any of the Law Officers or any request for the provision of such advice’. Section 35(5) states ‘the Law Officers’ for England as being the Attorney General and Solicitor General.

104. The Law Officers are the principal legal advisers to the Government. Their core function is to advise on legal matters, helping Ministers to act lawfully and in accordance with the rule of law. They must be consulted by Ministers or their officials before the Government commits itself to critical decisions involving legal considerations. They also have a role in ensuring the lawfulness and constitutional propriety of legislation<sup>10</sup>.

105. Section 35(1)(c) reflects the longstanding constitutional convention that Government does not reveal whether Law Officers have or have not advised on a particular issue, or the content of any such advice. The purpose of this confidentiality is to protect fully informed decision-making by allowing government to seek legal advice in private, without fear of any adverse inferences being drawn from the content of the advice or the fact that it was sought. It ensures that Government is neither discouraged from seeking advice in appropriate cases, nor pressured to seek advice in inappropriate cases.

106. As the Commissioner’s guidance makes clear, the neither confirm nor deny (NCND) provision cannot be used to disguise the content of information, the existence of which it is acknowledging. Therefore, where a public authority confirms that some legal advice is held, they

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<sup>10</sup> See Chapter 6 of [The Cabinet Manual \(1st edition October 2011\)](#).

cannot then use section 35(3) to conceal whether or not that advice is from a Law Officer.

107. Therefore, in this case, the Cabinet Office would not be able to confirm that they hold legal advice, withhold that advice under section 42(1) and at the same time use section 35(3) to neither confirm or deny whether *that same advice* originated from a Law Officer. This is because section 35(3) provides an exemption from the duty to confirm or deny whether the requested information is held.
108. However, it would be open to the Cabinet Office to neither confirm nor deny whether, *in addition to* the information withheld under section 42(1), they also hold information relating to advice from a Law Officer under section 35(3), regardless of whether any such additional information is held.
109. In submissions to the Commissioner, the Cabinet Office confirmed that they were applying the NCND exclusion at section 35(3) **in addition to** (i.e. not to information also covered by) section 42(1).
110. Based on the broadly worded scope of the complainant's request, and the subject to which the information requested relates, the Commissioner is satisfied that section 35(3) is engaged.

### **Public interest test**

111. Section 35 is subject to a public interest test under section 2(1)(b) of FOIA. An NCND response can only be maintained if the public interest in doing so outweighs the public interest in confirming or denying whether the information is held.

#### *Public interest arguments in favour of confirming or denying*

112. In submissions to the Commissioner the complainant stated that the public interest arguments which he had made in respect of section 42(1) applied equally to section 35(3), such as his contention that there was no need for a safe space on this issue, given that the conferral of the title had already been made at the time of his request. In addition to those arguments the complainant contended that there was a public interest, 'in knowing whether the government consulted senior internal lawyers about a unique constitutional issue'.

*Public interest arguments for maintaining the NCND response*

113. In submissions to the Commissioner, the Cabinet Office acknowledged and accepted that there is a public interest in knowing whether decisions of this nature have been taken with the benefit of sound legal advice. However, they contended that the public interest in knowing if Law Officers' advice is held was outweighed by the strong public interest in maintaining the exclusion. They noted that the NCND response supports the longstanding constitutional convention that government does not reveal whether Law Officers have or have not advised on a particular issue, or the content of any such advice. The Cabinet Office highlighted that the convention is recognised in paragraph 2.13 of the Ministerial Code, which states that:

'The fact that the Law Officers have advised or have not advised and the content of their advice, must not be disclosed outside Government without their authority'<sup>11</sup>.

114. The Cabinet Office contended that in this particular case there were no factors in favour of confirming or denying that were sufficiently strong to override the public interest in maintaining the exclusion in the exemption. The Cabinet Office advised that in their view, the information which they had provided to the complainant in their original response to his request helped show that the decision to confer the title of Duke of Edinburgh for life was soundly made. They had confirmed that they hold information to which section 42 applies, which shows that the decision was made with the benefit of legal advice, even though the legal advice itself had not been disclosed.

*Balance of the public interest arguments*

115. The Commissioner recognises the legitimate public interest attached to the specific conferral to which the information requested relates. Given the constitutional significance and extremely rare nature of the conferral, the Commissioner would agree and accept that there is a public interest in knowing whether the Government consulted the Law Officers', i.e. the most senior legal advisers to the Government, about the matter.

116. However, there would have to be strong and compelling public interest factors in favour of confirming or denying that the Government consulted the Law Officers', in order to outweigh the strong and

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<sup>11</sup> [2022-12-22 Ministerial Code Final.docx \(publishing.service.gov.uk\)](#)



important public interest in protecting the longstanding convention that Government does not reveal whether Law Officers' have or have not advised on a particular issue. The Commissioner does not consider that there are such sufficiently strong and compelling public interest factors in this case. The Commissioner also considers that the public interest in knowing that this decision was informed by appropriate legal advice, has proportionately been met by the Cabinet Office having confirmed that some of the information within scope of the complainant's request is subject to LPP (i.e. exempt under section 42(1)).

117. The Commissioner's decision is therefore that the Cabinet Office were entitled to rely on section 35(3) to NCND whether they hold information falling within the scope of section 35(1)(c).

### **Section 40(2) – Third party personal data**

118. In submissions to the Commissioner, the Cabinet Office advised that they were applying section 40(2)(third party personal data) to the names of seven junior (i.e. below Senior Civil Servant grade) civil servants who are named in the withheld information.

119. The Cabinet Office correctly noted that in previous cases, the Commissioner has, generally speaking, recognised that the personal details/contact information of departmental officials below Senior Civil Servant grade are legitimately exempt under section 40(2).

120. The Cabinet Office advised the Commissioner that they accepted that a legitimate interest was being pursued by the complainant in seeking to understand the decision to confer the Dukedom of Edinburgh as a life peerage, but that 'there is no evidence that the complainant is interested in knowing the identities of those officials named in the information we hold'.

121. The Commissioner notes that the arguments advanced by the complainant for disclosure of the information requested have reasonably and appropriately focused on the substantive issue to which the information relates, i.e. the conferral of the aforementioned title, rather than any individual officials named in the information. This being the case, the Commissioner considers it unlikely that the complainant would have challenged the use of this exemption to the seven junior civil servants, had the Cabinet Office applied the same earlier at the internal review stage.

122. The Commissioner considers that the names of the seven junior civil servants to which the Cabinet Office have applied section 40(2) would in any case – in these particular circumstances – be exempt from disclosure under section 37(1)(b) (along with any other individuals named in the withheld information). However, for completeness and the avoidance of doubt, the Commissioner is satisfied that the names of the

seven junior civil servants are exempt from disclosure under section 40(2). Specifically, although there is some legitimate interest in the disclosure of these names, the Commissioner does not consider disclosure to be necessary in order to meet that interest.<sup>12</sup>

## Other matters

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123. Internal reviews are not subject to statutory timescales. However, the Commissioner's guidance<sup>13</sup> to public authorities is clear and well established, in that he expects most internal reviews to be provided within 20 working days, with a maximum of 40 working days in certain circumstances, unless there are legitimate reasons why a longer extension is necessary. In this case the Cabinet Office took more than five months to provide the internal review. In confidential submissions to the Commissioner, the Cabinet Office explained why the process of providing the internal review took so long as it did. The Commissioner acknowledges the explanation provided but nevertheless considers that the time taken to provide the internal review was excessive and not reasonable.

124. In submissions to the Commissioner, the complainant noted that the Cabinet Office first made him aware that they were applying sections 42(1) and 35(3) to the information which he had requested in their internal review, and the complainant therefore had no opportunity of challenging those exemptions directly with the Cabinet Office. The complainant stated that this was 'an unacceptable oversight in producing their initial response to my first request'.

125. Notwithstanding a public authority's obligations as to the application of exemptions under section 17(1) of FOIA<sup>14</sup>, the Commissioner recognises that a public authority may apply an exemption to information requested at any point in the request process (including appeal to the First-tier Tribunal) and that one of the purposes of an internal review is to rectify shortcomings or errors in an initial response. However, from the perspective of a requester, it is clearly less than satisfactory when a new

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<sup>12</sup> <https://ico.org.uk/for-organisations/foi/section-40-and-regulation-13-personal-information/part-three-the-first-condition-would-disclosure-contravene-the-data-protection-principles>

<sup>13</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

<sup>14</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-17-refusing-a-request-writing-a-refusal-notice/> - although the late application of an exemption may constitute a breach of section 17 in respect of its timing, that in itself does not invalidate the application of that exemption.

exemption(s) is applied by a public authority in an internal review, since it prevents the requester from challenging that exemption(s) directly with the public authority. The Commissioner also recognises that the complainant will likely have been frustrated by the amount of time taken to issue the internal review.

126. However, as the complainant has been able to provide the Commissioner with submissions on the use of these exemptions by the Cabinet Office, the Commissioner is satisfied that the complainant has, ultimately, been afforded the opportunity to challenge the outcome of the internal review.

## **Right of appeal**

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127. 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)

128. 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.

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

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