

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 November 2010

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Summary

The complainant asked the Ministry of Justice (the "public authority") to provide information relating to representations made by The Queen or the Royal Household regarding UK Freedom of Information law. The public authority withheld the disputed information on the basis of the exemptions at sections 35(1)(a) (formulation or development of government policy), 37(1)(a) (communications with Her Majesty), 40(2) (personal data) and 41(1) (information provided in confidence) of the Freedom of Information Act 2000 (the "Act").

The Commissioner's decision is that the exemption in section 37(1)(a) is engaged and that the public interest in maintaining the exemption outweighs that in disclosure. Therefore, he has not considered the applicability of the other exemptions. The public authority's handling of the request also resulted in a breach of a procedural requirement of the Act as identified in this Notice.

The Commissioner's role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. Changes to section 37 of the Act (communications with Her Majesty) have been enacted in the Constitutional Reform and Governance Act 2010, which received royal assent on 8 April 2010. These changes will, when brought into force, result in communications with the Sovereign, the Heir to the Throne and the second in line to the Throne becoming absolutely exempt from disclosure under the Act. Further information is also available on the House of Commons website.
3. At the time of the request in this case, the Government were considering whether to amend section 37 and other provisions of the Act, following publication of the report from the 30 Year Rule Review ¹.

The request

4. On 14 August 2009 the complainant made the following information request:

"Any representations made by Her Majesty, other members of the Royal Family of the Royal Household might have made [sic] in respect of UK Freedom of Information law or policy during the calendar years 2008 and 2009.

In addition I am considering making a second request Please let me know how many weeks worth of Royal Correspondence (starting from 14 August 2009 working backwards) I can request without exceeding the cost limit".

5. On 15 September 2009, one day outside the date for compliance, the public authority sent its response. It confirmed that it held information in respect of the first part of the request, but stated that this was exempt by virtue of the exemptions at sections 35(1)(a) (formulation and development of government policy), 37(1)(a) (communications with Her Majesty, etc.), 40(2) (personal information) and 41(1) (information provided in confidence). It stated that it did not hold any information within the scope of the second part of the request, explaining that:

¹ <http://www.justice.gov.uk/about/docs/government-response-30-year-rule-review.pdf>

"... we do not hold recorded information stating how many weeks or days worth of correspondence requester [sic] could get within the cost limit. To identify this, we would need to locate, retrieve and extract all relevant information, that would, in essence, take longer than 3.5 working days and would there [sic] engage section 12".

6. On 15 September the complainant requested an internal review. He stated:

"I believe disclosure is in the public interest therefore I do not accept the outcome of the public interest test. I felt the test failed to take account of the overwhelming public interest in ensuring that everyone is equal before the law".

7. On 20 December 2009 the complainant wrote to the Commissioner because, at this point, he had still not received a response to his request for an internal review. His complaint only referred to the first part of his request.
8. On 13 January 2010 the Commissioner acknowledged the complaint and also wrote to the public authority. In the meantime, on 12 January 2010, the public authority sent out its internal review; it maintained its earlier position.

The investigation

Scope of the case

9. On 8 June 2010 the Commissioner commenced his investigation. He sought clarification from the complainant concerning the scope of his complaint.
10. On 17 June 2010 the complainant confirmed that he wished the Commissioner to consider the exemptions applied to the withheld information in respect of the first part of his request.

Chronology

11. On 17 June 2010 the Commissioner raised initial queries with the public authority. He chased an acknowledgement of receipt on 23 June 2010 which was sent on the same day.

12. On 19 July 2010 the Commissioner chased a response to his queries. This was acknowledged on the same day and the Commissioner was advised that he would be given a revised response date.
13. On 20 July 2010 the Commissioner advised the public authority that it had already exceeded his stipulated response time but that he would allow a further 10 working days. On 26 July 2010 the public authority advised the Commissioner that it did not believe it would be able to meet this deadline as it was undergoing consultation with other parties. The Commissioner responded saying that he would be likely to issue an Information Notice if a response was not received.
14. On 26 July 2010 the public authority made a partial response which allowed the Commissioner to make some progress with his investigation. Its full response was submitted on 17 August 2010.

Analysis

Exemptions

15. As the exemption at section 37(1)(a) covers all the information held the Commissioner has considered this exemption first.

Section 37(1)(a) – communications with Her Majesty, etc.

16. This exemption states that:

*“(1) Information is exempt information if it relates to –
(a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household”.*

17. The request specifies ‘representations’ made by Her Majesty or other members of the Royal Household, i.e. those parties as the originators of any related information. The Commissioner has viewed the withheld information which consists of communications from the Deputy Private Secretary to The Queen to the public authority. The Commissioner’s established view is that such a communication should itself be treated as a communication from The Queen, although the Deputy Private Secretary is himself a member of the Royal Household in any event. The Commissioner is therefore satisfied that the withheld information clearly falls within the remit of this exemption.
18. Section 37 is a qualified exemption and is therefore subject to the public interest test set out in section 2(2)(b) of the Act, i.e. whether in

all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Under the public interest test in section 2 of the Act the presumption is in favour of disclosure, so if the arguments on both sides are equally weighted the Act requires disclosure of the information.

Public interest test

19. The public authority has provided the Commissioner with arguments to support its position that the public interest in relation to section 37(1)(a) favours maintaining the exemption. Furthermore, during the course of the Commissioner's investigation of this complaint, he has exchanged correspondence with the Cabinet Office in relation to a number of complaints (including this one) he has received about information requests submitted to a range of central government public authorities for correspondence with The Royal Household. In some instances the Cabinet Office has provided the Commissioner with submissions on the application of section 37(1)(a) and asked him to consider these submissions when reaching his decision in all cases involving requests for this type of information; the Commissioner has agreed to do so. Therefore, although for consistency and ease of reference the remainder of this Notice suggests that information or a particular submission has been provided by the public authority, it may be the case that it was in fact provided by the Cabinet Office on the public authority's behalf.
20. The complainant has also provided the Commissioner with arguments to support his view that the public interest favours disclosing the information.
21. The Commissioner has summarised these various submissions under two headings, arguments in favour of disclosing the information and arguments in favour of maintaining the exemption. The Commissioner has then gone on to set out his position on where the balance of the public interest lies in respect of the information in this case.

Public interest arguments in favour of disclosing the requested information

22. The public authority advised the complainant of the following arguments in favour of disclosure:

"We recognise there is a public interest in the role of the Royal Family generally and specifically with regard to their interaction with Government."

"We also acknowledge that there is a specific public interest with regard to any information held in this context, given the operation of the Act and the Prime Minister's announcement on 10 June that Government will look to provide greater protection for sensitive 'Royal' papers".

Public interest arguments in favour of maintaining the exemption

23. The public authority advised the complainant of the following arguments in favour of maintaining the exemption:

"... it must be noted that there is a well established constitutional Convention that correspondence between the Sovereign and Government is confidential in nature.

The Convention is an adjunct to the right of the Sovereign to be consulted by her Government, and to advise, encourage and warn the Government as appropriate.

The rights of the Sovereign could not be exercised effectively in the absence of confidentiality, as the political neutrality of the Sovereign could not be preserved.

These communications are regarded as subject to expectations of confidence, and it is of considerable public interest that they be treated as such".

24. The public authority has also advised the Commissioner that it believes there is a: *"...strong public interest in ensuring that the constitutional position of the Monarchy is not undermined by the disclosure of information such as this".* It also remarked that the Commissioner has acknowledged this position in a number of his previous decisions and it provided examples of these.
25. The complainant's public interest arguments in favour of disclosure were as follows:
- There is an overwhelming public interest in favour of disclosure in this case to determine whether or not the Royal Family are lobbying for greater secrecy in public life.
 - There is a strong public interest in having more open, democratic and accountable system of government.

Balance of the public interest arguments

26. Although not specified by the public authority, the Commissioner recognises the following arguments in favour of disclosure:
- An assumption of disclosure in most cases;
 - the general public interest favouring transparency and openness in government;
 - increased transparency leading to a greater accountability of public officials and an increased level of public understanding and engagement with the process of government.
27. These arguments are central to the operation of the Act and thus are likely to be deployed every time the public interest test is applied. The Commissioner does not consider that this diminishes their importance as they are fundamental and carry considerable weight.
28. In the circumstances of this case the Commissioner recognises that there is significant interest in, and debate surrounding, the proposed changes to the Act, which are likely to have a direct bearing on the future release of communications with the Royal Family and the Royal Household. Therefore he accepts that there is a clear public interest in knowing any views which may have been expressed by members of the Royal Family or Royal Household on these matters.
29. In correspondence with the Commissioner, the public authority referred to a previous Decision Notice² in which the Commissioner decided that the following four public interest factors can be said to be inherent in maintaining this exemption; it stated that the first and third bullet points were applicable to this particular case:
- protecting the ability of the Sovereign to exercise her right to consult, to encourage and to warn her Government and to preserve her position of political neutrality;
 - protecting the ability of the Heir to the Throne to be instructed in the business of government in preparation for when he is King and in connection with existing constitutional duties, whilst preserving his own position of political neutrality and that of the Sovereign;
 - preserving the political neutrality of the Royal Family and particularly the Sovereign and the Heir to the Throne to ensure the stability of the constitutional Monarchy; and

² http://www.ico.gov.uk/upload/documents/decisionnotices/2010/fs_50127361.pdf

- protecting the privacy and dignity of the Royal Family.
30. Having viewed the withheld information, the Commissioner believes that the two bullet points referred to by the public authority above are wholly relevant. Accordingly, as he previously determined, he accepts that there is a significant and weighty public interest in preserving the operation of these constitutional conventions.
31. The public authority also drew the Commissioner's attention to another of his decisions which found that there was a strong public interest in withholding this type of information³. It drew the Commissioner's attention to the following two paragraphs from that Notice, stating that it believed that both these arguments applied in favour of withholding the information in this case too:

"37. The Commissioner accepts that there is a significant and weighty public interest in preserving the operation of the convention identified by the Cabinet Office, i.e. it would not be in the public interest for the operation of the established convention of confidentiality to be undermined. This is particularly so given that the convention is designed to protect communications at the heart of government, i.e. between the Monarch and government Ministers.

38. Furthermore, the Commissioner believes that significant weight should be attributed to the argument that disclosure could undermine the political neutrality of The Queen: it is clearly in the public interest that the Monarch is not perceived to be politically biased, in order to protect Her position as Sovereign in a constitutional democracy".

32. The Commissioner accepts that the information consists of communications which fall within the heart of government, being correspondence from or on behalf of The Queen to the public authority. Accordingly, he again concludes that it would not be in the public interest for the operation of the established convention of confidentiality to be undermined. Furthermore, he accepts that disclosure of the information covered could undermine The Queens' political neutrality and, as noted above, he accepts that it is inherent in the exemption contained at section 37(1)(a) that it is in the public interest for the political neutrality of all members of the Royal Family to be preserved. However, the Commissioner would like to clarify here that he is not suggesting that this exemption is, effectively, 'absolute' and that there may be cases where the public interest balance would

³ http://www.ico.gov.uk/upload/documents/decisionnotices/2010/fs_50220275.pdf

be different if there was an equally weighty public interest in disclosure.

33. In this case, the Commissioner has concluded that the public interest in maintaining the exemption at section 37(1)(a) clearly outweighs the public interest in disclosing the information.

Other exemptions

34. As he has concluded that the information was properly withheld under the exemption at section 37(1)(a), the Commissioner has not further considered the other exemptions applied.

Procedural requirements

Section 10 – time for compliance with request

35. Section 10(1) requires a public authority to respond to a request promptly and in any event no later than 20 working days after the date of receipt.
36. The initial request was sent on 14 August 2009 and the response was sent on 15 September 2009, 21 working days later. In failing to comply with section 1(1)(a) within 20 working days, the public authority breached section 10(1) of the Act.

Section 17 – refusal of request

37. Section 17(1) requires that, where a public authority believes that any exemption from Part II of the Act applies, it should issue a notice stating why the exemption in question is engaged. This notice must be issued within 20 working days of receipt of the request.
38. In this case the public authority issued its refusal notice later than the twenty working day limit. Accordingly, the Commissioner finds a breach of section 17(1).

The Decision

39. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- *it correctly withheld the requested information under the exemption at section 37(1)(a).*
40. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- *in failing to respond to the request within 20 working days the public authority breached section 10(1) of the Act;*
 - *in failing to issue an appropriate refusal notice within 20 working days it breached section 17(1) of the Act.*

Steps required

41. The Commissioner requires no steps to be taken.

Other matters

42. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following.

Time for internal review

43. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his 'Good Practice Guidance No 5', published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it has taken 82 working days for an internal review to be completed.

Right of Appeal

44. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

Dated the 2nd day of November 2010

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal annex

Time for compliance with request

Section 10 provides that-

- (1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
- (2) Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”
- (3) If, and to the extent that –
 - (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
 - (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

Refusal of request

Section 17 provides that -

- (1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—
 - (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.