

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 February 2021

Public Authority: Department for Business, Energy & Industrial Strategy

Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant has requested copies of any correspondence and communications to the Secretary of State for Business, Energy & Industrial Strategy¹ from The Duke and Duchess of York concerning the late Jeffrey Epstein or his business and charitable organisations made between the period 1 January 2000 to 1 January 2001. The Department for Business, Energy and Industrial Strategy (BEIS) provided a neither confirm nor deny (NCND) response to the request under sections 40(5)(third party personal data) and 37(2)(communications with Her Majesty and other members of the Royal Family).
2. The Commissioner's decision is that BEIS were entitled to rely on section 40(5B) of the FOIA to neither confirm or deny holding any information within the scope of the request.

¹ In fact, BEIS did not come into existence until July 2016 and at the relevant time the Department was the Department of Trade and Industry, which ceased operations in June 2007.

Background

3. The Duke of York (The Duke) has said that he first met the American financier Jeffrey Epstein in 1999 through Ms Ghislaine Maxwell, Epstein's then girlfriend who was already known to The Duke. The Duke and Epstein were first linked in press reports in the UK and the US in 1999, although in a letter to The Times newspaper in March 2011, The Duke's former Private Secretary, Alastair Watson, said that The Duke met Epstein in the 'early 1990s'.² The Duke reportedly flew with Epstein on Epstein's private jet to his private island of Little St James in the US Virgin Islands in February 1999. The Daily Mail reported that 10 months earlier Epstein's logbook showed that he had flown to the same location to meet the Duke's ex-wife, Sarah, Duchess of York.
4. In February 2000, Ms Maxwell and Epstein were photographed together, with The Duke, at Donald Trump's Mar-a-Lago Club in Florida. Photographs of the three together at Royal Ascot during the summer 2000 were revealed on the BBC Panorama programme in December 2019. In June 2000 Epstein and Ms Maxwell were among the guests at a party hosted by the Queen at Windsor Castle. The Dance of the Decades event was to celebrate four Royal birthdays, including the Duke's 40th. The Duke later told the BBC³ that Epstein was there at his invitation, not the Royal Family's, but was to some extent Ms Maxwell's 'plus one'. In December 2000 The Duke threw Ms Maxwell a surprise birthday party at Sandringham, the Queen's Norfolk estate, with Epstein among the guests, in what The Duke later described as 'a straightforward shooting weekend'. The Duke told the BBC that he used to see Epstein a maximum of three times a year but confirmed that he had been on his private plane, stayed at his private island and at his homes in Palm Beach, Florida and New York.
5. In 2001, The Duke was appointed to be the UK's Special Representative for International Trade and Investment. As the UK's trade envoy, The Duke travelled the world to promote UK business interests abroad, a role which attracted some controversy (not related to Epstein).
6. Allegations about Epstein begin to surface in March 2005 when the parents of a 14 year old girl reported him to the Palm Beach police for

² <https://www.bbc.co.uk/news/uk-12659571>

³ During the Duke's Newsnight interview aired on 16 November 2019.

molesting her. Epstein was accused of paying girls under the age of 18 to perform sex acts at his Manhattan and Florida mansions between 2002 and 2005. However, in a controversial plea deal, instead of facing federal sex trafficking charges, Epstein pled guilty to a lesser charge of soliciting a minor for prostitution.

7. In July 2006 Epstein was invited to a masked ball at Windsor Castle to celebrate the 18th birthday of Princess Beatrice, The Duke's elder daughter. The previous month Epstein had been charged with one count of solicitation of prostitution. According to The Duke's later account, Epstein had been invited via Ms Maxwell and The Duke was not aware at the time of the invitation '*what was going on in the United States*'. The Duke said that Epstein never mentioned that he was under investigation.
8. In 2008 Epstein was given an 18 month sentence following the plea deal. During his sentence he was able to go on 'work release' to his office for 12 hours a day, six days a week. He was released on probation after 13 months.
9. In 2010 Epstein provided Sarah, Duchess of York with £15,000 to assist with her personal debt. When this was reported by The Telegraph the following year, she made a public apology for accepting the money, stating that:

'I personally, on behalf of myself, deeply regret that Jeffrey Epstein became involved in any way with me. I abhor paedophilia and any sexual abuse of children and know that this was a gigantic error of judgement on my behalf. I am just so contrite I cannot say. Whenever I can I will repay the money and will have nothing ever to do with Jeffrey Epstein ever again. What he did was wrong and for which he was rightly jailed'.

10. In December 2010 The Duke was photographed walking with Epstein in New York's Central Park. The Duke later said that he travelled across the Atlantic to end his friendship with Epstein. It was reported that The Duke had spent four days at Epstein's Manhattan mansion.
11. In July 2011 The Duke stood down from his role as UK trade envoy amid controversy over his relationship with Epstein. A Buckingham Palace spokesperson said that The Duke would '*continue to support business in the UK*' and that he '*will not have a specialist role as defined by government but will undertake trade engagements if requested*'.
12. In 2015 Buckingham Palace denied that The Duke had committed any impropriety after he was named in US court documents related to Epstein. At the World Economic Forum in Davos, The Duke, in his first public engagement since becoming named in the allegations, responded by stating:

'Firstly, I think I must, and want, for the record, to refer to the events that have taken place in the last few weeks. I just wish to reiterate, and to reaffirm, the statements that have already been made on my behalf by Buckingham Palace'.

13. In July 2019, Epstein was arrested again, accused of sex trafficking of underage girls over a number of years. He pleaded not guilty to the charges and was held without bail. He faced up to 45 years in prison if convicted. On 10 August 2019, Epstein was found dead in his prison cell whilst awaiting trial. His death was determined to be suicide.
14. That same month, pictures emerged in the press allegedly showing The Duke inside Epstein's Manhattan home in 2010. Buckingham Palace released a statement in response saying that *'His Royal Highness deplores the exploitation of any human being and the suggestion he would condone, participate in or encourage any such behaviour is abhorrent'*.
15. Following Epstein's death, and breaking his silence on the issue for the first time since 2015, The Duke released a statement on 24 August 2019 in which he stated that, *'at no stage during the limited time I spent with him did I see, witness or suspect any behaviour of the sort that subsequently led to his arrest and conviction'*.
16. On 16 November 2019, the BBC aired an interview with The Duke on Newsnight. Asked by Emily Maitlis if he regretted his friendship with convicted paedophile Epstein, The Duke said he did not, saying that *'the people that I met and the opportunities that I was given to learn either by him or because of him were actually very useful'*. The interview created a furore and was widely seen as a disaster with The Duke being subject to strong criticism.
17. Days after the Newsnight interview aired, The Duke released a statement announcing that he was *'stepping back from public duties for the foreseeable future'* with permission from The Queen. The Duke stated that he *'deeply sympathised'* with all of Epstein's victims and added that he was *'willing to help any appropriate law enforcement agency with their investigations, if required'*. Businesses, charities and universities had begun to sever ties with The Duke following his interview. In May 2020 it was announced that The Duke would permanently resign from all public roles.

Request and response

18. On 28 August 2019, the complainant wrote to BEIS and requested information in the following terms:

'I would like to request the following information under the Freedom of Information Act and the Environmental Information Regulations.

Please note that the reference to The Duke and Duchess of York should include those two individuals (acting together or separately), their private offices, as well as any press and PR representative acting specifically on their behalf.

Please note that the reference to The Secretary of State should include The Secretary of State and his/her private office.

Please note that I am only interested in information relating to the period 1 January 2000 to 1 January 2001.

Please note that the reference to correspondence and communications in the questions below should include all traditional forms of correspondence, including letters, faxes, telegrams and memos; all emails irrespective of whether they were sent or received via official or private accounts and all messages sent through encrypted messaging services.

Please note that I have confined the request to the period 1 January 2000 to 1 January 2001 because this is a period when the Prince is known to have had a great deal of contact with Mr Epstein.

But please do let me know if you are ALREADY aware of any other relevant contacts and communications which fall outside the period and I will submit another request.

Please also provide any information held on behalf of a predecessor department.

I believe there are strong public interest reasons for disclosure, given the continuing controversy surrounding The Prince's relationship with the late Mr Epstein.

1) During the aforementioned period did The Duke and Duchess of York write or correspond with the Secretary of State about any of the following:

- a) The American businessman Jeffrey Epstein*
- b) Any business or charitable organisation run by Jeffrey Epstein either in the UK or abroad.*
- c) Jeffrey Epstein's nationality and the possibility that he could apply for and or obtain a British passport.*
- d) Past and current police investigations which have centred on Mr Epstein's private life or his financial affairs.*

- e) *The amount of time spent by Mr Epstein in the UK and his UK residential status.*
- f) *The idea that Mr Epstein should be given a diplomatic or trade role which would involve him representing the UK Government overseas.*
- 2) *If the answer to question one is yes, can you please provide copies of this written correspondence and communication?*
- 3) *Did the Secretary of State write or correspond with The Duke and Duchess of York about any of the above (a to f)?*
- 4) *If the answer to question three is yes, can you please provide copies of this correspondence and communication.*
- 5) *If any relevant correspondence or communication has been destroyed can you state when it was destroyed and why. In the case of each piece of destroyed correspondence and communication can you identify the author(s), the recipient(s), the date generated and a brief outline of its contents. If any destroyed documentation continues to be held in another form can you please provide a copy of that documentation'.*
19. BEIS responded to the request on 14 September 2019. They provided a neither confirm nor deny (NCND) response under both sections 37(2)(communications with Her Majesty, with other members of the Royal Family or with the Royal Household) and 40(5)(third party personal data). The response stated that *'the exemptions in s37 and s40 are qualified exemptions and we have considered the public interest arguments in confirming or denying whether the Department holds the requested information'.*
20. The Commissioner would note that whilst section 37 is a qualified exemption (providing the information does not relate to communications with the Sovereign, the heir to the throne or second in line to the throne), section 40 is an absolute exemption, albeit potentially subject to the legitimate interests condition.
21. In their response, BEIS acknowledged that confirming or denying whether information relevant to the request was held would increase transparency and provide a greater insight into the relationship which members of the Royal Family have with the department and the influence they exert in matters of public policy. However, BEIS advised that members of the Royal Family will sometimes carry out public roles where their performance is dependent on maintaining the confidentiality of their communications with public authorities. BEIS contended that there is an *'inherent public interest in preserving that confidentiality*

where confirming or denying would compromise a Royal Family members' ability to carry out their role'. The Department stated that 'some members of the Royal Family will perform ambassadorial roles (Duke of York – UK Trade Envoy) in the form of official visits and meetings with foreign dignitaries. Confirming or denying whether information is held could impair their ability to successfully fulfil those ambassadorial functions'.

22. BEIS determined that in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighed the public interest in confirming or denying whether the information is held. They informed the complainant that *'this should not be taken as an indication that the information you have requested is or is not held by the Department'*.

23. The complainant requested an internal review on 24 October 2019. Noting that The Duke and Duchess of York are not automatically exempt under the FOIA and the Environmental Information Regulations 2004 (EIR), he stated that he would be grateful if the Department *'could double check whether any information held is environmental in nature and eligible for release under the EIRs'*. He also stated that he would be grateful if the review could *'double check whether any information held can actually be classed as information relating to the communications of The Sovereign'*.

24. The complainant contended that there were strong grounds for disclosure:

'At the time of writing there is a great deal of public concern about the exact nature of the relationship between both The Duke and Duchess and the late Mr Epstein. It is a matter of public record that The Duke and Duchess have accepted hospitality of one kind or another from Mr Epstein. I think it therefore follows that the public has a right to know if the couple have been lobbying on Mr Epstein's behalf'.

25. The complainant noted the concerns about confidentiality but suggested that there were a number of problems with that approach. Firstly, the Duchess of York does not have a programme of official engagements, and secondly, the complainant stated that *'I am not actually seeking any information relating to the Duke of York's public engagements'*. Thirdly, the complainant contended that the Department had provided no evidence to substantiate their claim that disclosure of the relevant information (if held) would impact on The Duke's willingness or ability to carry out his engagements. The complainant noted the Department's point that some members of The Royal Family perform ambassadorial roles, including The Duke of York, who had been UK trade envoy, *'but I simply make the point again that I am not seeking information which could have any impact on roles past and present'*.

26. BEIS provided the internal review on 12 December 2019. The review repeated that the exemptions at sections 37 and 40 were qualified and that they had considered the public interest arguments in confirming or denying whether they held the requested information although the review contained no details of this consideration. The review concluded that the relevant exemptions had been correctly applied and upheld the original response.

Scope of the case

27. The complainant contacted the Commissioner on 17 December 2019 to complain about the way his request for information had been handled.

28. In his complaint he contended that:

'Disclosure is unlikely to have any toxic effect on the conduct of official Royal duties. The Duke has been required to forfeit all of his official duties in the light of the continuing scandal surrounding his friendship with the late Mr Epstein. Given that the Duke and Duchess have both been in receipt of hospitality from Mr Epstein, the public has a right to know if they have been lobbying on his behalf'.

29. The Commissioner considers that the scope of her investigation is to determine whether or not BEIS were correct to issue a neither confirm nor deny under section 40(5) and/or section 37(2).

Reasons for decision

30. Section 40(5B)(a)(i) of the FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 (GDPR) to provide that confirmation or denial.

31. Therefore, for BEIS to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether they hold information falling within the scope of the request, the following two criteria must be met:

- Confirming or denying whether this information is held would constitute the disclosure of a third party's personal data; and
- Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

32. Section 3(2) of the Data Protection Act 2018 (DPA) defines personal data as '*any information relating to an identified living individual*'.
33. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
34. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
35. If BEIS were to confirm whether they held information within the scope of the request they would be confirming whether either The Duke of York or the Duchess of York had corresponded with the Secretary of State⁴ between the period 1 January 2000 to 1 January 2001, and that the correspondence related to Jeffrey Epstein or his business activities.
36. The Commissioner would note that as the request relates to correspondence from only three people, confirming or denying will connect them much more closely than if the request was for any correspondence from a larger group of people.
37. It is important to note that the question of Jeffrey Epstein's privacy rights does not arise, as information relating to a deceased person does not constitute personal data and therefore is not subject to the GDPR.
38. The Commissioner therefore accepts that issuing a confirmation or a denial that information is held would, in itself, reveal personal data about The Duke and Duchess of York. The request is worded in such a way that any information BEIS confirmed they held or did not hold would be inextricably linked to The Duke and Duchess of York. Therefore, issuing a confirmation or a denial would reveal information which had those individuals as its focus and would therefore reveal their personal data.
39. For the reasons set out above, the Commissioner is satisfied that if BEIS confirmed whether or not they held the requested information, this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.

⁴ Stephen Byers being the Secretary of State for Trade and Industry at the DTI at the time.

40. However, the fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent BEIS from refusing to confirm whether or not they hold this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.

Would confirming whether or not the requested information is held contravene one of the data protection principles?

41. The Commissioner considers that the most relevant data protection principle is principle (a).

42. Article 5(1)(a)(GDPR) states that:

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

43. In the case of an FOIA request, personal data is processed when the public authority confirms or denies holding information within the scope of the request. This means that the information can only be disclosed – or as in this case the public authority can only confirm whether or not they hold the requested information – if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1)(GDPR), be fair and be transparent).

Lawful processing: Article 6(1)(f) GDPR

44. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *'processing shall be lawful only if and to the extent that at least one of the conditions listed in the Article applies'*. One of the conditions in Article 6(1) must therefore be met before providing a confirmation or denial in response to the request would be considered lawful.

45. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR, which provides as follows:

'Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child'.

46. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:

- (i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- (ii) **Necessity test:** Whether confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;
- (ii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

47. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) Legitimate interests

48. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, the more trivial and personal the interest, the less likely it is that such an interest will outweigh the rights of the data subjects such that disclosure to the world at large would be justified.
49. In their responses to the complainant's request BEIS failed to address the legitimate interests in the disclosure of the specific information requested. In submissions to the Commissioner, BEIS rectified this shortcoming. They recognised that there is a public interest in understanding the roles of members of the Royal Family and how they interact with Government. BEIS also acknowledged that at the time of the complainant's request *'there was considerable press speculation about the precise nature of the Duke of York's relationship with Mr Epstein'*.
50. BEIS accepted that there is a legitimate interest in transparency, and for this reason there is a legitimate interest in confirming or denying whether the requested information is held. The Department noted that there is *'a general public interest in openness in government'* which could extend to the nature of discussions between government ministers and third parties, including the Royal Family. However, BEIS confirmed that they had not identified *'any more specific purpose'* that would override The Duke's or Duchess's rights and freedoms as data subjects.
51. BEIS acknowledged that the request related to topics which the public are interested in, and members of the public may well be interested in whether or not The Duke and/or Duchess had corresponded with the then Secretary of State about the topics covered by the request. However, BEIS contended that it was *'important to draw a distinction*

between what is of interest to the public and what is in the public interest'. BEIS stated that there are significant public interests in maintaining the confidentiality of correspondence between the Royal Family and government, and in protecting the rights and freedoms of the individuals. In light of those interests, BEIS considered the legitimate interest in confirming or denying that the information requested was held *'to be limited'*.

52. As previously noted, the complainant contended that as it was a matter of public record that The Duke and Duchess had accepted hospitality of one kind or another from Mr Epstein, the public had the right to know if they had been lobbying on his behalf.
53. The Commissioner notes that at the time of the complainant's request there was considerable media coverage about the exact nature of the relationship between The Duke of York (and to a lesser extent) the Duchess of York and the late convicted sex offender, Jeffrey Epstein. Much of that media interest stemmed from allegations made against The Duke by Ms Virginia Giuffre, but would dramatically intensify following the BBC's broadcast of The Duke's Newsnight interview on 16 November 2019 (which post-dated the complainant's request and request for internal review but not the provision of that review by BEIS). As far back as 2011, it had been reported that Epstein had helped the Duchess to pay off her debts, although he had later reportedly threatened to sue her when she apologised for what she herself described as a *'gigantic error of judgement'* in associating with him.
54. The Commissioner does not accept the distinction which BEIS have sought to draw in this case between what is of interest to the public and what is in the public interest. Whilst the association of The Duke and to a much lesser degree, the Duchess, with Jeffrey Epstein, has certainly generated scandal and prurience, particularly in the tabloid press, and is therefore undoubtedly of interest to large sections of the public, there is clearly a very serious and legitimate public interest in knowing whether The Duke and Duchess's ill-judged association with Epstein was exploited for his personal benefit or those of his business activities.
55. In his Newsnight interview, The Duke was not shy about how his friendship with Epstein had provided him (The Duke) with *'very useful'* opportunities *'to learn'*. The Commissioner considers that there is an important and legitimate public interest in knowing what reciprocity Epstein may have received from The Duke, e.g. the possibility of The Duke exercising his significant influence with government departments, such as the then Department of Trade and Industry.
56. Where members of the Royal Family choose to associate or do business with influential, high profile and controversial figures such as Jeffrey Epstein, the Commissioner considers that there should be a reasonable

expectation on their part that such involvement or association (even if entirely appropriate and proper) will carry a strong and legitimate interest in terms of transparency and accountability. That legitimate interest will extend to any correspondence or communications which such members of the Royal Family may have had with government departments.

57. BEIS correctly note that at the time of the request there was '*considerable press speculation*' about the precise nature of The Duke's relationship with Jeffrey Epstein. The Commissioner notes that much of that speculation had been generated by The Duke's own actions and decisions, such as continuing to enjoy the hospitality of Epstein even after the latter's criminal conviction. By contrast, the Duchess of York, as previously noted, explicitly distanced herself from Epstein following his conviction for such serious offences.
58. Although not specifically raised by BEIS in this case, the Commissioner is mindful from her decisions in previous similar cases that if the Department were to confirm, hypothetically, that they held the information requested by the complainant, although it would show that either The Duke or Duchess (or both) had corresponded with the then Secretary of State about Jeffrey Epstein, such a confirmation would provide little illumination about the contents of any such correspondence or communications.
59. Nevertheless, the Commissioner considers that there is a legitimate interest in knowing when and where ministers are being corresponded with by members of the Royal Family, particularly where third parties are involved.
60. However, the Commissioner considers that the 'when' in this case is a key factor in the strength and weight of the legitimate interest attached to the information requested. The complainant's request is for information concerning (amongst other topics) '*past and current police investigations*' but he specified that he was only interested in information held between 1 January 2000 and 1 January 2001. The complainant advised BEIS in his request that he was interested in the stated 12 months '*because this is a period when the Prince is known to have had a great deal of contact with Mr Epstein*'. As detailed in paragraph 4 above, it is clear that The Duke did indeed have a significant amount of contact with the financier during this period.
61. It is apparent that The Duke had known Jeffrey Epstein for some time before the period covered by the complainant's request, although the precise date and circumstances of their first meeting remains unclear. According to press reports, the Duchess appears to have met Epstein at least as early as 1998 although her contact with him was clearly much less than her former husband. However, allegations as to Epstein's sex

offending did not arise, officially at least, until March 2005, when he was reported to the Florida police by the parents of a 14 year old girl. It would therefore appear that between the period 1 January 2000 to 1 January 2001, there were no police investigations being carried out concerning Epstein and neither The Duke nor the Duchess could have corresponded with the Secretary of State about the same.

62. This timing is important as the Commissioner considers that the strength and degree of the legitimate interest attached to correspondence or communications from The Duke or Duchess concerning Epstein which may be held by the Department largely depends on what was known about Epstein's criminality at the time.
63. Much of the furore and public interest surrounding The Duke's friendship with Epstein arises from the fact that he remained in contact with Epstein, even after the financier's criminal conviction. Were it the case that The Duke (or the Duchess) had corresponded or communicated with BEIS with a view to lobbying or assisting Epstein *after* his conviction in 2008 then this would constitute a strong and compelling legitimate interest in BEIS providing a confirmation or denial as to whether they held such information.
64. However, the Commissioner considers that the legitimate interest in providing such a confirmation or denial is substantially less for the period 1 January 2000 to 1 January 2001, since this predates the allegations (and subsequent conviction) surrounding Epstein, and the controversy caused by The Duke maintaining his friendship with the convicted sex offender.
65. The Commissioner would emphasise that this does not mean that there would be no legitimate public interest if The Duke (or Duchess) had corresponded with the Secretary of State for Trade and Industry on behalf of Epstein during the period specified in the complainant's request, or that the public interest in any such correspondence would be '*limited*'. Rather, it means that the legitimate interest in providing a confirmation or denial that such information was held would be substantially less strong and compelling than for a more recent period in time.
66. Whilst the Commissioner assesses the legitimate interests at the time a request is made to a public authority, the legitimate interests in the actual correspondence requested (or confirming or denying that such information is held) must take account of the facts and circumstances which existed during the period for which the information is requested. The legitimate interests attached to historical information (if held) cannot be retrospectively bolstered by events or circumstances which post-date the period in question, in this specific case, Epstein's

conviction for sex offending and the further serious similar charges which he was facing at the time of his death.

67. With similar considerations in mind, the Commissioner would note that The Duke was appointed to his trade envoy role in 2001, a position in which he would have had greater scope and opportunity, should he wished to have done so, to lobby on behalf of, or otherwise assist Epstein. The twelve month period covered by the complainant's request pre-dates this appointment.
68. Nevertheless, even necessarily discounting what only later became known about Epstein, the Commissioner considers that there is a legitimate interest in knowing whether The Duke and/or Duchess corresponded with the Secretary of State for Trade and Industry during 2000 with a view to lobbying for, or assisting, their then friend Jeffrey Epstein. This is a legitimate interest which BEIS could satisfy by issuing a confirmation or denial that relevant information is held. The Commissioner therefore considers the legitimate interests test has been met and has thus gone on to consider the Necessity test.

(ii) Is confirming whether or not the requested information is held necessary?

69. 'Necessary' means more than desirable, but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity, which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA, as to whether the requested information is held, must therefore be the least intrusive means of achieving the legitimate aim in question.
70. In submissions to the Commissioner, BEIS confirmed that they had considered whether there was a necessity to confirm or deny whether the information was held in order to meet the legitimate interest in transparency and contended that in order for there to be a necessity, *'there must be a pressing social need for confirmation or denial which outweighs the privacy rights of the Duke and Duchess'*. Whilst BEIS acknowledged that disclosure *'may be desirable for transparency reasons, and may also satisfy public curiosity in the topics to which this request relates'*, they did not consider that there was a pressing social need for disclosure that would outweigh the public interest in protecting the rights and freedoms of The Duke and/or Duchess.
71. The Commissioner considers that BEIS has failed to apply the necessity test properly because they failed to identify correctly the legitimate interests in issuing a confirmation or a denial that information was held.

72. In the circumstances of this case, the Commissioner considers that the legitimate interest in understanding whether or not The Duke and/or Duchess corresponded with the Secretary of State in relation to Jeffrey Epstein cannot be satisfied in any way other than by BEIS issuing a confirmation or a denial that they hold relevant information. She therefore considers that the Necessity test is met and has gone on to consider the balancing test.

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

73. Even where issuing a confirmation or denial that information is held is necessary to satisfy a legitimate interest, the Commissioner must still balance the legitimate interests against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not they held the requested information in response to an FOI request, or if such confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.

74. In submissions to the Commissioner BEIS stated that confirming or denying whether they held the requested information would affect the privacy of The Duke and/or Duchess. In relation to The Duke, the Department contended that *'the expectation of confidentiality of discussions between the Royal Family and government means there is an expectation that his personal data would not be disclosed'*. As regards the Duchess, BEIS advised that *'The Duchess is not a Member of the Royal Family but has the rights to privacy of any other private individual'*.

75. BEIS advised that they are required to comply with their obligations to The Duke and Duchess under the Data Protection Act 2018. They stated that their privacy rights may be adversely impacted by confirmation or denial, and to do so may cause damage and distress. The Department advised that, *'we are not aware of any information in the public domain about communications between the Duke or Duchess and the then Secretary of State of this nature'*. Neither, BEIS stated, had The Duke or Duchess waived their right to privacy in this respect, *'so it is reasonable to consider that they would have reasonable expectations that their personal data would not be processed in this way'*.

76. BEIS also contended that confirming or denying whether information within the scope of the request was held would contravene the first data protection principle (Article 5(1) GDPR) on the basis that it would be unfair.

77. In reaching this conclusion, BEIS advised that they had taken into account the reasonable expectations of The Duke and Duchess of York in terms of what would happen to their personal data and the consequences of revealing their personal data, including any damage or distress they would be likely to suffer as a result.
78. BEIS stated that none of the information requested is in the public domain via an official source. Given that the right to privacy had not been waived by The Duke and Duchess, BEIS contended that it was reasonable to argue that to confirm whether or not any personal data exists would be to go against The Duke's and Duchess's reasonable expectations that their personal data would not be processed in this way.
79. BEIS advised the Commissioner that they also considered that The Duke and Duchess would suffer damage or distress if the Department were to confirm whether or not the requested information was held. BEIS contended that, *'apart from the injury to their rights as data subjects outlined above, confirming whether or not information is held would result in a breach of The Duke's and Duchess's privacy. This would be unfair since the same considerations apply to members of the Royal Family as would apply to any other individual, who would not expect their personal data to be released to the public in such a way'*.
80. The Department contended that *'the nature of communications between Members of the Royal Family and government, which has historically and necessarily taken place under an expectation of confidence, gives rise to the expectation that the personal data of The Duke of York will not be disclosed'*. BEIS stated that the public interest in preserving this constitutional position outweighed the general public interest considerations in favour of confirmation or denial.
81. The Commissioner notes that at the time of the request, and indeed for the period of time (1 January 2000 to 1 January 2001) covered by the request, The Duke was a senior working Royal, in receipt of the Sovereign Grant. The Duchess, whilst retaining a royal title, is not a prominent member of the Royal Family and does not have a programme of official engagements. Nevertheless, she retains a high public profile for a number of reasons, such as being the mother of Princess Beatrice and Princess Eugenie.
82. Nevertheless, the fact that an individual may have a high profile does not mean that they give up their right to privacy or that they should not have a reasonable expectation that their right to correspond (or not correspond) with a Secretary of State should be protected.

83. In this particular request, the complainant has not just sought correspondence from particular individuals, but the correspondence those individuals have engaged in in relation to a particular subject.
84. Whilst the Commissioner recognises that higher profile individuals may have their correspondence handled (or at least considered) by a more senior individual within BEIS, she still does not consider that this alone is sufficient to remove an individual's expectation of privacy. Ordinary members of the public would not expect the fact or the content of their private correspondence with a government department to be disclosed to the world at large. The Commissioner considers that The Duke and Duchess are still entitled to have this expectation.
85. The Commissioner would note that this case can be distinguished from those concerning 'advocacy correspondence' to government departments by The Prince of Wales. In the Upper Tribunal case of *Evans v Information Commissioner [2012] UKUT 313 (AAC)*⁵ it was acknowledged that it was widely known that The Prince of Wales has written to ministers in the past. In *Evans* the Tribunal found that Mr Evans was entitled to disclosure of 'advocacy correspondence' as *'It will generally be in the overall public interest for there to be transparency as to how and when The Prince of Wales seeks to influence government, although there are cogent arguments for non-disclosure, the public interest benefits of disclosure of 'advocacy correspondence' falling within Mr Evans's requests will generally outweigh the public interest benefits of non-disclosure'*. Section 37 FOIA was amended by the Constitutional Reform and Governance Act (CRAG) 2010 which introduced the new section 37(1)(aa) to the FOIA. Section 37(1)(aa) exempts information from disclosure if it relates to communications with the heir to, or the person who is for the time being, second in line of succession to the Throne. As an absolute exemption there is no public interest test. However, The Duke and Duchess of York do not hold such positions of influence, and therefore cannot be said to have a similar reasonable expectation that their personal data would be disclosed
86. The Commissioner acknowledges the point made by BEIS that they are not aware of any information in the public domain about information of the nature requested by the complainant. The Commissioner is similarly unaware of any public record of such information. However, this is also a valid argument for providing a confirmation or denial, in order to bring transparency to this area. The Commissioner considers that the

⁵ <https://www.judiciary.uk/judgments/evans-v-information-commissioner/>

Department's arguments about the expectation of confidentiality of discussions between the Royal Family and government have greater weight and purchase in this case.

87. In FS50807609 (June 2019) which concerned an information request to the Cabinet Office for copies of correspondence between the then Prime Minister, Theresa May, and The Duke of York and/or Duchess of York, concerning the wedding of their daughter, Princess Eugenie, the Commissioner accepted that in order for members of the Royal Family to be able to carry out diplomatic and goodwill work, they must be able to exchange correspondence with public authorities with the expectation that such information would be treated confidentially. The Commissioner found that providing such a confirmation (or denial) would *'represent a direct infringement of the principle that such communications are considered to be confidential'*. In attributing weight to this argument, the Commissioner noted that the request concerned a senior member of the Royal Family, which in the Commissioner's view, arguably increased the risk of harm occurring if the Cabinet Office complied with section 1(1) (a) in that case.
88. The Commissioner accepted that there was a genuine and legitimate public interest in how Princess Eugenie's wedding was funded, but *'taking into account the wider consequences of undermining the confidentiality of such communications, and given the importance of such confidentiality to the work of the Royal Family'*, the Commissioner concluded that in the circumstances of that request, albeit by a narrow margin, that the public interest in maintaining the exemption (section 37(2) in that case) outweighed the public interest in the Cabinet Office confirming whether or not the requested information was held.
89. In the above case, the Commissioner reached her conclusion, albeit by a narrow margin, because there was some public debate at the time about the amount of public money being spent on the security of the wedding.
90. By contrast, in the present case, the Commissioner recognises that although there is considerable public debate and interest surrounding The Duke's friendship and association with Jeffrey Epstein, that debate and public interest does not strongly focus on the period covered by the complainant's request but rather some years later (primarily after Epstein's criminal conviction).
91. The Commissioner acknowledges the complainant's contention that the provision by BEIS of a confirmation or denial is unlikely to have a toxic effect on the conduct of official Royal duties, and that The Duke has forfeited all of his official duties in the light of the continuing scandal surrounding his friendship with Epstein (though this development post-dated the complainant's request).

92. However, such is the strength of the public interest in protecting the confidentiality of communications between members of the Royal Family and government, it requires a clear and strong legitimate public interest to outweigh the same and require a public authority to provide a confirmation or denial response. For the reasons explained above, and mindful that the request is largely speculative in nature, the Commissioner does not consider that the legitimate interests in confirming or denying that the requested information is held are sufficiently strong enough to override the fundamental interests of the data subjects and the public interest in protecting the confidentiality of communications between, in this case, members of the Royal Family and government. She thus does not consider that there is a lawful basis for the processing of this personal data and accordingly, confirmation or denial under the FOIA would be unlawful.
93. As confirmation or denial would be unlawful, such processing would breach the first data protection principle and therefore BEIS were entitled to rely on section 40(5B) of the FOIA in the manner that they did.
94. Having found that BEIS were entitled to rely on section 40(5B) to refuse to confirm or deny whether they held the information requested, the Commissioner has not gone on to consider the application of section 37(2).

Environmental information

95. In both his request and request for an internal review, the complainant asked BEIS to consider their responsibilities under the Environmental Information Regulations 2004 and respond accordingly.
96. Given the wording and nature of his request, the Commissioner is not convinced that any relevant information BEIS held (if in fact they held any) would be self-evidently environmental – and the complainant has not advanced any arguments to explain why it would be. The Commissioner is therefore satisfied that it was appropriate for BEIS to handle this request under the FOIA.
97. However, given the similarities between section 40(5) of the FOIA and regulation 13(5) of the EIR, the Commissioner considers that BEIS would have been able to rely on the latter exception to neither confirm nor deny holding any relevant environmental information.

Other matters

98. In his complaint to the ICO, the complainant stated that '*my complaint is a consequence of the department's failure to disclose the information I think it might hold rather than with its application of any particular **exemptions***' (Commissioner's emboldening). As the complainant has been advised on several previous occasions, it is important to understand that in NCND cases, it is **solely** the validity (or otherwise) of the exclusion from the duty to confirm or deny which the Commissioner is required to consider – that is the Commissioner's role and remit in such cases.

Right of appeal

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

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

Tel: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

100. 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.

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

Signed

**Gerrard Tracey
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Information Commissioner's Office
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SK9 5AF**

