

Freedom of Information Act 2000 (Section 50)

Decision Notice

29 January 2009

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Summary

The complainant made a freedom of information request to the Cabinet Office for information relating to communications with Diana, Princess of Wales and/or her representatives. In response to the request the Cabinet Office disclosed a quantity of information but withheld further information under the exemptions in section 37(1)(a) (communication with Her Majesty, with other members of the Royal Family or with the Royal Household), section 40(2) (Personal information) and section 41(1) (Information provided in confidence). Having investigated the complaint, and having inspected the withheld information, the Commissioner is satisfied that the section 37(1)(a) and section 40(2) exemptions were correctly applied. Therefore the Commissioner has not undertaken an assessment of section 41(1). The Commissioner also found that the Cabinet Office breached section 17(1) of the Act by failing to issue a refusal notice within 20 working days and by failing to cite exemptions on which it later sought to rely. It also breached section 17(1)(b) by failing to specify why section 40(2) applied and breached section 17(3) by failing to communicate its public interest determination to the complainant within a reasonable timescale.

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.

The Request

2. On 9 June 2006 the complainant made a request to the Cabinet Office for information concerning communications between the Government and Diana, Princess of Wales and/or her representatives.

3. The public authority initially responded to the request on 2 August 2006. The public authority informed the complainant that when a qualified exemption applies to requested information the Act allows the time for responding to a request to exceed the 20 working days limit. In this case the public authority said that the exemption in section 37 of the Act applied and it needed additional time to carry out a public interest test. The public authority said that it aimed to respond by 4 September 2006.
4. The public authority provided a substantive response to the request on 3 October 2006 at which point it disclosed to the complainant a quantity of information falling within the scope of the request, consisting of seven telegrams from Diana Princess of Wales to Prime Ministers of the day thanking them for birthday wishes. It confirmed that it held further relevant information but said that this was being withheld under section 37(1)(a) of the Act section 40 of the Act and section 41(1) of the Act.
5. The public authority carried out a public interest test in respect of its application of section 37(1)(a). It said that whilst it recognised that there was a general public interest in access to information about public life it considered that there was a strong public interest in maintaining the fundamental constitutional principle that communications between the Royal Family or Royal Household and ministers and other public bodies are essentially confidential in nature. It concluded that the public interest favoured maintaining this exemption. Section 40 and section 41(1) provide absolute exemptions under the Act and so the public authority did not apply a public interest test.
6. On 5 October 2006 the complainant contacted the public authority to ask that it carry out an internal review of its handling of his freedom of information request.
7. The public authority presented the findings of its internal review on 6 November 2006. It concluded that, having carefully considered the circumstances of the case, the exemptions were correctly applied. It explained that section 37(1)(a) provides for an exemption for information which constitutes communications with Her Majesty, the Royal Family and Royal Household. It said that it considered that communications with Diana, Princess of Wales fall within this exemption and the public interest in maintaining the exemption outweighed the public interest in disclosure. It said that section 40 and section 41 applied to some of the withheld information but again said that as these exemptions are absolute it had not carried out a public interest test.

The Investigation

Scope of the case

8. On 13 November 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's decision to

withhold some of the information falling within the scope of his request under sections 37(1)(a), 40 and 41(1).

Chronology

9. The Commissioner contacted the public authority with details of the complaint on 6 March 2007. The Commissioner asked the public authority to address the following points:
 - The Commissioner asked the public authority to clarify its application of section 37(1)(a) and to explain the basis on which it considered Diana, Princess of Wales to be a member of the Royal Family for the purpose of this exemption.
 - Given that the request extends to cover communications with representatives of Diana, Princess of Wales the Commissioner asked the public authority to comment on the possibility that such representatives may not fall within the category of members of the Royal Household.
 - The Commissioner asked the public authority to clarify its application of the public interest test in respect of the information withheld under section 37.
 - The Commissioner asked the public authority to explain its application of section 40 in light of the fact that the request related to a deceased person.
 - The Commissioner asked the public authority to explain why disclosure of the withheld information would constitute an actionable breach of confidence under section 41(1).
10. Despite the Commissioner's request that it respond to his enquiries within 20 working days, the public authority did not respond until 5 October 2007.
11. First of all the public authority explained how it had interpreted the complainant's request. It said that it had interpreted the request for communications with Diana, Princess of Wales as a request for communications with her before and after her divorce. It explained that it was only after her divorce that she was known as 'Diana , Princess of Wales' and that prior to that she was known as the 'The Princess of Wales'.
12. The public authority went on to respond to each of the Commissioner's enquiries and provided a description of the content of each of the documents that were withheld from the complainant.
13. The Deputy Information Commissioner visited the premises of the public authority to inspect the withheld information in situ.

Findings of fact

14. The official website of the British Monarchy (www.royal.gov.uk) shows “The Princess of Wales, later Diana, Princess of Wales” in the list of members of the Royal Family since 1975.¹
15. The Queen announced in a press release on 12 July 1996 that Diana, Princess of Wales, would continue to be regarded as a member of the Royal Family, following her divorce.
16. The withheld information constitutes six pieces of correspondence, over a 15 year period, between Diana, Princess of Wales and the Prime Minister of the day.
17. All of the withheld information pre-dates the 18 August 1996 divorce of Diana, Princess of Wales.

Analysis

18. A full text of the provisions of the Act referred to in this section is contained within the legal annex.

Procedural matters

19. The complainant made his request to the public authority on 9 June 2006. The public authority contacted the complainant on 2 August 2006 at which point it explained that it was extending the time for responding to the request in order to consider the public interest test.
20. Where a public authority is relying on a claim that a qualified exemption applies to a request for information it may provide the complainant with a separate notice under section 17(3) of the Act, within such time as is reasonable in the circumstances, setting out its public interest determination.
21. However, a public authority must still provide the complainant with a notice under section 17(1) within the time for complying with section 1(1). This notice must state that the requested information is exempt, state which exemption applies and state why the exemption applies. In this case the public authority failed to provide the complainant with such a notice within 20 working days and consequently breached section 17(1) of the Act.
22. In the initial notice issued on 2 August 2006 the public authority explained that the section 37 exemption was being applied to the requested information. When the public authority provided its substantive response on 3 October 2006 it explained that the exemptions in section 40 and 41 were also being applied. By failing to cite these exemptions in the initial notice the public authority additionally breached section 17(1) of the Act.

¹ See, <http://www.royal.gov.uk/output/page3764.asp>

23. The public authority cited section 40 in the notice issued on 3 October 2008. However it failed to cite which specific subsection and paragraph of the exemption it was relying on either at this point or at the internal review stage. This constitutes a failure to specify the exemption in question which is a breach of section 17(1)(b).
24. The Commissioner has also considered whether the public authority took a reasonable time to arrive at a decision under the public interest test. What is reasonable is not defined in the Act but the Commissioner has issued guidance on this point which states that public authorities should aim to respond to all requests within 20 working days and only in cases involving exceptionally complex public interest considerations will it be reasonable to take longer.² The Commissioner's view is that in no case will it be reasonable to take over 40 working days. In this case the public authority took almost four months to issue a notice setting out its public interest determination and given the circumstances of the case the Commissioner has decided that this was unreasonable and that therefore the public authority breached section 17(3) of the Act.

Exemption

Section 37 – Communications with Her Majesty, etc. and honours.

25. As mentioned above, the public authority has refused to disclose 6 pieces of correspondence between Diana, Princess of Wales and the Prime Minister of the day that took place over a 15 year period. The public authority has applied section 37(1)(a) to all of the information it has withheld.
26. Section 37(1)(a) provides that information is exempt from disclosure if it relates to communications with Her Majesty, with other members of the Royal Family or with the Royal Household.
27. The complainant has argued that following her divorce from The Prince of Wales Diana, Princess of Wales ceased to be a member of the Royal Family. Therefore the complainant maintains that information relating to communications with her would not be covered by the exemption in section 37(1)(a) of the Act. The Commissioner rejects this argument not least because of Diana, Princess of Wales' position as the mother of the second and third in line to the Throne. The Commissioner has also taken into account the fact that The Queen made it clear at the time of the divorce that Diana, Princess of Wales would continue to be regarded as a member of the Royal Family.
28. The Commissioner wishes to stress that he considers section 37(1)(a) to still apply to information relating to communications with Diana, Princess of Wales following her divorce. However, in this case the argument as to whether Diana, Princess of Wales remained a member of the Royal Family following her divorce is not relevant as all of the withheld information relates to communications prior to her divorce.

² see,

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/foi_good_practice_guidance_4.pdf

29. The Commissioner has also considered whether section 37(1)(a) applies to communications made on behalf of members of the Royal Family by their representatives. In this case 2 of the 6 items of correspondence were made on behalf of The Princess of Wales (as she was styled prior to her divorce) by her Private Secretary.
30. Whilst members of the Royal Household are not defined in the Act, the public authority has suggested that this should be taken to include those individuals who are authorised to act on behalf of a member of the Royal Family. In support of this the public authority has argued that, constitutionally, Private Secretaries are considered to speak and correspond on behalf of the members of the Royal Family they represent. The Commissioner agrees with the public authority on this point and is satisfied that letters and other communications written by Private Secretaries on behalf of members of the Royal Family will be covered by the exemption in section 37(1)(a) of the Act.
31. Having reviewed all of the withheld information the Commissioner is satisfied that it relates to communications with the Royal Family and the Royal Household and therefore has found that section 37(1)(a) is engaged.

Public Interest Test

32. Section 37(1)(a) of the Act is a qualified exemption and is therefore subject to a public interest test under section 2(2)(b) of the Act. This provides that the exemption will only apply if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Therefore, the Commissioner has undertaken the public interest test in respect of the withheld information.
33. The complainant has not advanced any arguments as to why disclosure of the information would be in the public interest, although, the Commissioner recognises that there is a general public interest in how government operates and how it communicates with members of the Royal Family. However, the Commissioner considers that the public interest in disclosure of information relating to communications with the Royal Family is likely to be strongest in cases where the information relates to the performance of a public role or function, as opposed to private or personal matters.
34. The Commissioner wishes to make clear that in this case the withheld information is of an entirely personal nature and does not, in any way, comment on or relate to government or public policy or to the performance of public duties. Therefore the Commissioner considers that any public interest in disclosure is very much reduced.
35. The Commissioner is aware that there is still a significant demand for details of the life of the late Diana, Princess of Wales but this should not be taken to mean that there is a public interest in further details of her life being revealed. In cases of this kind it is important to draw a clear distinction between matters of public interest and matters about which the public may be merely curious. Following an

inspection of all the withheld information, the Commissioner is satisfied that there is little or no public interest in its disclosure.

36. On the other hand, the Commissioner finds that there is a strong public interest in affording the private correspondence of members of the Royal Family the same protection as the private correspondence of other individuals. In cases of this kind the status of the individuals involved is not relevant when the correspondence is written in a personal capacity about private matters. The Commissioner is of the view that there is a general but strong public interest in the Royal Family being able to correspond with Government on personal matters in the expectation that the content of that correspondence will not be disclosed. In this case the correspondence was made with a clear expectation of confidentiality, within the context of the close relationship that exists between the Government, in particular the Prime Minister, of the day and the Royal Family. This weighs heavily in favour of the public interest in maintaining the exemption.
37. In all the circumstances of the case the Commissioner finds that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Section 40 – Personal information

38. The public authority has also applied section 40 of the Act to four of the six pieces of withheld correspondence. Information will be exempt under section 40(2) if it constitutes the personal data of someone other than the person making the request and disclosure would breach one of the data protection principles.
39. Personal data is defined in the Data Protection Act 1998 as:
- “...data which relate to a living individual who can be identified –*
(a) From those data, or
(b) From those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.”
40. In this case the data controller is the public authority.
41. In order for the public authority to be able to rely on section 40(2) it is first necessary to decide if the withheld information constitutes personal data. The complainant has argued that the public authority incorrectly cited section 40(2) because Diana, Princess of Wales is now deceased and personal data, as defined, only relates to living individuals.
42. The complainant is correct that references in the withheld information to Diana, Princess of Wales do not amount to personal data. However, the four items of correspondence also include references to other members of the Royal Family and other individuals and it is this that determines that the information should be withheld under section 40(2).
43. Whilst the public authority has not explicitly said which principle(s) would, in its opinion, be breached as a result of disclosure, it has said that it does not consider it fair for the purposes of the Data Protection Act, for this information to be

disclosed. The first data protection principle requires that data be processed fairly and lawfully and the Commissioner agrees that it is this principle which is of most relevance in this case.

44. When determining whether disclosure would be unfair the Commissioner has considered whether the persons mentioned in the correspondence had any expectation that the information would be disclosed. In this case the Commissioner is satisfied that the information was written in the expectation that it would remain confidential and the individuals who feature in the correspondence would reasonably expect that the contents of the correspondence would not be released. In reaching his decision on this point the Commissioner wishes to stress that whilst members of the Royal Family are inevitably high profile public figures, they are entitled to the same data protection rights as other individuals.
45. The Commissioner is satisfied that the information referred to above in 4 of the pieces of withheld correspondence is personal data and disclosure would breach the first data protection principle. Section 40 is an absolute exemption and therefore there is no public interest test to apply.

Section 41 – Information provided in confidence

46. Given that the Commissioner is satisfied that the withheld information is either exempt under section 37(1)(a) or both section 37(1)(a) and section 40, he has not gone onto consider the public authority's application of section 41.

The Decision

47. 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:
- The withholding of the six items of correspondence under the exemptions in section 37(1)(a) and, in respect of four of those items, section 40(2).

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The public authority breached section 17(1) of the Act by failing to issue a refusal notice within 20 working days.
- The public authority breached section 17(1) of the Act by failing to cite in the refusal notice the section 41(1)(a) and section 40(2) exemptions which it later sought to rely on.
- The public authority breached 17(1)(b) of the Act by failing to specify which sub-section of section 40 it was relying by the internal review stage.

- The public authority breached section 17(3) by failing to communicate to the complainant the result of its public interest determination within a reasonable timescale.

Steps Required

48. The Commissioner requires no steps to be taken.

Right of Appeal

49. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

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

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

Dated the 29th day of January 2009

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Section 1(1) provides that –

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Section 10(1) provides that –

“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.”

Section 17(1) provides that –

“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.”

Section 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(4) provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

Section 37(1) provides that –

“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, or
- (b) the conferring by the Crown of any honour or dignity.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”