

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 February 2012

**Public Authority:** Department for Business, Innovation and Skills  
**Address:** 1 Victoria Street  
London  
SW1H 0ET

### Decision

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1. The complainant made a freedom of information request to the Department for Business Innovation and Skills (BIS) for copies of correspondence with the Duchy of Cornwall on the Apprenticeship Skills, Children and Learning Bill. BIS refused the request by relying on the exemptions in section 37(1)(a) (communications with Her Majesty etc), section 40(2) (personal information) and section 42 (legal professional privilege). The Commissioner has investigated the complaint and found that some of the withheld information was exempt under section 37(1)(a) but the public interest favoured disclosure. For the remaining information the Commissioner found that either it was exempt under section 37(1)(a) and the public interest favoured maintaining the exemption, or it was exempt under section 42 and the public interest favoured maintaining the exemption or it was exempt under section 40(2).
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose some of the requested information to the complainant. The Commissioner has provided BIS with a schedule identifying the information to be disclosed.
3. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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4. On 13 December 2010, the complainant wrote to the Department for Business, Innovation and Skills (BIS) and requested information in the following terms:

*"Under the Freedom of Information Act, I would be grateful if you would forward to me copies of the correspondence in connection with consultation with the Duchy of Cornwall with regard to the Apprenticeship Skills, Children and Learning Bill of 2009."*

5. On 13 January 2011 BIS contacted the complainant to say that it needed further time to carry out a public interest test in respect of the requested information. It confirmed that the qualified exemptions that applied were section 37(1)(a) (Communications with Her Majesty etc) and section 42 (Legal professional privilege) and that it aimed to provide a substantive response by 10 February 2011.
6. On 10 February 2011 BIS contacted the complainant again to say that it had not yet reached a decision on the balance of the public interest on these exemptions and that it now aimed to respond by 10 March 2011.
7. BIS responded substantively on 10 March 2011 and confirmed that it held information falling within the scope of the request. However, it said that it was withholding the information as it was exempt from disclosure under section 37(1)(a) (Communications with Her Majesty etc), section 40 (Personal information), section 41 (Information provided in confidence) and section 42 (Legal professional privilege). It explained why each exemption was believed to apply and in the case of section 37(1)(a) and section 42 said that it considered the public interest in maintaining each exemption to outweigh the public interest in disclosure.
8. BIS subsequently carried out an internal review of its handling of the request and wrote to the complainant on 11 April 2011. It said that it was upholding the decision to refuse the request by relying on the exemptions referred to in its original response.

## Scope of the case

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9. On 15 April 2011 the complainant contacted the Commissioner to complain about BIS' decision to refuse his request.

10. During the course of the Commissioner's investigation BIS released some of the information falling within the scope of the request to the complainant. This Decision Notice only considers whether the information which continues to be withheld should be disclosed.

## **Reasons for decision**

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11. The complainant has requested copies of correspondence with the Duchy of Cornwall in relation to what was then the proposed Apprenticeship Skills, Children and Learning Bill which made provision for a statutory framework for apprenticeships. The Duchy of Cornwall is all the lands and estates held by the Heir to the Throne, HRH The Prince of Wales, as Duke of Cornwall. The Prince of Wales has a right to be consulted by government on proposals which affect the interests of the Duchy.

### Section 37(1)(a) – Communications with Her Majesty etc

12. Section 37(1)(a) has been applied to all of the withheld information and therefore the Commissioner has considered this exemption in the first instance. Section 37(1)(a) provides that information is exempt if it relates to communications with Her Majesty, with other members of the Royal Family or with the Royal Household.
13. The complainant maintains that the Duchy of Cornwall is a private estate and separate legal entity to the position of Prince of Wales and that therefore correspondence with The Prince of Wales in his capacity as Duke of Cornwall should be seen as falling outside the scope of the exemption. For its part BIS has said that it accepts that for the purposes of this request the Duchy of Cornwall does not form part of the Royal Household. However, it explained that on this particular piece of legislation (the Apprenticeship Skills, Children and Learning Bill) due to the way in which the consultation was undertaken at the time, the information which has been found relevant to the request constitutes and relates to the communications with The Queen's private secretaries.
14. The Commissioner has reviewed the withheld information which comprises letters with The Queen's private secretaries, drafts of these letters, and a series of emails between government officials also including representatives of Her Majesty. The Commissioner agrees with BIS that all of the information is exempt on the basis of section 37(1)(a). This is because the information either concerns the letter sent by BIS to the The Queen's Private Secretary at Buckingham Palace or

the subsequent reply. It is important to bear in mind that the section 37(1)(a) exemption extends to cover not only correspondence with the The Queen, Royal Family and Royal Household but information that relates to such correspondence as well. Therefore the exemption can be given a relatively broad interpretation.

15. The Commissioner is satisfied that the information either constitutes communications with the Royal Household or else relates to communications with the Royal Household. Therefore the Commissioner has found that section 37(1)(a) is engaged in this instance.
16. At the time of the request section 37(1)(a) was a qualified exemption meaning that even where the exemption applies information may only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosure. Since the request was made relevant provisions of the Constitutional Reform and Governance Act 2010 have been implemented. With effect from 19 January 2011 section 37 has been amended so that communications with or on behalf of the Sovereign, the Heir to the Throne and second-in-line to the Throne, are absolutely exempt. However, given that the changes are not retrospective the Commissioner must base his decision on the law as it was at the time of the request. Therefore he has carried out a public interest test in respect of the withheld information.
17. The Commissioner considers that the public interest in disclosure lies in knowing more about how The Queen and The Prince of Wales (in his capacity as Duke of Cornwall) may influence government policy and the process by which consent is obtained when Parliamentary Bills may affect the prerogatives or interests of the Crown, or in the case of the Prince of Wales, the interests of the Duchy of Cornwall. The Monarchy has a central role in the British constitution and in the Commissioner's view the public is entitled to know how the various mechanisms of the constitution operate in practice.
18. As regards the public interest in maintaining the exemption, BIS has said that the arguments against disclosure arise from the "fundamental constitutional principle" that communications between The Queen and her Ministers, including their respective Private Secretaries, are confidential. It describes this principle as Her Majesty having the right and duty to counsel, encourage and warn her Government, and being entitled to have opinions on Government Policy and to express these opinions to Ministers. BIS argues that because she is constitutionally bound to accept and act on the advice of her Ministers it is important that communications relating to such advice remain confidential in order

to maintain the Monarch's political neutrality. It argues that disclosure of the information withheld in this case under section 37(1)(a) would undermine this principle.

19. The Commissioner has considered the competing arguments and has reached the view that for some of the correspondence sent by The Queen's representatives the public interest favours maintaining the exemption. This is because disclosure of such correspondence would risk revealing the private views of The Queen. The Commissioner finds more compelling the arguments regarding the importance of free and frank communication between The Queen and her Ministers. Disclosure of this information could have an adverse impact on the ability of The Queen to correspond with her ministers if it was felt that such information may be released in response to a request under the Act. The Commissioner also finds that the public interest favours maintaining the exemption by protecting the dignity of The Queen and the Royal Family which he considers to be a factor inherent in the section 37(1)(a) exemption. This is to preserve their position and ability to fulfil their constitutional role as a unifying symbol for the nation. To the extent that disclosure would undermine the dignity of the Royal Family by invading their privacy, the Commissioner accepts that this adds further weight to maintaining the exemption.
20. Whilst the Commissioner accepts that there is a public interest in favour of disclosure he finds that these arguments are more general in nature. The Commissioner does not think that there are any particular circumstances in this case that would warrant undermining an important constitutional principle or intruding on the privacy of The Queen. For instance, there is no suggestion here that any member of The Royal Family has exerted any undue influence over government policy. Therefore, where the information reveals the views of The Queen, or the Royal Household or those acting on her behalf the Commissioner has decided that the public interest favours maintaining the exemption under section 37(1)(a). However, for the remaining information the Commissioner has found that the public interest is balanced differently.
21. Where the information constitutes a communication sent from BIS to Buckingham Palace the Commissioner considers that the information does not raise any concerns in relation to the constitutional principles on the right of the Sovereign to communicate with her Ministers in confidence. The information is more factual in that it sets out the purpose behind the proposed legislation and how it might affect the Royal Household and the Duchies of Cornwall or Lancaster. The information does not reveal the views of Her Majesty or her

representatives and therefore the Commissioner is of the view that disclosure would not prejudice the political neutrality of The Queen and would be unlikely to discourage future communications with her Ministers. However, some of this information has also been withheld under section 42 and the Commissioner will go on to consider this exemption below.

22. The Commissioner also found that for some other information the public interest favours disclosure. As he explained above, BIS has already disclosed some information falling within the scope of the request in the form of redacted emails between government officials. The names of officials were redacted under the section 40(2) exemption and a very small amount of information was redacted under section 37(1)(a). The Commissioner will go on to discuss the issue of officials' names but as regards the information redacted under section 37(1)(a) he would simply say that he can see no reason why this cannot be disclosed to the complainant. The information redacted from the emails sent to the complainant when viewed in isolation is completely innocuous and reveals nothing which would prejudice the process by which The Queen's and The Prince of Wales' consent is sought on legislation or would compromise the political neutrality of The Queen or the Royal Household. The Commissioner has also found that a small amount of the information in emails between government officials not previously disclosed to the complainant should also be disclosed for the same reasons.

#### Section 42(1) – Legal professional privilege

23. BIS has also applied the section 42(1) legal profession privilege exemption to some of the withheld information. Section 42(1) provides that information in respect of which a claim for legal professional privilege could be maintained in legal proceedings is exempt. Legal professional privilege protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal as:

*“a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the*



*client, and even exchanges between the clients and third parties if such communication or exchanges come into being for the purpose of preparing for litigation.”<sup>1</sup>*

24. There are two types of legal professional privilege. Litigation privilege will apply where litigation is in prospect or contemplated and legal advice privilege will apply where no litigation is in prospect or contemplated. In this case the withheld information constitutes emails between government officials and their legal advisers on the issue of the Royal Household and the Duchy of Cornwall being covered by the Apprenticeship skills, Children and Learning Bill as well as references to this advice contained within some of the other documents falling within the scope of the request. So long as the advice remains confidential this information will be subject to legal advice privilege. Whilst the withheld information does include legally privileged communications, the Commissioner has found that in some places section 42(1) has been applied to an entire document falling within the scope of the request when it appears that only some of the document actually refers to legal advice received. In these instances the Commissioner is concerned that the definition of legal professional privilege has been applied too broadly and therefore he has only agreed to information being withheld under this exemption where the information is very obviously legal advice or a reference to such advice. The Commissioner has identified which specific information he considers to be legally privileged in a schedule to this decision notice which will be provided to BIS.
25. The principle of legal professional privilege will only apply to communications that are confidential to the world at large. Where legal advice has been placed in the public domain or has been disclosed without any restrictions placed on its further use, privilege will have been lost. The Commissioner has seen nothing to suggest that the legal advice has been disclosed, thus waiving privilege, and he is satisfied that section 42(1) is engaged in respect of the information specified in the schedule. The Commissioner has therefore gone on to carry out a public interest test for this information.

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<sup>1</sup> Bellamy v The Information Commissioner and the Secretary of State for Trade & Industry [EA/2005/0023], para. 9.

26. As regards the public interest in disclosure the Commissioner would repeat the arguments referred to at paragraph 17 above. BIS also acknowledged that disclosure of the information may promote greater transparency and understanding of constitutional protocols and workings of government.
27. In favour of maintaining the exemption BIS has said that protecting the principle of legal professional privilege is important because it ensures that departments are able to obtain free and frank legal advice so that decisions can be made in fully informed legal context. It argued that without such comprehensive advice government decisions would not be fully informed.
28. When considering the public interest in maintaining the exemption under section 42 of the Act the Commissioner will take into account the general public interest in protecting legal professional privilege. The Commissioner's view is that there will always be a strong public interest inbuilt into the section 42 exemption. In reaching this view the Commissioner has taken into account the findings of the Information Tribunal in the case of *Bellamy v Information Commissioner & Secretary of State for Trade and Industry* in which it states:

*"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case..."*<sup>2</sup>
29. In that case legal professional privilege was described as "a fundamental condition" of justice and "a fundamental human right". Therefore the Commissioner finds that BIS' arguments regarding the importance of it being able to obtain free and frank legal advice in confidence are strong.
30. When considering the particular weight to be given to the arguments in favour of disclosure or maintaining the exemption the Commissioner will also have regard to the particular circumstances of the case. At the time the request was received in December 2010 the legal advice was still

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<sup>2</sup> *Bellamy*, para. 35.



relatively recent in that it dated from late 2008 to early 2009. The Commissioner considers that the public interest in maintaining privilege will be stronger for legal advice which is recent because it is likely to be used in a variety of decision making processes which would be likely to be affected by disclosure. In light of this and in view of the importance of the principle of legal professional privilege itself, the Commissioner has decided that the public interest in maintaining the section 42(1) exemption outweighs the public interest in disclosure.

#### Section 40 – (Personal information)

31. BIS has said that it is withholding the names of officials featured in some of the information falling within the scope of the request by relying on section 40(2) of the Act which provides that information shall not be disclosed if it constitutes the personal data of someone other than the applicant and it satisfies one of two conditions relating to the Data Protection Act 1998 (DPA 1998). In this case the relevant condition is the first condition which is that disclosure would contravene any of the data protection principles. BIS has argued that disclosure would contravene the first data protection principle which requires that data be processed fairly and lawfully.
32. In deciding whether the exemption applies it is first necessary to consider whether the withheld information (the names of civil servants) constitutes personal data. Personal data is defined in the DPA 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,  
  
and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;’
33. The names of individuals will not always be personal data. A common name like ‘John Smith’ when viewed in isolation is unlikely to allow for that individual to be identified. Much depends on the context of the information. However, in this case the Commissioner is satisfied that the information is personal data. This is because the names of the individuals when combined with the other withheld information and the fact that it would be known that the individuals are civil servants

employed in certain government departments would allow for the individuals to be identified.

34. Having satisfied himself that the information is personal data the Commissioner has gone on to consider whether disclosure would contravene the first data protection principle. The first data protection principle states that:

'1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

(a) at least one of the conditions in Schedule 2 is met, and  
(b) in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.'

35. BIS has argued that disclosure would contravene the first data protection principle because it would not be fair to the individuals concerned. BIS has not provided any detailed arguments as to why disclosure would be unfair except to say that the individuals concerned are junior officials who have a right to expect that it will respect their personal data in accordance with the DPA 1998.

36. In considering the fairness of disclosure the Commissioner has taken into account the following factors:

- The expectations of the individuals
- The possible consequences of disclosure
- Whether the legitimate interests of the public are sufficient to justify any negative impact on the rights and freedoms of the data subjects

37. The Commissioner's guidance on personal information states that it is important to draw a distinction between the information which senior staff should expect to have disclosed about them and what junior staff should expect to be disclosed.<sup>3</sup> The rationale for this is that the more senior a person is the more likely it is that they will be responsible for making influential policy decisions. In this case the information relates to the seeking of The Queen and the Duchy of Cornwall's consent in

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<sup>3</sup>[http://www.ico.gov.uk/for\\_organisations/freedom\\_of\\_information/information\\_request/~media/documents/library/Data\\_Protection/Detailed\\_specialist\\_guides/PUBLIC\\_AUTHORITY\\_STAFF\\_INFO\\_V2.ashx](http://www.ico.gov.uk/for_organisations/freedom_of_information/information_request/~media/documents/library/Data_Protection/Detailed_specialist_guides/PUBLIC_AUTHORITY_STAFF_INFO_V2.ashx)

relation to the Apprenticeships Skills, Children and Learning Bill. The individuals concerned are junior officials and not themselves responsible for the bill or the constitutional convention that consent is sought in such cases. The Commissioner's view is that in these circumstances the individuals concerned would have a reasonable expectation that their personal information would not be disclosed. The Commissioner would also say that having reviewed the withheld information it appears to him that the officials are not in public facing roles where one might more readily expect information about their professional life to be disclosed.

38. As regards the consequences of disclosure the Commissioner does not think that there is anything especially sensitive in the information which would have adverse consequences for the individuals for instance in terms of their careers or reputation. Indeed, if there were clear and compelling legitimate interests in favour of disclosing these names then he would be likely to conclude that disclosure would be fair. However, the Commissioner is not convinced that there is any real legitimate interest in the names themselves being released. Disclosure would add very little to the information he has ordered to be disclosed. Whilst it could be argued that there is a legitimate interest in promoting transparency and accountability the Commissioner's view is that this would be only in the most general sense due to the seniority of the officials.
39. The Commissioner has decided that disclosure of the names of officials would contravene the first data protection principle. The Commissioner also found that the name of a representative of The Queen would also contravene the first data protection principle for similar reasons and especially because this person was not a public figure. Consequently, the Commissioner has found that this information is exempt under section 40(2) of the Act.

#### Section 41 – Information provided in confidence

40. The Commissioner has not considered this exemption as he already found that the information to which this exemption has been applied is exempt on the basis of section 37(1)(a).

#### **Other matters**

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41. The complainant submitted his request to BIS on 13 December 2010. BIS provided a response within 20 working days but said that it needed

further time to consider the public interest test. It was not until 10 March 2011 that it issued a substantive response, refusing the request.

42. Under section 17(3) of the Act a public authority may extend the time to respond to a request where it needs further time to consider the public interest test. However any extension must be 'reasonable'. The Commissioner has issued guidance on how long a public authority should take to consider the public interest.<sup>4</sup> In this guidance the Commissioner made it clear that he would expect public authorities to aim to respond to all requests fully within 20 working days. Only in exceptionally complex cases would it be reasonable to take longer and in no case should the total exceed 40 working days. In this particular case the public authority took almost 3 months to issue a refusal notice and the Commissioner's view is that in the circumstances such a delay was not reasonable. Therefore the Commissioner has found that BIS breached section 17(3) in its handling of the request.

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<sup>4</sup>[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/foi\\_good\\_practice\\_guidance\\_4.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_4.pdf)

## Right of appeal

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43. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

44. 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.
45. 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 .....**

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

## Schedule of information

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Document 1 – disclose but with legal advice in paragraph 4 and associated tracked changes (e.g. deleted excerpt from penultimate paragraph) withheld under section 42(1).

Document 2 – disclose the 23/01/09 18:35 email from this chain but with names redacted.

Document 3 – disclose all emails but with names redacted and highlighted section withheld under section 42(1).

Document 4 – disclose all emails with names redacted.

Document 5 – disclose but with legal advice in paragraph 4 and associated tracked changes withheld under section 42(1).

Document 6 – as above.

Document 7 – disclose but with legal advice in paragraph 7 withheld under section 42(1).

Document 8 – disclose all emails with names redacted.

Document 9 – withhold under section 37(1)(a).

Document 10 – disclose all emails with names redacted.

Document 11 – disclose all emails but with names redacted and highlighted sections only withheld under section 42(1).

Document 12 – disclose but with legal advice in paragraph 4 redacted under section 42(1).

Document 13 – Disclose all emails but with names redacted and only the highlighted sections redacted under section 42(1).