

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 October 2018

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office for copies of correspondence between the then Prime Minister, Tony Blair, and The Duke of Edinburgh about the death of Diana, Princess of Wales. The Cabinet Office refused to confirm or deny whether it held any information falling within the scope of the request on the basis of the exemption contained at section 37(2) of FOIA, by virtue of section 37(1)(ac) which provides that information is exempt from disclosure if it relates to communications with, or on behalf of, a member of the Royal Family. It also sought to rely on section 40(5) (personal data) of FOIA. The Commissioner has concluded that section 37(2) is engaged and that in all the circumstances of the case the public interest favours maintaining the exemption.

Request and response

2. The complainant wrote to the Cabinet Office on 29 August 2017 and submitted the following request:

'Please note that the reference to the Prime Minister should include Mr Blair and the Prime Minister's private office.'

Please note that the reference to Prince Philip should just include the Prince and his private office.'

Please note that I am only interested information generated between 31 August 1997 and 31 October 1997.'

1...During the aforementioned period did Prince Philip exchange correspondence and communications including emails with Tony Blair which in any way touched upon the Death of Diana Princess of Wales and or the public's response to the Princess's death and or the Royal Family's response to the tragedy and and [sic] or Diana's funeral.

2...If the answer is yes can you please provide copies of this correspondence and communications. Please note I am interested in receiving both sides of the correspondence and communication. Please do include the transcript and recordings and any relevant telephone conversations.

3...If relevant information has been subsequently destroyed can you please detail which documents were destroyed. Can you please provide an outline of their contents and state the date (s) on which they were destroyed. Can you please provide any documents held by the Cabinet Office which in any way relate to the decision to destroy the documents. If the destroyed documents are held in another form can you please provide copies.

Please do provide relevant information if it falls outside the time line stated.'

3. The Cabinet Office responded on 26 September 2017 and refused to confirm or deny whether it held any information on the basis of section 37(2) of FOIA by virtue of 37(1)(ac).
4. The complainant contacted the Cabinet Office on 2 October 2017 and asked it to conduct an internal review of this decision.
5. The Cabinet Office informed him of the outcome of the internal review on 15 June 2018. The review upheld the application of section 37(2) and also explained that it considered section 40(5) of FOIA to apply to this request.

Scope of the case

6. The complainant contacted the Commissioner on 20 February 2018 in order to complain about the Cabinet Office's refusal of his request and its failure to complete the internal review within a reasonable timescale.
7. In relation to this complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.
8. As explained above, the Cabinet Office is seeking to rely on section 37(2) to refuse to confirm or deny whether it holds information falling within the scope of the request. Therefore this notice only considers whether the Cabinet Office is entitled, on the basis of these exemptions, to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.

Reasons for decision

Section 37 - Communications with the sovereign, other members of the Royal Family and the Royal Household

9. Section 37(2) of FOIA states that:

'The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).'
10. In the circumstances of this case the subsection within section 37(1) which has been cited by the Cabinet Office is 37(1)(ac). This section states that information is exempt if it relates to:

'communications with other members of the Royal Family (other than communications which fall within any of paragraphs (a) to (ab) because they are made or received on behalf of a person falling within any of those paragraphs).'
11. To engage section 37(2) the requested information (if held) would therefore have to fall within the scope of one of the exemptions contained within section 37(1).

12. As the complainant has requested correspondence the Duke of Edinburgh may have exchanged with the then Prime Minister, Tony Blair, the Commissioner is satisfied that if the Cabinet Office held such information it would be clearly be exempt from disclosure on the basis of section 37(1)(ac) of FOIA. Section 37(2) is therefore engaged.

Public interest test

13. However, section 37(2) is a qualified exemption. Therefore, the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in confirming whether or not the requested information is held.

Public interest arguments in favour of confirming whether or not the requested information is held

14. The Cabinet Office acknowledged that there is a public interest regarding the funeral of Diana, Princess of Wales and to know if there is any correspondence between the spouse of the Monarch and the Prime Minister at the time.
15. The complainant argued that it was highly likely that the Cabinet Office did hold information relevant to his request and that a number of well sourced media reports have suggested that the Duke of Edinburgh did play an active part in the arrangements for the funeral of Diana, Princess of Wales.

Public interest arguments in maintaining the exclusion to confirm or deny whether the requested information is held

16. The Cabinet Office argued that it was expected that correspondence between members of the Royal Family and the Prime Minister would be treated confidentially. Consequently, if it complied with section 1(1)(a) of FOIA in relation to this request, and thus revealed whether or not the Duke of Edinburgh had corresponded with the Prime Minister on a particular topic, such confidentiality would be undermined. The Cabinet Office argued that this could hinder the open dialogue between the Royal Family and Prime Minister and undermine the constitutional position of the Monarchy an outcome which would be firmly against the public interest. The Cabinet Office also argued that there is no specific and particularly pressing public interest that would supersede the countervailing interest in respect of any correspondence that might be held concerning the Duke's involvement in the funeral preparations for Diana, Princess of Wales.

Balance of the public interest arguments

17. The Commissioner agrees with the Cabinet Office that there is strong public interest in ensuring that the Royal Family can exchange free and frank correspondence with the Prime Minister. Confirmation as to whether or not the Cabinet Office held the requested information would reveal whether the Duke of Edinburgh had discussed a specific issue with the Prime Minister of the day over a particular time period. In the Commissioner's view such a confirmation would represent a significant risk of a chilling effect on any future correspondence. The Commissioner also considers there to be a significant public interest in ensuring that the Royal Family is not politicised and in her view revealing the topics and subjects on which they exchanged (or may have exchanged) correspondence with the Prime Minister presents a real risk of this occurring. The Commissioner acknowledges that complying with section 1(1)(a) would contribute towards the transparency of how the Royal Family and Prime Minister engage on particular topics. She also accepts that there is a public interest in the events following the death of Diana, Princess of Wales. However, she also agrees with the Cabinet Office that there is no specific and particularly pressing public interest in confirming whether the requested information is held. Therefore, the Commissioner has concluded that in the circumstances of this request the public interest in maintaining the exemption contained at section 37(2) outweighs the public interest in the Cabinet Office confirming whether or not the requested information is held.
18. In light of this finding, the Commissioner has not considered the Cabinet Office's reliance on section 40(5) of FOIA.

Other matters

19. The complainant expressed his concern to the Commissioner about the length of time it took the Cabinet Office to complete its internal review. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.
20. In this case the complainant submitted his request for an internal review on 2 October 2017. The Cabinet Office informed him of the outcome of the internal review on 15 June 2018, 178 working days later. The Commissioner wishes to use this as an opportunity to remind the Cabinet Office, as she has done on a number of previous occasions, of

Reference: FS50727895

the need to complete internal reviews within the timeframes set out in her guidance.

Right of appeal

21. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

22. 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.
23. 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

Jonathan Slee
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