

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 17 August 2018

**Public Authority:** HM Treasury  
**Address:** 1 Horse Guards Road  
London  
SW1A 2HQ

#### Decision (including any steps ordered)

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1. The complainant has requested copies of correspondence and communications between the Chancellor of the Exchequer and The Queen and or Prince Philip from 1 May 1996 to 1 February 1998 in relation to The Royal Yacht Britannia. The public authority neither confirmed nor denied holding the requested information, relying on section 37(2) FOIA.
2. The Commissioner has concluded that the public authority was entitled to rely on section 37(2).
3. No steps are required.

## Request and response

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4. The complainant submitted a request for information to the public authority on 28 December 2017 in the following terms:

"I would like to request the following information under The Environmental Information Regulations (EIRs)

Please note that the reference to The Queen and Prince Philip should include The Royal Couple as well as their private secretaries and their press secretaries.

Please note that the reference to The Chancellor should include the holders of that office and their respective private offices.

Please note that I am only interested in information which relates to the period 1 May 1996 to 1 February 1998.

If you are ALREADY aware of relevant information being held outside the time period please let me know and I will submit another request.

1. During the aforementioned period did the Chancellor exchange correspondence and communications with The Queen and or Prince Philip which in any way related to The Royal Yacht Britannia. This correspondence and communication will include but will not be limited to exchanges about the cost, upkeep and maintenance of the Yacht. It will also include but will not be limited to exchanges about its value to the nation, its value to The Royal Family; its voyages (past and present) and its planned replacement/retirement.
2. If the answer is yes can you please provide copies of this correspondence and communication including emails. Please do also provide transcripts and recordings of any relevant telephone conversation. Please note that I would like to receive both sides of the correspondence and communication.
3. If relevant documents have been subsequently destroyed can you please provide the following information. In the case of each destroyed document can you please state when it was destroyed and why. In the case of each destroyed document can you please provide a brief outline of its contents. Can you please provide a copy of the destroyed information if it continues to be held in another form."
5. The public authority responded on 10 January 2018. It neither confirmed nor denied whether any information was held within the scope of the request, relying on section 37(2) FOIA.

6. The complainant requested an internal review of this decision on 10 January 2018.
7. On 26 January 2018 the public authority wrote to him with details of the outcome of the review. The review upheld the original decision.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 14 March 2018 in order to complain about the public authority's handling of his request.
9. He maintained that "any information held about the Yacht is likely to be environmental as defined by the EIRs."
10. He further submitted there were strong grounds for disclosure given the "controversy" surrounding the decision to scrap the Yacht.
11. The scope of the Commissioner's investigation therefore was to determine whether the public authority was entitled to neither confirm nor deny holding information within the scope of the request.
12. Nothing in this notice should be taken to either indicate that the public authority holds or does not hold information within the scope of the request.

### **Reasons for decision**

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13. The first question the Commissioner must consider is whether the public authority was entitled to deal with the request under the terms of the FOIA, or the EIR, or both.
14. Section 1(1) FOIA provides two rights to applicants. They are:
  - a) The right to be informed in writing by the public authority whether or not it holds the information requested by the applicant, and
  - b) If so, the right to have that information communicated.
15. Both these rights are subject to other provisions in the FOIA.
16. The right in section 1(1)(a) is commonly referred to as a public authority's duty to either "confirm or deny" whether it holds information requested by an applicant.

17. There are a number of exclusions in the FOIA from the duty to confirm or deny in section 1(1)(a). Section 37(2) (communications with Her Majesty etc.) is one of such exclusions.
18. Under the EIR there are two exclusions from the duty to "confirm or deny" in relation to regulation 12(5)(a) (international relations, defence, national security or public safety) and regulation 13 (personal data). Both exclusions are respectively contained at regulation 12(6) and regulation 13(5). There are no other exclusions from the duty to confirm or deny in the EIR.
19. "Environmental information" is described at regulation 2(1) of the EIR.<sup>1</sup> The Commissioner can understand why the complainant is of the view that if held, information within the scope is likely to include environmental information within the meaning of the EIR. However, for the reasons in the confidential annex which cannot be shared with the complainant and the wider public, the Commissioner has concluded that the public authority was entitled to deal with his request under the FOIA.

### **Section 37(2)**

20. The Commissioner next considered whether the public authority was entitled to neither confirm nor deny holding any information in scope, relying on section 37(2) FOIA.
21. Section 37 FOIA states:
  - "(1) Information is exempt information if it relates to—
    - (a) communications with the Sovereign,
      - (aa) communications with the heir to, or the person who is for the time being second in line of succession to, the Throne,
      - (ab) communications with a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne,
      - (ac) 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), and

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<sup>1</sup> <http://www.legislation.gov.uk/ukxi/2004/3391/regulation/2/made>

(ad) communications with the Royal Household (other than communications which fall within any of paragraphs (a) to (ac) because they are made or received on behalf of a person falling within any of those paragraphs), or]

(b) the conferring by the Crown of any honour or dignity.

(2) 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)."

20. The public authority's position is that confirming or denying whether it holds information within the scope of the request would itself reveal information relating to communications with The Queen which would otherwise be exempt on the basis of section 37(1)(a) and or would reveal information in relation to communications with The Duke of Edinburgh which would otherwise be exempt on the basis of section 37(1)(ac).
21. It is clear from section 37 that information is exempt on the basis of section 37(1)(a) if it relates to communications with The Queen, and is also exempt on the basis of section 37(1)(ac) if it relates to communications with other members of the Royal Family (ie other than those mentioned in paragraphs a to ab).
22. Section 37(2) is also clear that a public authority is excluded from the duty to confirm or deny whether it holds information which is, or if it were held by the public authority would be, exempt from disclosure by virtue of sections 37(1)(a) and (ac).
23. The Commissioner is satisfied that confirming or denying whether the information requested by the complainant is held would reveal information which would otherwise be exempt under sections 37(1)(a) and (ac).
24. The Commissioner has therefore concluded that the public authority was entitled to rely on the exclusion at section 37(2) as the basis for neither confirming nor denying whether it held information within the scope of the request.

### **Public interest test**

25. The exclusion at section 37 from the duty to comply with section 1(1)(a) with respect to information that would otherwise be exempt under section 37(1)(ac) is subject to the public interest test set out in section 2(1)(b) FOIA. The exclusion at section 37 is absolute if relied upon by a public authority on the basis that it would reveal information which would otherwise be exempt under section 37(1)(a).

26. The Commissioner has therefore considered whether in all the circumstances of the case, the public interest in maintaining the exclusion at section 37(2) with respect to information that would otherwise be exempt under section 37(1)(ac) outweighs the public interest in complying with section 1(1)(a) FOIA.
27. The complainant has argued that there were strong grounds for disclosure given the "controversy" surrounding the decision to scrap the Yacht.
28. The public authority acknowledged that there is a public interest in whether there is correspondence between the Duke of Edinburgh and the Chancellor on significant topics of the day.
29. It however argued that there is also a countervailing public interest for the existence of such correspondence not to be confirmed. There is a strong public interest in Members of the Royal Family being able to carry out their duties in this way. That they are able to do so depends on the maintenance of the confidentiality of their communications. The effective performance of The Duke of Edinburgh's role is dependent upon maintaining the expectation of confidentiality of communications.
30. The public authority further submitted that there was no specific and particularly pressing public interest that would supersede the public interest in maintaining the exclusion. Although Members of the Royal Family are not in the same constitutional position as Her Majesty, the need to maintain the neutrality of the Sovereign, and not to undermine diplomatic and goodwill work of all Members of the Royal Family are still relevant factors in the public interest. Confirming or denying whether information is held in relation to this topic specific request could undermine the neutrality of the Sovereign and the work of Members of the Royal Family.

*Balance of the public interest*

31. The Commissioner accepts that the effectiveness of the established constitutional relationship between Government and the Royal Family is dependent upon maintaining the confidentiality of their communications with Government. Consequently, she considers that there is a significant public interest in not undermining the constitutional relationship between The Duke of Edinburgh and Government. Confirming or denying whether there have been communications between The Duke

and Government in relation to an issue that has remained not too distant from the headlines<sup>2</sup> is likely to undermine that relationship.

32. The Commissioner appreciates that the decision not to replace the de-commissioned Royal Yacht has generated debate including recently. However, she does not share the view that this fact in itself is a weightier factor in the public interest in support of confirming or denying whether The Duke of Edinburgh and the Chancellor exchanged correspondence and communications in relation to the Yacht. The damage it could do to relations between Government and The Royal Family should not be underestimated. There is a significant public interest in not undermining the constitutional relationship between Government and the Royal Family.
33. The Commissioner has therefore concluded that on balance, in all the circumstances of the case, the public interest in maintaining the exclusion outweighs the public interest in complying with the duty to confirm or deny whether the public authority holds information within the scope of the request.

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<sup>2</sup> See for example, <http://www.bbc.co.uk/news/uk-politics-37428864>

## Right of appeal

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34. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

35. 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.
36. 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 .....**

**Terna Waya  
Senior Case Officer  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
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SK9 5AF**