

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 March 2021

Public Authority: The Foreign, Commonwealth and Development Office

Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant has requested copies of any correspondence and communications to the Foreign Secretary from The Duke and Duchess of York concerning the late Jeffrey Epstein or his business and charitable organisations made between the period 1 January 2002 to 1 June 2002.
2. The Foreign, Commonwealth and Development Office (the Foreign Office) refused to confirm or deny whether it held the requested information and cited sections 40(5) (third party personal data) and 41(2) (information provided in confidence) as its basis for doing so.
3. The Commissioner's decision is that the Foreign Office is entitled to rely on section 40(5B) of the FOIA to neither confirm or deny holding whether it holds the requested information.

Background

4. 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'.¹ The Duke reportedly flew with Epstein on

¹ <https://www.bbc.co.uk/news/uk-12659571>

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.

5. 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 BBC² 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.
6. 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).
7. 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 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.
8. 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*

² During the Duke's Newsnight interview aired on 16 November 2019.

States'. The Duke said that Epstein never mentioned that he was under investigation.

9. 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.
10. 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'.

11. 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.
12. 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*'.
13. 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'.
14. 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.

15. 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'*.
16. 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'*.
17. 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.
18. 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

19. On 21 November 2019, the complainant wrote to the FCO and requested information in the following terms:

"Please note that the Duke and Duchess of York should include those two individuals (acting together or separately) and their private offices. Please note that the reference to the Foreign Secretary should include the Foreign Secretary and his/her private office. Please note that I am only interested in information generated between 1 January 2002 to 1 June 2002. 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 vial [sic]

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 2002 to 1 June 2002 but please do let me know if you are aware of relevant information which falls outside that period and I will submit another request.

I believe there are strong public interests grounds for disclosure given the ongoing concern about the Duke and Duchess's relationship with the late Mr Epstein, a convicted sex offender.

In the light of Prince Andrew's decision to withdraw from public life for the foreseeable future (following his Newsnight television interview) and given the fact that the Duchess does not have a programme of official duties it would be quite wrong to suggest that disclosure of the material would have any impact on their current public roles or their current public duties.

1... During the aforementioned period did the Duke and Duchess of York write or correspond or communicate with the Foreign Secretary 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, his residency in the UK, the amount of time he has spent in the UK, and the possibility that he could apply for and 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 idea that Mr Epstein should be given a diplomatic role or similar which would be overseen by the Foreign Office.

f... An application for foreign office funding submitted by Mr Epstein and or his companies and or hon his behalf by the Duke and Duchess.

2... If the answer to question one is yes can you please provide copies of this written correspondence and communication?

3... During the aforementioned period did the Foreign Secretary write or correspondence [sic] or communicate with the Duke and or Duchess about any of the issues outlined in question 1 (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 information has been destroyed can you state when it was destroyed and why. In the case of each piece of written correspondence and communication which has been destroyed can you provide details of the author(s), the recipient(s), the date generated

and a brief outline of its contents. If any of this destroyed documentation continues to be held in another form can you please provide copies of that documentation."

20. On 19 December 2019, the Foreign Office provided its response and refused to neither confirm or deny that it held information falling within the scope of the request. The Foreign Office confirmed that it was relying on section 40(5) and section 41(2) to do so. The Foreign Office explained that it considered confirming or denying would breach the first data protection principle and therefore was exempt under section 40(5) and would also constitute an actionable breach, engaging section 41(2).
21. On 15 January 2020, the complainant wrote to the Foreign Office and requested an internal review. He disputed that the Foreign Office was entitled to refuse to confirm or deny whether it holds information falling within the scope of the request. He confirmed that there are strong public interest grounds in favour of disclosure, namely, the public concern regarding the precise nature of the relationship between the Duke and Duchess and Mr Epstein.
22. In an undated letter, the Foreign Office provided the outcome of its internal review. The Foreign Office acknowledged the public interest in understanding the relationship between the Duke and Duchess and Mr Epstein but upheld that it was entitled to refuse to confirm or deny whether it held information within the scope of the request. The Foreign Office reiterated its reasons for relying on section 40(5) and section 41(2).

Scope of the case

23. The complainant contacted the Commissioner on 1 March 2020 to complain about the way his request for information had been handled.
24. The Commissioner considers that the scope of her investigation is to determine whether the Foreign Office is entitled to refuse to confirm or deny whether the requested information was held. The Commissioner will consider section 40(5) in the first instance, should she determine that section 40(5) is not engaged, she will proceed to consideration of section 41(2).

Reasons for decision

25. 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.

26. Therefore, for the Foreign Office 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?

27. Section 3(2) of the Data Protection Act 2018 (DPA) defines personal data as '*any information relating to an identified living individual*'.
28. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
29. 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.
30. If the Foreign Office was to confirm whether it held information within the scope of the request it would be confirming whether either The Duke of York or the Duchess of York had corresponded with the Foreign Secretary³ between the period 1 January 2002 to 1 June 2002, and that the correspondence related to Jeffrey Epstein or his business activities.
31. 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.
32. 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.

³ Jack Straw being the Foreign Secretary during the time period requested

33. 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 the Foreign Office confirmed it 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.
34. For the reasons set out above, the Commissioner is satisfied that if the Foreign Office confirmed whether or not it 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.
35. 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 the Foreign Office from confirming whether or not it holds 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?

36. The Commissioner considers that the most relevant data protection principle is principle (a).
37. 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'.

38. 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

39. 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.

40. 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'.

41. 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;
- (iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

42. 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

43. 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.
44. In its submissions to the Commissioner, the Foreign Office acknowledged that there is a legitimate interest in transparency for its own sake. The Foreign Office considered that to this extent, there is a legitimate interest in confirmation or denial, albeit limited. The Foreign Office also acknowledged that there may a legitimate interest relating to

the accountability of the individuals concerned in respect of the topics which the request includes.

45. The Foreign Office queried, however, whether disclosure is proportionate for that purpose. The Foreign Office explained that the requests are broad in scope, covering all communications between the Duke or Duchess and the Foreign Secretary and their offices about Jeffrey Epstein. The Foreign Office considers that it is not limited to matters of alleged public interest.
46. The Foreign Office explained that if it confirmed or denied whether it holds this information, this could set a precedent whereby requestors could ask the Foreign Office for all communications with a member of the Royal Family about a particular topic, and the Foreign Office in confirming or denying whether these communications exist would effectively disclose some of the contents of these communications.
47. The Foreign Office considers that the public may have an interest in knowing whether the Duke and/or Duchess and the Foreign Secretary have exchanged correspondence as described in the complainant's request. The Foreign Office considers, however, that it is important to draw a distinction between what is of interest to the public and what is in the public interest.
48. The Foreign Office considers that there is a public interest, generally, in openness in government, and this could extend to the nature of topics discussed when government ministers correspond with third parties.
49. Beyond these generic public interests, the Foreign Office explained that it had been unable to identify any more specific purpose that would override the Duke or Duchess' rights and freedoms as data subjects.
50. 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 the Foreign Office). 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.

51. The Commissioner does not accept the distinction which the Foreign Office has 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.
52. 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 the Foreign Secretary.
53. 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.
54. The Commissioner notes that there was considerable press speculation about the precise nature of the Duke's relationship with Jeffrey Epstein, however, she also notes that much of the 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.
55. The Commissioner notes that the Foreign Office considers that confirmation or denial would disclose information on the contents of the correspondence, however the Commissioner does not accept this argument in the specific circumstances of this case. Whilst the request provides a list of information the complainant would expect to be held, the requests 1 a&b encompass any communications that may be held regarding Jeffrey Epstein and his businesses or charitable interests and the following requests would therefore fall within the scope of requests 1 a&b. 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 Foreign Secretary about Jeffrey Epstein, such a confirmation would provide little illumination about the contents of any such correspondence or communications.

56. 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.
57. 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 2002 and 1 June 2002.
58. 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 2002 to 1 June 2002, there were no police investigations being carried out concerning Epstein and neither The Duke nor the Duchess could have corresponded with the Foreign Secretary about the same.
59. 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 Foreign Office largely depends on what was known about Epstein's criminality at the time.
60. 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 the Foreign Office with a view to lobbying or assisting Epstein *after* his conviction in 2008 then this would constitute a strong and compelling legitimate interest in the Foreign Office providing a confirmation or denial as to whether they held such information.

61. However, the Commissioner considers that the legitimate interest in providing such a confirmation or denial is substantially less for the period 1 January 2002 to 1 June 2002, 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.
62. 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 Foreign Secretary 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.
63. 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.
64. 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.
65. 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 Foreign Secretary during 2002 with a view to lobbying for, or assisting, their then friend Jeffrey Epstein. This is a legitimate interest which the Foreign Office 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?

66. '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.
67. In submissions to the Commissioner, the Foreign Office explained that it considered that the identified legitimate interests could be served by means other than the release of information about private one-to-one communications. However, the Foreign Office did not set out how the legitimate interests could be met other than by confirming or denying that the information is held.
68. The Foreign Office considers that confirmation or denial in this case would risk going into the realms of desirability and public curiosity rather than legitimate public interest.
69. The Foreign Office therefore considers that confirming or denying that the requested information is held is not necessary to meet any alleged or generic legitimate interest in this case.
70. The Commissioner considers that the Foreign Office has failed to apply the necessity test properly because it has failed to identify correctly the legitimate interests in issuing a confirmation or a denial that information was held.
71. 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 Foreign Secretary in relation to Jeffrey Epstein cannot be satisfied in any way other than by the Foreign Office 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

72. 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.

73. In submissions to the Commissioner, the Foreign Office explained that it considered that any legitimate interest is overridden by the interests, rights and freedoms of the Duke and Duchess. It considers that confirming whether the requested information is or is not held would have an adverse impact on the Duke's and/or Duchess' privacy. The nature of the communications between members of the Royal Family and members of the public, which have 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. The public interest in preserving this constitutional position outweighs the general public interest considerations in favour of confirmation or denial.
74. The Foreign Office explained that in the case of the Duchess, as she is not, and was not at the time, a member of the Royal Family she has the same rights to privacy as any other private individual which outweigh any legitimate interest in confirming or denying that information is held.
75. The Foreign Office therefore concluded that the rights and freedoms of the individuals in this case far outweigh the legitimate interests of public in knowing whether the requested information is or is not held. There is a legitimate public interest to uphold the rights of the individuals to whom the requested information currently relates. The Foreign Office confirmed that it has to observe its obligations to these individuals under the GDPR and the Data Protection Act 2018. Their rights and interests may be negatively impacted by substantive confirmation or denial to the extent that disclosure may cause damage or distress. The Foreign Office considers the balance to be strongly in favour of maintaining the neither confirm nor deny position as to do otherwise would breach the data protection principles.
76. The Commissioner notes that at the time of the request, and indeed for the period of time (1 January 2002 to 1 June 2002) 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.
77. 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.

78. 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.
79. Whilst the Commissioner recognises that higher profile individuals may have their correspondence handled (or at least considered) by a more senior individual within the Foreign Office, including the Foreign Secretary, 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.
80. 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)*⁴ 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.

⁴ <https://www.judiciary.uk/judgments/evans-v-information-commissioner/>

81. The Commissioner has considered whether any already publicly available information on the subject may affect the reasonable expectations of the Duke and/or Duchess. The Commissioner is unaware of any public or official record of such information which would give rise to an expectation of disclosure. 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 Foreign Office's arguments about the expectation of confidentiality of discussions between the Royal Family and government have greater weight and purchase in this case.
82. 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.
83. 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.
84. 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.
85. 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).

86. For the reasons set out 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 to override the fundamental interests of the data subjects and the public interest in protecting the individuals' privacy. She does not, therefore consider that there is a lawful basis for the processing of the this personal data and, accordingly, confirmation or denial under the FOIA would be unlawful.
87. As confirmation or denial would be unlawful, such processing would breach the first data protection principle and therefore the Foreign Office is entitled to rely on section 40(5B) of the FOIA in the manner that they did.
88. Having found that the Foreign Office is 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

89. In both his request and request for an internal review, the complainant asked the Foreign Office to consider its responsibilities under the Environmental Information Regulations 2004 and respond accordingly.
90. Given the wording and nature of his request, the Commissioner is not convinced that any relevant information the Foreign Office 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 the Foreign Office to handle this request under the FOIA.
91. However, given the similarities between section 40(5) of the FOIA and regulation 13(5) of the EIR, the Commissioner considers that the Foreign Office would have been able to rely on the latter exception to neither confirm nor deny holding any relevant environmental information.

Other matters

92. In his complaint to the ICO, the complainant stated that the focus of his complaint was the department's failure to disclose the information he believed 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

93. 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

94. 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.
95. 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
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF