

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 30 May 2024

**Public Authority:** HM Treasury

**Address:** 1 Horse Guards Road  
Westminster  
London  
SW1A 2HQ

#### **Decision (including any steps ordered)**

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1. The complainant has requested a file about Parliamentary annuities to the Royal Family listed at The National Archives but retained by HM Treasury ("HMT"). HMT refused to provide it citing sections 40(2) (personal data), section 41(1) (information provided in confidence) and section 37(1)(ac) (communications with members of the Royal Family). It upheld this at internal review.
2. The Commissioner's decision is that HMT is entitled to rely on section 40(2), section 41(1) and section 37(1)(ac) as its basis for withholding the requested information.
3. The Commissioner does not require further steps.

#### **Request and response**

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4. On 9 January 2023, the complainant wrote to HMT and requested information in the following terms:

"I am writing with regard to a file [from 1994] that is listed in the catalogue of the National Archives. I believe that the file is held by the Treasury. The file is titled - Parliamentary annuities to members of the Royal Family: accounts - and is listed as T 498/1.  
<https://discovery.nationalarchives.gov.uk/details/r/C17141231> Under

the act, I would like to ask for a complete copy of this file to be released.”

5. HMT responded on 2 March 2023. (This was outside the statutory time for compliance which is 20 working days.) It refused to provide the information it held within the scope of the request. It cited the following exemptions as its basis for doing so:
  - section 40(2);
  - section 41; and
  - section 37(1)(ac).
6. The complainant requested an internal review on 2 March 2023. Following an internal review, HMT wrote to the complainant on 8 August 2023. It upheld its original position. Further comment about the time taken to conduct an internal review is set out in the Other Matters section of this Notice.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 19 September 2023 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to decide whether HMT is entitled to rely on the three exemptions it has cited as its basis for refusing to provide the requested information.

### **Reasons for decision**

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9. Under section 40(2) of FOIA, information is exempt from disclosure if it is the personal data of someone other than the requester and a condition under section 40(3A) is satisfied. Section 40(2) only relates to living individuals.
10. In this case, the complainant has requested information which relates to a number of living individuals who are members of the Royal Family. They have also requested information which relates to a number of now deceased individuals who were members of the Royal Family. HMT cited other exemptions with respect to information about those latter individuals and these will be addressed later in this Notice.
11. In this case, the relevant condition is contained in section 40(3A)(a). This applies where disclosing the information to any member of the

public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').

12. In considering this exemption, the Commissioner has had regard for his own published guidance.<sup>1</sup>
13. First, the Commissioner must determine whether the withheld information can be categorised as 'personal data' as defined by the Data Protection Act 2018 ('the DPA'). If it is not personal data, then section 40(2) of FOIA cannot apply.
14. Section 3(2) of the DPA defines personal data as: -"any information relating to an identified or identifiable living individual". An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier, such as their name. 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.
15. Having read the withheld information, the Commissioner is satisfied that it contains the personal data of a number of individuals, most of whom are members of the UK Royal Family. This includes not only their names but also information from which they can be identified.
16. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

17. Article 5(1)(a) of the UK GDPR states that: "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
18. In the case of an FOIA request, personal information is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-40-and-regulation-13-personal-information/>

19. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the UK GDPR**

20. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f), which states: "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."
21. When he considers the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, the Commissioner has to consider the following three-part test:

**Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

**Necessity test:** Whether disclosure of the personal data is necessary to meet the legitimate interest in question; and

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

22. The Commissioner considers that the test of 'necessity' must be met before the balancing test can be applied. If it cannot be met, the processing will be unlawful.

### **Legitimate interests**

23. In considering any legitimate interest(s) in disclosing the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. A wide range of interests may also be legitimate interests. They can be the requester's own interests, the interests of third parties, commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

### **Necessity test**

24. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves considering alternative measures which may make disclosure of the requested information unnecessary. Disclosure under

FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

25. HMT acknowledged the legitimate interest in transparency and accountability. It also accepted that disclosure would be the only way to serve that interest because the information was not otherwise available.
26. Having considered the withheld information and HMT's explanation, the Commissioner agrees that there is no other way of satisfying the legitimate interest in transparency and accountability as it applies in this particular case. He concludes that disclosure is necessary to meet the legitimate interest identified above.

### **Balancing test**

27. Since the Commissioner is satisfied that disclosure is necessary for the purpose that this legitimate interest represents, he will now go onto consider whether the identified interests in disclosure outweigh the interests or fundamental rights and freedoms of the data subject. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure
28. In performing this balancing test, the Commissioner has considered the following:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the data subject expressed concern about the disclosure; and
  - the reasonable expectations of the data subject.
29. As referred to earlier, in the Commissioner's view, the balancing test should take into account whether the data subject has a reasonable expectation that their information would not be disclosed. This expectation may be influenced by a number of factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose which this personal information serves.
30. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to the data subject.
31. HMT said:

"Although this is official and semi-official expenditure, Members of the Royal Family are in a unique position whereby the actions and the spending of their Household, even on official activities, are an extension and reflection of their personal direction. Furthermore, income from which the spending derives is no longer public money in the sense that these were later refunded by Queen Elizabeth II".

32. HMT explained that not all the information was personal data. It was referring not only to information relating to deceased individuals but also to other information in the file. Exemptions applied to this information will also be addressed later in this Notice.
33. HMT argued that there was a legitimate interest in transparency and accountability in public life. HMT acknowledged that disclosure would be necessary to meet this legitimate interest and that there was no other way to meet this legitimate interest.

34. The complainant said:

"I believe the case for disclosure - to help transparency and accountability surrounding public funds that were given to members of the Royal Family - is stronger than the personal privacy of the individual concerned. The issue of the funding of the Monarchy is live, and has been for many decades. It has been an important debate within our democracy. It is not right that information that helps shed light on the debate is withheld from public view because of an unjustified use of privacy".

35. When asked whether the information was about each individual's personal life or private life, HMT said:

"The information is official and semi-official expenditure so in that sense it relates to their public life as working Royals. That said, this is not a straightforward question because of the unique position that working Members of the Royal Family hold whereby there is an overlap between their public life and private duties. The information relates to spending of smaller Royal Households which are similar in form and operation to the private office of a private individual. As stated above, the actions and spending of the Household, even on official activity, are an extension and reflections of the Member of the Royal Family's personal direction".

36. HMT also explained that the individuals had no reasonable expectation that this personal data would be disclosed. There had been no requirement for information of this nature to be disclosed. HMT advised that it had contacted the Royal Household and no consent had been given for disclosure. It added that disclosure would breach the

individuals' privacy. It said, "This would not be fair since the same considerations apply to Members of the Royal Family as would apply to any other individual, who would not expect their personal data to be released to the public".

37. In summary, HMT, while acknowledging a general legitimate interest in transparency and accountability in public life, it explained that "from 1993 onwards Queen Elizabeth II agreed to refund these annuities meaning the spending summarised in the file [to which section 40(2) had been applied] resulted in no net cost to the government". It added that, in its view, disclosure would breach Article 5 of the UK GDPR in that it would be unfair and "We therefore consider that the public interest is therefore minimal".
38. HMT provided additional arguments regarding a number of other individuals whose personal data is also in the withheld information but who are not Members of the Royal Family. HMT stressed that they too had no reasonable expectation of disclosure of their personal data.
39. The Commissioner recognises that there is a legitimate interest in knowing more about the funding of the Monarchy and, in particular, annuities paid to relatives of the Monarch in respect of their public duties. The fact that requested information (including personal data) has not been disclosed before does not necessarily mean it can never be disclosed. While Members of the Royal Family are entitled to privacy in the same way any other individual is entitled to privacy, many Members have public roles and are, either directly or indirectly, in receipt of public money (including support resources such as policing). The Commissioner acknowledges that the late Queen Elizabeth II repaid the amounts and therefore the amounts in the withheld information do not represent the expenditure of public funds. In saying that, the Commissioner is mindful of the fact that the Monarch is funded from the public purse<sup>2</sup> among other income sources inherited as a result of their position as the Monarch. These sources are the result of accumulated wealth as a result of their inherited position.
40. The Commissioner is somewhat puzzled by HMT's use of the phrase "official and semi-official" with respect to expenditure. He acknowledges that this might reflect the nature of the duties of members of the Royal Family. HMT said, "The actions and spending even on an official activity are an extension and reflection of the Member's individual and personal direction".

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<sup>2</sup> <https://www.instituteforgovernment.org.uk/explainer/royal-finances>

41. However, the Commissioner recognises that there is a personal element of the official expenditure (since reimbursed by the late Queen Elizabeth II). He also recognises that it is reasonable for the individuals in question to expect it would not be disclosed. This is particularly the case in respect of the personal data of any individual who is not a member of the Royal Family.
42. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner recognises that the strength of this legitimate interest differs depending on whether the individual in question is a Member of the Royal Family. However, his conclusions in this case are the same for those who are and those who are not Members of the Royal Family. The Commissioner therefore considers that disclosing the requested information to which section 40(2) has been applied would be unlawful as it would contravene a data protection principle; that set out under Article 5(1)(a) of the UK GDPR.

#### **Section 41 – information provided in confidence**

43. The Commissioner has considered the application of this exemption with respect to those individuals mentioned in the withheld information who are now deceased.
44. Section 41(1) of FOIA states that: '(1) Information is exempt information if—
  - (a) it was obtained by the public authority from any other person (including another public authority), and
  - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'
45. Therefore, for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party and the disclosure of that information has to constitute an actionable breach of confidence.
46. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:
  - whether the information had the necessary quality of confidence;



- whether the information was imparted in circumstances importing an obligation of confidence; and,
  - whether an unauthorised use of the information would result in detriment to the confider.
47. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.
48. The Commissioner has assessed each of these criteria in turn, taking into account the submissions provided to him by both HMT and the complainant.

**Was the information obtained from another person?**

49. HMT explained that the information was provided by households of members of the Royal Family on the individual members' behalf.
50. The Commissioner is therefore satisfied that section 41(1)(a) of FOIA is clearly met.

**Does the information have the necessary quality of confidence?**

51. In the Commissioner's view, information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.
52. HMT argued that the information was clearly more than trivial in that it is important to the confider and that there had never been any requirement to publish it.
53. It said "the documents were shared with the Treasury solely for the purposes of assessing propriety in relation to Members' expenditure as relates to taxation. Furthermore although the information relates to official expenditure for public purposes, Members of the Royal Family are in a unique position whereby there is significant overlap between their personal lives and official duties. The actions and spending even on official activity are an extension of and reflection of the Members' individual and personal directions."
54. Having examined the withheld information, the Commissioner agrees with HMT's assessment of it, namely that it is clearly more than trivial. The Commissioner therefore accepts that the information clearly has the quality of confidence.

**Was the information imparted in circumstances importing an obligation of confidence?**

55. HMT stressed that there was clearly an “overarching expectation of confidence” and that there had never been a requirement to make public a breakdown of individual spending.
56. It made further arguments with specific reference to the withheld information and also drew attention to the fact the expenses had been covered by the late Queen Elizabeth II.
57. The Commissioner is satisfied, having read the information and considered HMT’s submissions that it was imparted in circumstances importing an obligation of confidence which extends beyond death.

**Would unauthorised use of the information result in detriment to the confider?**

58. As noted above, where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure. HMT has argued that the information is personal in nature due to the unique circumstances. The Commissioner recognises the argument that this information is about spending that was incurred to carry out public duties and therefore cannot be considered personal as such. However, he acknowledges that in the context of the public duties carried out by various members of the Royal Family, there is a personal element to it.
59. The expenditure has subsequently been reimbursed by the late Queen Elizabeth II from her personal funds (notwithstanding the Commissioner’s earlier comment regarding the source of these funds). The information does not ultimately, therefore, relate to the expenditure of public funds.
60. The Commissioner recognises that unauthorised use of this information following FOIA disclosure would result in detriment to the confider. The Commissioner is satisfied that an obligation of confidence continues after a person dies in this case, subject to exceptions (such as criminal wrongdoing) which do not apply here. In his published guidance, he gives the example of banking records. While this information is not information related to banking, it is information relating to personal expenditure (subsequently reimbursed by Queen Elizabeth II from her personal funds) which the confider did not expect would be made public.<sup>3</sup>

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<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

## **Is there a public interest defence to the disclosure of the information?**

61. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under FOIA). British courts have historically recognised the importance of maintaining a duty of confidence, so it follows that strong public interest grounds would be required to outweigh such a duty.
62. However, disclosure of confidential information where there is an overriding public interest is a defence to an action for breach of confidentiality. The Commissioner is therefore required to consider whether HMT could successfully rely on such a public interest defence to an action for breach of confidence in this case.
63. The complainant argued:

“Disclosure of this file would enhance public and democratic debate over the financing of the Monarchy. This file appears to relate to the payments that were paid from the public purse to members of the Royal Family. It is in the public interest for the public to be able to examine how and why these payments were made. This file relates to 1994 – some time ago – and therefore any alleged sensitivity over privacy may have faded. Moreover the file may relate to payments that were made to members of the Royal Family who have since died. This would also mean that questions over – for instance – privacy are no longer relevant. I would also point out that the payments to individual members of the Royal Family were routinely published in parliament –

<https://hansard.parliament.uk/Commons/1989-03-14/debates/21a9f3ec-6c13-42a6-9d77-6449012d300d/WrittenAnswers><sup>4</sup>

<https://api.parliament.uk/historic-hansard/commons/1990/jul/24/the-civil-list-proposals-reversion-to>”

64. The Commissioner agrees that there continues to be an important debate about the financing of the Monarchy. He is not convinced that

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<sup>4</sup> There are a number of questions and answers linked here. The Commissioner has concluded that the complainant is referring to a request on the subject of the Civil List made by William Powell MP.

the argument "this information has never been disclosed before" is especially persuasive in the context of an FOIA request.

65. However, he thinks that in the circumstances of this case, the public interest in ensuring that confidences are maintained is stronger than the public interest in disclosure. The Commissioner has therefore concluded the withheld information to which section 41(1) has been applied is exempt under that provision of FOIA.

### **Section 37(1)(ac) – Communications with the Royal Family**

66. Section 37(1)(ac) states that information is exempt information if it relates to communications with other members of the Royal Family (other than communications which fall within any of paragraphs (a) to (ab<sup>5</sup>) because they are made or received on behalf of a person falling within any of those paragraphs).
67. The Commissioner is satisfied, from sight of the withheld information and from HMT's explanations, that some of the withheld information falls within this category.
68. Section 37(1)(ac) is a class based exemption. This means that information which falls under the class of information described in the request is exempt information under that provision. However, it is also subject to a balance of public interest test. A public authority can only rely on this exemption if the public interest in doing so outweighs the public interest in disclosure.

### **Public interest in disclosure**

69. The complainant's arguments are set out above at paragraph 63. The Commissioner has taken them into account when considering this exemption as well.
70. HMT acknowledged a public interest in transparency in respect of the expenditure of members of the Royal Family with respect to their public duties.

### **Public interest in maintaining the exemption**

71. HMT emphasised that the public interest was served where broad spending figures rather than details were provided. It also said:

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<sup>5</sup> These provisions relate to the Sovereign or the Heir to the Throne or second in line to the Throne.

“Release of this material could undermine the value of these activities by exposing to undue scrutiny the internal operations required to deliver these Members of the Royal Family’s support to the Sovereign. These are activities for which the appearance and presentation are of significant importance, especially with regards to the diplomatic goodwill work undertaken. The release of material that breaks down the costs of supporting these activities [it then referred specifically to the withheld information] could have a negative impact on their public perception and thus undermine their impact.”

72. In addition, it argued

“The Content of this file was produced under the clear and reasonable expectation of privacy and provided to HM Treasury for the confidential purpose of confirming that income from Parliamentary Annuities was allowable for tax so that the Department could notify Parliament of that fact. Although the mechanisms for funding Royal Households have changed since this information was created, the Royal Household continues to liaise with HM Treasury on a regular basis regarding a range of issues, including matters relating to the Sovereign Grant. These discussions take place under the expectation of confidentiality and privacy. If it became clear that material provided by Households to HM Treasury in the course of similar discussions could also be brought into the public domain there then could be a chilling effect on the willingness of all parties to exchange information regarding these important matters freely”.

73. Noting that there was “no net cost to the public” in respect of this information, HMT argued that there would be a negative impact on the relationship between the Royal Family and HM Treasury and that disclosure would “devalue the good work carried out [by] the Royal Family”.

### **Public interest test – Commissioner’s conclusion**

74. In the Commissioner’s view, this is finely balanced. The Commissioner recognises a public interest in protecting the dignity of Members of the Royal Household in their work representing and supporting the Sovereign. Publishing the minutiae of Household accounts could be construed as undermining that dignity. The Commissioner notes, however, that this is relatively old information and that the system of financing the Royal Family is different today. Nonetheless, he accepts that there is a public interest in supporting the work of the Sovereign and maintaining the exemption in this case would form part of that.

75. That said, the Commissioner is not particularly persuaded by HMT’s argument that disclosure would lead to a reduction in cooperation

between the Royal Family and HMT. Such an outcome would be particularly negative for the Royal Family were it to fail to cooperate with HMT where required and this failure were to become public, for example, through formal action by HMT.

76. In light of the above, the Commissioner has concluded by a narrow margin that the public interest in maintaining the exemption outweighs the public interest in disclosure.
77. The complainant makes important arguments about the importance of scrutinising the financing of the Royal Family. Had the information in question been a reflection of the direct cost to the public purse, the Commissioner may have come to a different conclusion because the public interest factors would have carried a different weight. Furthermore, there is a public interest in informing the debate about the extent to which the Sovereign's personal wealth is derived from public funds. However, the Commissioner does not agree that disclosure of this information would provide information that is useful to that debate.

## Other Matters

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78. The Commissioner notes that there was a significant delay in responding to the complainant's request for an internal review in respect of his request.
79. Part VI of the section 45 Code of Practice makes it desirable practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information and that the procedure should encourage a prompt determination of the complaint.
80. As the Commissioner has made clear in his guidance, he considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.<sup>6</sup>
81. In this case, the request for an internal review was made on 2 March 2023 and the response was issued on 8 August 2023. The Commissioner

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<sup>6</sup> <https://ico.org.uk/for-organisations/foi/guide-to-managing-an-foi-request/complaints-internal-reviews/>

notes that in this case, the time taken to respond was 109 working days. The Commissioner therefore considers this delay to have been excessive.

## **Right of appeal**

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82. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

83. 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.
84. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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