



**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Appeal Reference: EA/2020/0356

**Decided without a hearing
On 31 August 2021**

Before

**JUDGE HAZEL OLIVER
EMMA YATES
MICHAEL JONES**

Between

CHRISTOPHER HASTINGS

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

THE CABINET OFFICE

Second Respondent

DECISION

The appeal is dismissed.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 3 December 2020 (IC-48515-H5H4, the “Decision Notice”). The appeal relates to the application of the Freedom of Information Act 2000 (“FOIA”) and the Environmental Information Regulations 2004 (“EIR”). It concerns information requested by the appellant from the Department for Digital, Culture, Media and Sport (“DCMS”) about correspondence sent by Zara Tindall MBE (“ZT”) or her brother Peter Phillips (“PP”) to the Secretary of State.

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. On 16 August 2019, the appellant wrote to DCMS and requested the following information (the "Request"):

"I would like to request the following information under the Freedom of Information Act and the Environmental Information Regulations. Please note that any reference to The Queen's grandchildren Zara Tindall and Peter Phillips in the questions below should be taken to mean those two individuals; their private offices, and anyone specifically acting on their behalf. Please note that the reference to The Secretary of State in the questions below should include The Secretary of State his/herself and The Secretary of State's private office. Please note that the reference to written communications and correspondence in the questions below should be taken to mean all traditional forms of correspondence including letters and faxes, all emails (irrespective of whether they were received and/or sent through private or official email accounts/addresses) and any communications sent through encrypted messaging services.

Please note that neither Zara Tindall or Peter Phillips enjoys any automatic exemption from the FOI. Please note that they are not exempt from the EIR.

1) Since January 2018, have Zara Tindall and/or Peter Phillips (acting together or as individuals) sent written correspondence and communications to The Secretary of State which in any way relates to the following:

(a) The Hong Kong businessman Dr Johnny Hon. This correspondence and communications will include but not be limited to communications about his actual and proposed investments and his actual and proposed business activities in both the UK and abroad. It will also include but not be limited to his actual and proposed charity commitments in the UK and overseas. It will also include but not be limited to Dr Hon's residency or amount of time spent in the UK. Please note that I am interested in all correspondence and communications irrespective of how it relates to Dr Hon.

(b) The Global Group of Companies owned by Dr Hon. This will include correspondence and communications about the company's actual and proposed business activities in the UK and abroad. Again, I am interested in all correspondence and communications irrespective of how it relates to The Global Group of Companies.

(c) Any other business which you know is owned by Dr Hon.

2) If the answer to question one is yes, can you please provide copies of this written correspondence and communications, including any letters, faxes, emails (sent and received through private and official accounts/addresses) and any communications sent through encrypted messaging services.

3) Did the Secretary of State reply to this correspondence and communications?

4) If the answer to question three is yes, can you please provide copies of this written correspondence and communications including any letters. Faxes, emails (sent and received through private and official accounts/addresses) and any communications sent through encrypted messaging services”.

4. DCMS responded on 16 September 2019. They stated the request had been dealt with under FOIA, and they could neither confirm nor deny whether the information was held under section 40(5B)(a)(i) FOIA (a “NCND” response). They explained, *“It will be clear that if the Department were to hold information in scope of the request, it would contain personal information of both Zara Tindall and Peter Phillips. To confirm we held information would confirm both whether the named people have written to us, and specifically what they have written concerning. For this reason, the Department neither confirms nor denies it holds information under section 40(5B)(a)(i).”*

5. The appellant requested an internal review and DCMS upheld its position in the internal review outcome on 15 October 2019.

6. The appellant complained to the Commissioner on 3 December 2019. On 30 April 2020 the Commissioner asked DCMS to revisit its decision, noting that DCMS was required to consider whether there could be lawful processing of personal data and had failed to consider whether the appellant was pursuing legitimate interests. DCMS provided a detailed response on 24 July 2020. DCMS apologised for having failed to apply the legitimate interest test. They provided detailed reasons for the NCND response and why the application of the legitimate interest test did not lead to a different outcome.

7. The Commissioner informed the appellant on 30 July 2020 that she was highly likely to find that DCMS were correct to provide a NCND response. The appellant requested a formal decision notice.

8. The Commissioner decided that DCMS was correct to provide a NCND response. Confirming whether information was held would reveal personal data about ZT, PP and Dr Hon. The appellant did have legitimate interests in pursuing the Request which could not be satisfied in any other way. However, these interests were not strong enough to outweigh the individuals’ privacy rights. The Commissioner was not persuaded that any relevant information would be environmental and so needed to be dealt with under EIR, but in any event DCMS would have been able to rely on the equivalent exemption in EIR to provide a NCND response.

The Appeal and Responses

9. The appellant appealed on 8 December 2020. His grounds of appeal are:

- a. He had requested copies of the documentation, not just a statement of confirmation or denial.
- b. The Commissioner should have viewed the relevant documentation and made a decision on disclosure, which is particularly important as this request included the EIR and Mr Hon’s business interests in the oil and energy sectors.
- c. Disclosure would be in the public interest, as any occasion when an individual is seeking to lobby ministers on behalf of their own or a third party’s interests should be made public.

- d. The argument that ZT and PP are not working Royals and so should be entitled to an extra level of protection is disingenuous, as the opposite argument has been used in the past and it appears public bodies are trying to operate a blanket ban.
- e. Dr Hon makes a point of employing individuals with a connection to the British Royal Family, and has said this is because of what they can do for individual projects.
- f. There were failings in how DCMS dealt with the request, in relation to the legitimate interest test and failing to consider EIR.

10. The Commissioner's response maintains that the Decision Notice was correct, having carried out a careful investigation and considered all relevant factors in applying the balancing exercise.

- a. The issue here is the duty to confirm or deny, not whether requested information should be provided.
- b. It was not necessary to view relevant documentation as the issue was whether DCMS was entitled to provide a NCND response.
- c. Section 40 is an absolute exemption, meaning there is no public interest test. There are legitimate interests in knowing when and where ministers are being corresponded with by members of the Royal Family, but these should not override the individuals' fundamental rights and freedoms in this case.
- d. There is no blanket ban applied by the Commissioner for members of the Royal Family.
- e. DCMS did make an error on the legitimate interest point, but this was comprehensively considered by the Commissioner. Even if EIR applied, DCMS would still have been entitled to provide a NCND response.

11. By directions dated 27 January 2021, the Cabinet Office was joined as a party to the appeal. Their response maintains that the Commissioner's decision was correct. There is no obligation for the Commissioner to ask DCMS to produce documentation in a NCND case, as this would defeat NCND protection. There is a legitimate public interest, but this is reduced where the individuals are not "working Royals". Necessity is accepted. However, the privacy rights of the individuals are not outweighed by a pressing social need for confirmation or denial.

12. The appellant submitted a reply to the Commissioner which states he believes there are strong public interest grounds for disclosure, he is concerned the Commissioner has not viewed material which DCMS may hold, the matter should not have been restricted to NCND, and he believes government departments are operating a blanket ban on the release of Royal correspondence.

Applicable law

13. The relevant provisions of FOIA are as follows.

- 1** ***General right of access to information held by public authorities.***
- (1) *Any person making a request for information to a public authority is entitled—*
 - (a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
 - (b) *if that is the case, to have that information communicated to him.*

.....

40 Personal information.

-
- (5B) *The duty to confirm or deny does not arise in relation to other information if or to the extent that any of the following applies –*
- (a) *Giving a member of the public the confirmation or denial that would have to be given to comply with section 1(1)(a) –*
- (i) *would (apart from this Act) contravene any of the data protection principles...*

.....

58 Determination of appeals

- (1) *If on an appeal under section 57 the Tribunal considers—*
- (a) *that the notice against which the appeal is brought is not in accordance with the law, or*
- (b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
- (2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

14. The relevant provisions of the EIR are as follows.

- 5(1) *...a public authority that holds environmental information shall make it available on request.*

-
- 12(3) *To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.*

-
- 13(5A) *For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that —*
- (a) *the condition in paragraph (5B)(a) is satisfied...*

-
- (5B) *The conditions mentioned in paragraph (5A) are—*
- (a) *giving a member of the public the confirmation or denial—*
- (i) *would (apart from these Regulations) contravene any of the data protection principles...*

15. Section 3(2) of the Data Protection Act 2018 (“DPA”) defines “personal data” as “any information relating to an identified or identifiable living individual”. The “processing” of such information includes “disclosure by transmission, dissemination or otherwise making available” (s.3(4)(d) DPA), and so includes disclosure under FOIA or EIR.

16. The data protection principles are those set out in Article 5(1) of the General Data Protection Regulation (“GDPR”), and section 34(1) DPA. The first data protection principle under Article 5(1)(a) General Data Protection Regulation (GDPR) is that personal data shall be: “processed lawfully, fairly and in a transparent manner in relation to the data subject”. To

be lawful, the processing must meet one of the conditions for lawful processing listed in Article 6(1) GDPR. These include where “*the data subject has given consent to the processing of his or her personal data for one or more specific purposes*” (Article 6(1)(a)). It also includes where “*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.*” (Article 6(1)(f)).

17. This involves consideration of three questions (as set out by Lady Hale DP in ***South Lanarkshire Council v Scottish Information Commissioner*** [2013] UKSC 55):

- (i) Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
- (ii) Is the processing involved necessary for the purposes of those interests?
- (iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

The wording of question (iii) is taken from the Data Protection Act 1998, which is now replaced by the DPA and GDPR. This should now reflect the words used in the GDPR – whether such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data.

Issues and evidence

18. The issues are:

- a. Was DCMS entitled to provide a “neither confirm nor deny” response under section 40(5B)(a)(i) FOIA?
- b. Alternatively, if EIR applied to the Request, was DCMS entitled to provide a “neither confirm nor deny” response under Regulation 13(5B)(a)(i) EIR?
- c. In both cases, this requires us to consider:
 - (i) Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
 - (ii) Is the processing involved necessary for the purposes of those interests?
 - (iii) Are such interests overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data?

19. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents, which included the appeal, responses and appellant’s reply.
- b. A small closed bundle containing an unedited copy of DCMS’s response to the Commissioner dated 24 July 2020.
- c. An email from the Commissioner containing final comments dated 8 June 2021.

Discussion and Conclusions

20. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner’s Decision Notice was in accordance with the law. As set out in section 58(2), we may review

any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision.

21. Was DCMS entitled to provide a “neither confirm nor deny” response under section 40(5B)(a)(i) FOIA? We start with some of the specific issues raised by the appellant.

22. The appellant says he requested copies of documentation, not simply a confirmation or denial. The Commissioner and Cabinet Office maintain that the issue here is NCND, and the requirement to provide information only applies once a public authority has complied with its duty to confirm or deny if it holds that information. The Tribunal confirms that NCND is a permitted response under FOIA. It applies where confirmation or denial would in itself reveal exempt information – in this case, personal data. Where NCND is relied on, there is no requirement to provide copies of any information.

23. The appellant says that the Commissioner should have asked to view relevant documentation before making her decision, particularly because the Request included the EIR. He asks how the Commissioner can be sure there is not environmental information without examining the documents. The Commissioner says it was not necessary to view documents in an NCND case, and in this case she was able to consider the appellant’s full reasons in detail and so had all the information needed to carry out the balancing exercise. The Commissioner’s email of 6 June clarifies that she is entitled to request information but is not required to do so. The Cabinet Office says that a requirement to produce documentation would mean NCND protection would be lost and the provision deprived of its purpose, as this would reveal whether information is held. We agree that there is no requirement on the Commissioner to view documentation, and this was not necessary in this case. A NCND response can usually be dealt with without viewing any information, and in most cases this would not be appropriate as producing information would confirm that it is held and so defeat the purpose of the NCND response. We address the issue about environmental information in paragraph 35 below.

24. The appellant maintains that disclosure of the material would be in the public interest. The Commissioner says that the NCND exemption in section 40 FOIA is an absolute exemption, and so there is no requirement to consider the public interest if the exemption is engaged. We agree that this is an absolute exemption, and so there is no public interest test. We note that public interest considerations are relevant to legitimate interests and the balancing exercise under the GDPR, and are considered below.

25. The appellant complains that there were failings in how DCMS dealt with the request, in relation to the legitimate interest test and failing to consider EIR. The Commissioner notes that DCMS did make an error on the legitimate interest point, but this was comprehensively considered by her after it was addressed by DCMS during her investigation. She also says that even if EIR applied, DCMS would still have been entitled to provide a NCND response. DCMS did fail to address all parts of the relevant test, but did so fully during the Commissioner’s investigation and provided an apology for not having done so earlier. The Tribunal’s role is to make its own decision on whether DCMS was entitled to rely on NCND, based on all the information we now have from the parties. We address the issue about environmental information in paragraph 35 below.

26. We note that the appellant’s Request asks for specific and detailed information, and so confirming or denying whether this information is held would reveal personal data about communications by and about the named individuals ZT, PP and Dr Hon. We are satisfied that

confirming or denying whether the requested information is held would reveal personal information about the third parties. This means we must determine whether processing of the personal information by confirmation or denial under FOIA would be lawful. As identified by the Commissioner, the condition most applicable for lawful processing in this case is Article 6(1)(f) GDPR, which involves the following tests.

27. Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests? Yes, there are various legitimate interests in disclosure of the information through confirmation or denial. There are legitimate interests in understanding whether there is communication with ministers by members of the Royal Family, especially where third parties are involved. The Cabinet Office says there is a legitimate interest in matters concerning Royal family and extended Royal family. The appellant makes the point that any lobbying of ministers on behalf of someone's own interests, or for the interests of third parties that they are in a financial relationship with, should be made public. There is certainly a general interest in government transparency, particularly where there is lobbying by public figures who may be using their position to influence the outcome.

28. Is the processing involved necessary for the purposes of those interests? The parties agree that confirmation or denial is necessary for the purposes of those interests. We agree that it is reasonably necessary. There is no less intrusive means of furthering these interests than confirming or denying if information is held.

29. Are such interests overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data? The parties hold different views on this point.

30. The appellant says that ZT and PP are in a financial relationship with Dr Hon, and any government department which has given preferential treatment to an individual due to the lobbying of others should expect its actions to be scrutinised. He says there is a public right to know if there is this kind of lobbying. He believes that the factors behind ministerial decisions, inputs into the formulation of policy and the awarding of public sector contracts should be fully transparent. The appellant also makes the point that ZT and PP, as grandchildren of the Queen, will have influence denied to other members of the public. He says that Dr Hon makes a point of employing individuals with connections to Royal Family. He also says that there appears to be blanket ban on disclosure of information about the Royal Family.

31. The Commissioner says that neither ZT nor PP has the title "HRH", and they do not receive the Sovereign Grant. They are non-working Royals and do not conduct engagements for the Queen. The Commissioner acknowledges that they have a higher profile than ordinary members of the public but they still have rights to privacy, as does Dr Hon. The Request asks for highly specific information, and ordinary members of the public do not expect the fact or content of private correspondence with a government department to be disclosed under FOIA. When the balancing test is applied, these privacy rights should not be overridden.

32. The Cabinet Office says that the right range of balancing factors has been taken into account – the interests of individuals in confidentiality and privacy of their business dealings; the public profile of PP and ZT as non-working royals; the interests in public authority transparency; the fact both PP and ZT are entitled and expected to pursue economic activity to earn a living and the degree to which their business dealings were in the public domain; the absence of any suggestion of wrongdoing; and the expectation that correspondence in

private/business matters with public authorities is not disclosed to world at large. The Cabinet Office also notes the privacy interests of Dr Hon.

33. We have considered the balance carefully. The legitimate interests here are not simply a general interest in government transparency, but a more specific interest in lobbying on behalf of third parties and how this affects ministerial decisions. ZT and PP are public figures, and so may have more influence than others if they contact a government department. We note the appellant's point that Dr Hon appears to engage individuals who are connected with the Royal Family in order to assist with his business dealings. However, we also note that ZT and PP are not working Royals and are required to earn their own living. They do have privacy rights in the same way as other members of the public, as does Dr Hon. If there have been any correspondence or other communications within the scope of the Request, this will have been in relation to private business matters which these individuals would not expect to have been made public under FOIA. There may be circumstances in which these privacy rights would not override the legitimate interests in government transparency, such as where there is evidence of potential wrongdoing. There is no such evidence in this case.

34. We therefore find that the legitimate interests in confirmation or denial that the requested information is held are overridden by the privacy rights of ZT, PP and Dr Hon. For the avoidance of doubt, this Tribunal has not applied a "blanket ban" on disclosure of information about members of the Royal Family. We have reached this decision after balancing the relevant factors in the case, as we would with personal information about any other individual. This means that disclosure of the personal information through confirmation or denial would not be lawful processing of personal data and would breach one of the data protection principles. DCMS was entitled to provide a NCND response under section 40(5B)(a)(i) FOIA.

35. ***Alternatively, if EIR applied to the Request, was DCMS entitled to provide a "neither confirm nor deny" response under Regulation 13(5B)(a)(i) EIR?*** We can confirm that the Tribunal has not seen any of the requested information (and does not know whether it exists), and so has not been able to assess whether the requested information is environmental. If so, the EIR would apply rather than FOIA. The Commissioner was in the same position, and DCMS did not address the EIR in its response to the Request. However, this is not a problem in an NCND case involving personal information, because the test under the EIR is exactly the same as the test under FOIA (as set out in paragraphs 13 and 14 above). In both cases, a NCND response can be provided if confirmation or denial would contravene any of the data protection principles. We have found that it would breach the requirement for lawful processing of personal data. If the EIR did apply to the Request, DCMS would be entitled to provide a NCND response under Regulation 13(5B)(a)(i) EIR for the same reasons as explained above.

36. We dismiss the appeal.

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date of Decision: 10 September 2021
Date Promulgated: 13 September 2021