Freedom of Information Act 2000 (Section 50)

Decision Notice

24 April 2008

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

Summary

The complainant sought the background papers relating to the decision announced in the 1993 Memorandum of Understanding on Royal Finances that the Queen and the Prince of Wales would voluntarily pay income tax. The Treasury refused to release the information, citing section 40 of the Act and, after the complainant had referred the matter to the Commissioner, sections 35, 37, 41 and 42 in addition. The Commissioner decided that the Treasury had correctly applied sections 37, 40 and 41 to the material under consideration but that it had breached section 17 of the Act in not informing the complainant of all the exemptions that it was intending to apply to the information sought.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 10 February 2005 the complainant wrote to the Treasury to ask, under the Freedom of Information Act 2000 (the Act), for the following information:

1) would you please supply me with the background papers which informed the 1993 Memorandum of Understanding on Royal Finances with particular reference to those papers that decided the appropriate forward financial arrangements:
2) how much the Treasury estimates would have been paid in inheritance(sic) upon the death of the late Queen Mother had such a provision been applicable?
3) whether, since the introduction of the 1993 Memorandum of Understanding on Royal Finances, the Queen has, on the voluntary basis agreed, paid a sum in

income tax equivalent to the sum which would have been required on a non-voluntary basis:

4) would you please supply me with the background papers which informed the decisions taken in respect of the most recent review of the Privy Purse finances.

3. On 11 March 2005 the complainant received a reply from the Financial Secretary to the Treasury. The Financial Secretary told the complainant that the Treasury held no information in relation to items 2), 3) and 4) of his request. As far as the first item in the request was concerned, the Treasury said that the rationale for the new arrangements was set out in the Royal Trustees Report and the 1993 Memorandum of Understanding (the MOU). The additional information requested related to the personal position of Her Majesty the Queen and the Prince of Wales in respect of their decision to voluntarily pay tax. This was personal information falling within section 40(2) (Personal information) of the Act. This was an absolute exemption and therefore not subject to the public interest test. The Treasury invited the complainant to seek an internal review of the decision if he remained dissatisfied.

4. On 22 March 2005 the complainant submitted a request for a review. He argued that, as the MOU was a public document, requests for information relating to it should be treated similarly under the terms of the Act. This request was acknowledged on 13 April 2005.

5. The Treasury provided a substantive reply to the review request on 23 May 2005. The Treasury confirmed its view that section 40 (2) applied to the information at issue: the MOU made it clear that the Queen and the Prince of Wales should receive the same level of confidentiality as any other taxpayer. The Treasury noted that sections 35 (Formulation of Government policy) and 37 (Communications with Her Majesty etc) were also applicable to the information sought but that, given the absolute nature of section 40, it had not considered those exemptions in detail.

The Investigation

Scope of the case

6. On 22 August 2005 the complainant contacted the Commissioner to complain about the refusal to provide the information sought in point 1) of his request: he did not refer to the other information he had requested. The complainant said that, although he recognised that he had asked for information additional to that which had been provided in the MOU, he nevertheless believed that this extra information was of public importance: he thought, in particular, that it would have been possible to release some of the background information and not apply a blanket refusal. In addition, in relation to the other exemptions that had been cited, he thought that matters relating to the question of the Royal Finances were clearly of public interest, especially in terms of generally assisting transparency.

Chronology

7. On 24 October 2005 a member of the Commissioner's staff wrote to the Treasury. The Treasury was asked to confirm its continuing reliance on section 40(2) and to provide a more detailed justification for its view that release of the information sought would be a breach of the data protection principles: in particular, the Treasury was asked how disclosure might breach confidentiality and to consider the possibility of redaction. The Treasury was also asked whether it intended to rely on sections 35 and 37 of the Act. In addition, the Treasury was asked to make the requested information available to the Commissioner for his consideration.

8. The Treasury responded to the Commissioner on 13 December 2005 and set out the basis on which the information request had been approached. The Treasury confirmed its continuing reliance upon section 40(2) and said that, although redaction had been considered, it was not thought possible given that the information sought related to two very identifiable individuals. All taxpayers expected privacy in respect of their tax position: the Queen and the Prince of Wales were no exception to that rule, and they had not given their consent to the disclosure of personal information. However, the Treasury also proposed to cite other exemptions. Treasury said that `*Whilst we are confident that the vast majority of the information requested is subject to the exemption in section 40(2), other exemptions (sections 35, 37,41 and 42) are equally applicable and we intend to rely on these in addition.'* In respect of section 35 the Treasury said that some of the information held related to the development of government policy in relation to the MOU and, generally, the tax position of the Queen and the Prince of Wales. Such matters might be subject to re-negotiation following a change in occupancy of the throne and it would be in the public interest, if that occurred, for the Treasury to have access to information that was as detailed as possible. Disclosure of such information now might jeopardise the provision of similar information in the future, which would not be in the public interest.

9. As far as section 37 was concerned, the Treasury said that it was of great importance that correspondence could take place on a free and frank basis between members of the Royal Household and the government. Release of the information sought would make it less likely that correspondence could take place on such a basis in the future. While the Treasury accepted that there was a public interest argument for the release of more information in this case, given the unusual nature of the tax arrangements being made, it was nevertheless the Treasury's view that these matters were sufficiently well explained in the MOU to satisfy the public interest requirement in this instance.

10. The Treasury also said that, in its view, two other exemptions were relevant to parts of the material sought. The first of these was section 41 (Information provided in confidence). Information relating to the tax affairs of the two individuals concerned had been supplied to the Treasury (and indeed to HM Revenue and Customs) on an understanding and an expectation of confidentiality. The Treasury said that it was a long-established right for taxpayers to expect their tax affairs to be dealt with on a confidential basis and it did not think that a court would ever take the view that it would be right to publicly

disclose information about the tax affairs of the Queen or the Prince of Wales, or indeed about the tax affairs of any other taxpayer. On that basis the Treasury took the view that some of the information fell within section 41 of the Act.

11. The Treasury also said that section 42 (Legal professional privilege) applied to some of the information sought by the complainant. This related to legal advice about aspects of the MOU which had involved the legal advisers of the two departments principally concerned, as well as Treasury Solicitors and other interested parties. Successful Government decision-making required the provision of full and frank legal advice. The Treasury took the view that disclosure in this case of the advice sought would potentially prejudice the ability of the Government to defend its own legal interests, and that this in itself would not be in the public interest.

12. Two of the Commissioner's officers visited the Treasury at the end of March 2006 to examine the relevant documentation, and one of these officers made a subsequent visit to look at the papers again. In passing it should be noted that, due to the sensitivity of the information involved, the Treasury refused to allow the Commissioner's staff at any time to either take the papers away for further consideration or to take any photocopies: given the volume and complexity of the material involved, this has added a further dimension of difficulty to the Commissioner's consideration of this case. Following that first visit the Treasury confirmed that some of the information to which it had applied section 42, specifically advice from the Law Officers dating from 1913 and 1921, was now in the National Archive and therefore already in the public domain. The Treasury wrote to the complainant to inform him of this, enclosing copies of that advice for ease of reference.

13. In addition, the Treasury confirmed that some of the information withheld had been marked as subject to both section 35 and section 36 (Prejudice to effective conduct of public affairs) of the Act. The Treasury recognised that these sections of the Act could not be applied concurrently but said that approval had been sought from the relevant qualified person (in this case the Solicitor General) and that, in those cases where both exemptions had been cited, the Treasury would wish to apply section 36 if the Commissioner took the view that section 35 was not applicable.

Findings of fact

14. There is no legal requirement on the Sovereign to pay income tax, capital gains tax or inheritance tax as the relevant legislation does not apply to the Crown. The same exemption applies to the Prince of Wales in respect of his income from the Duchy of Cornwall.

15. A small working group was established to look at the position of the Queen and the Prince of Wales in relation to their payment of income and other forms of tax. Membership of this group involved the Treasury, the Inland Revenue and the Royal Household: legal input was provided as necessary. Knowledge of the existence of this working group, and of its terms of reference, was extremely restricted. In November 1992, the Prime Minister announced in Parliament that

the Queen had indicated to him some months before that she wished consideration to be given to the basis on which she might voluntarily pay tax. The Prince of Wales had made a similar request in respect of the Duchy of Cornwall. Discussions continued between the Treasury, the Inland Revenue and the Royal Household and, when completed and following the recommendations of the group, the Prime Minister announced in Parliament in February 1993 that the Queen and the Prince of Wales had accepted the arrangements proposed. Accordingly, from 6 April 1993, it was agreed that the Queen should voluntarily pay income tax and capital gains tax and, with certain caveats, inheritance tax. The Prince of Wales likewise agreed to pay such taxes on his income from the Duchy of Cornwall. Notification to the public of these arrangements was made through the publication on 11 February 1993 of a report entitled `Civil List Acts 1972 and 1975 - Report of the Royal Trustees.' In particular, this report incorporates the MOU which records the agreed arrangements in some detail. This MOU was signed by representatives of the Queen, the Prince of Wales and the Government. It should be noted that paragraph 32 of the MOU states that:

`In relation to anything done in respect of this voluntary agreement The Queen and The Prince of Wales shall be entitled to full privacy and confidentiality in the same way as any other taxpayer; but this shall not preclude any exchange of information between the Treasury and the Inland Revenue which is necessary for the proper implementation of these arrangements.

Analysis

Procedural matters

16. The Treasury replied to the complainant's request of 10 February 2005 on 11 March 2005. It is not absolutely clear when the complainant's request was received but the Commissioner has no reason to suppose that the Treasury's response did not meet the requirement laid down in the legislation that replies to information requests should be made within twenty working days.

17. However, in its initial response to the complainant, and indeed in the subsequent review, Treasury informed him that it was relying on section 40 of the Act as its justification for withholding the information he had requested. But, as has been detailed above, in subsequent correspondence with the Commissioner the Treasury has shifted its ground and, while continuing to argue that section 40 applies, has also cited several other exemptions. These exemptions have not been formally cited to the complainant, although two were mentioned to the complainant in passing. The Commissioner therefore finds that Treasury has acted in breach of section 17(1) subsections (b) and (c) of the Act in that it has not specified to the complainant exemptions upon which it is relying to withhold information requested, and why it is relying on them.

Exemptions

18. The Commissioner has faced a number of difficulties in dealing with this case. The Treasury initially cited only section 40 as its justification for withholding the information sought. Subsequently, although only after the matter had been referred to the Commissioner, several other exemptions were cited. As the Commissioner understands it, the Treasury's present position is that it still believes that a case can be made for withholding all of the information under section 40 as the information covered by the request all relates, fundamentally, to the tax positions of the Queen and the Prince of Wales and all the work that was carried out in order to determine whether that position needed to be altered and, if so, in what way. However, the Treasury now prefers to proceed on the basis that a different approach, involving a number of exemptions, would be more appropriate. Treasury has continued to cite Section 40 in respect of most of the documents seen by the Commissioner: however, sections 35, 37 and 41 have usually been cited as well, normally to the entirety of the particular document concerned rather than to individual parts of it. It is therefore not the case that individual documents can be dealt with on the basis that one exemption might apply to one part of the document and another exemption to another part: the Commissioner's view is that, in any event, the nature of the material would make it a very difficult, and probably artificial, exercise to attempt to differentiate within an individual document in this way: many of the papers, while dealing with subject matters essentially covered by section 40, also involved information to which other exemptions might legitimately be applicable. The Commissioner has therefore approached his analysis of the material on the basis of the Treasury belief that several different exemptions might potentially apply to the contents of many of the documents that he has examined but, on the basis that it remains fundamental to the Treasury's case, and because it is also an absolute exemption, the Commissioner believes it appropriate to start by considering the application of section 40.

Section 40(2)

19. The full wording of this section of the Act is set out in the legal annex. What it says, in essence, is that information is exempt under the Act if it is personal data not relating to the applicant and if its disclosure without consent would either breach any of the data protection principles or, if processed, would be likely to cause damage or distress to the data subject.

20. As mentioned in paragraphs 14 – 15 above, the MOU (which is in the public domain) sets out the arrangements under which the Queen and the Prince of Wales have agreed to pay tax. Paragraph 37 of the MOU makes it clear that the arrangements have been described there in only very general terms. However, they do set out the circumstances under which the Queen will pay income tax, inheritance tax and capital gains tax and set out the position in similar terms for the Prince of Wales in respect of income derived by him from the Duchy of Cornwall. Distinctions are drawn in the MOU between the private incomes of both taxpayers and the monies provided out of public funds for the Queen and other members of the Royal Family which enable them to carry out their official duties. The treatment of that portion of the income received from the Duchy of

Lancaster which is not used to defray expenditure in relation to official duties is also dealt with in the MOU. The MOU makes more than one reference to the fact that, in terms of their expectations of privacy and confidentiality, the Queen and the Prince of Wales should be in no different a position to any other taxpayer.

21. The Treasury, in its initial response to the complainant on 11 March 2005, told him that `*the material covered relates to the personal position of Her Majesty and the Prince of Wales and their voluntary agreement to pay tax. It is within the scope of section 40(3)*, *which is information to which section 40(2) relates'.* ` Treasury confirmed this view in the internal review letter it sent to the complainant on 22 May 2005. In subsequent correspondence with the Commissioner the Treasury said that the information sought, or at least some of it, related directly to the `*personal financial and property affairs of the Queen and the Prince of Wales'* . The Treasury drew attention to paragraph 32 of the MOU, which confirmed the entitlement of those individuals to privacy and confidentiality at the same level as that expected by other taxpayers, and said that their consent had not been given for disclosure. Nor did the Treasury think that, in this case, redaction or anonymisation would be viable options: the taxpayers concerned were so uniquely identifiable that anonymisation would afford them no additional protection.

22. The first question for the Commissioner to determine is whether or not the information requested is capable of being personal information for the purposes of the data protection legislation. The Commissioner is entirely satisfied that the answer to this is yes. The Commissioner is in no doubt that the Queen and the Prince of Wales are living, identifiable individuals whose identities can be ascertained and that information relating to their tax affairs constitutes personal data in accordance with the requirements of the legislation. What the Commissioner needs to go on to consider, however, is whether or not the release of any of that information would constitute unfair or unlawful processing under the Act. In considering that matter the Commissioner has taken into account, and followed, the view expressed by the Information Tribunal in the case of the Corporate Officer of the House of Commons v the Information Commissioner and Norman Baker MP *(EA2006/0015 &0016)* that the Act requires that matters relating to the disclosure of personal data in respect of which section 40 has been cited should not be considered in relation to the Act but, rather, in relation to the provisions of the Data Protection Act 1998.

23. In that context it is the view of the Commissioner that, in dealing with information relating to the Queen and the Prince of Wales, a broad distinction needs to be drawn where possible between information relating to monies that are made available directly by the state or from other sources to enable them to carry out their public functions, and information relating to any tax that they might pay as individuals in respect of their purely private incomes. Information relating to the first is now (although this does not appear to have been the case in the early 1990s) routinely placed in the public domain: it can be found comprehensively set out in the Annual Reports on Royal Public Finances, and in the annual accounts of the Duchies of Lancaster and Cornwall which are published and laid before Parliament. It is clear also that the MOU put into the public domain

information about the relationship between the 'public' and 'private' finances of the Royal Family and how each was to be treated. It is not of course always possible to draw a clear distinction between the public and the private when dealing with individuals who, as well as existing in a private capacity, also hold public office: the existence of a precisely similar difficulty in the case of Members of Parliament was noted by the Tribunal in paragraph 78 of the case referred to in the previous paragraph. That difficulty is, however, especially acute in this particular case, where the nature of the positions held by the individuals in question means that the overlap between the private and the public is bound to be, to a degree, opaque. It ought perhaps also to be pointed out that the position of Members of Parliament is, in one significant respect, different in that they, unlike the Queen or the Prince of Wales, find themselves in this position as the result of voluntarily putting themselves forward for public office.

24. The information sought by the complainant in this case relates to the reaching of the agreement that the Queen and the Prince of Wales should voluntarily pay various forms of tax. Much of that information is, as might be expected, financial in nature. Some of that financial information held by the Treasury, and falling within the parameters of this request, relates to those two individuals purely in their private capacities, whereas other information about the same individuals is held by the Treasury in relation to the performance by them of public functions: some, inevitably, falls into both categories. All of that information was provided to the working group as part of the exercise of trying to determine whether the Queen should pay tax on her private sources of income and whether the Prince of Wales should pay tax on that part of his income from the Duchy of Cornwall which is used to meet his personal expenditure. The decision reached was that the Queen and the Prince of Wales would pay tax, on a voluntary basis. But it is the Commissioner's view that information provided to or held by the Treasury in relation to the tax position of the two individuals concerned is held on a general basis of, and in the reasonable expectation of, confidentiality. In respect of that part of the information held that does not relate to the performance of public functions but simply to private ones, then the Queen and the Prince of Wales should be placed in no different a position to any other taxpayer in their right to an expectation of confidentiality. The Commissioner believes, therefore, that section 40(2), which does not attract a public interest test, has been correctly applied to that 'private' information.

25. In respect of financial information held by the Treasury about the Queen and the Prince of Wales in relation to the performance of their duties in a public capacity, then it seems to the Commissioner that different criteria would apply. In that case the Commissioner would refer to Schedule 2 of the Data Protection Act 1998, which identifies relevant conditions for the processing of personal data. Paragraph 6 says:

"(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reasons of prejudice to the rights and freedoms or legitimate interests of the data subjects."

The Tribunal, in the case cited above (which involved details of allowances paid to Members of Parliament), argued that what was required was to carry out a consideration of the balance between the legitimate rights of the data subjects and the legitimate rights of those to whom the data would be disclosed, in this instance members of the public. In that case, the Tribunal concluded that the balance lay in favour of disclosure. In this case the information at issue is of a very similar nature, financial information supplied to the members of the working group relating to the Queen and the Prince of Wales in respect of their public roles. This is information of a kind which is now made publicly available and, indeed, was so when the complainant made his request. A strong argument might therefore be mounted to suggest that in this case also the Data Protection Act should not operate as a barrier to disclosure.

26 However, it seems to the Commissioner that two substantial points can be made in opposition to that view. The first is that the MOU, and the Royal Trustees Report that introduced it, put into the public domain a very considerable amount of information about the `public' financial position of the Queen and the Prince of Wales. This is not a case where the public is uninformed about the arrangements that have been reached: far from it. It therefore seems to the Commissioner that, while not overlooking the fact that the arrangements covered by the MOU deal with unusual circumstances, those who argue that the publication of the MOU is sufficient in itself to have satisfied the public interest in this matter have a strong case.

27. Secondly, the documents in this case date from between 1991 and 1993. It is clear from the security classification placed on many of them that they were intended to be handled on a confidential basis. Security classifications are not, of course, to be regarded as conclusive in terms of the Act: they are not to be preserved for all eternity and it is generally accepted that the passage of time will, in the majority of cases, see a lessening in the sensitivity of such information. But there is, of course, a difference between, say, information relating to what was at the time a major (but now historic) policy issue and personal information about individuals who are still alive. And it needs also to be recognised that, unlike in the case of Members of Parliament and their expenses (see above), this information was provided at a time when there would have been no expectation of imminent freedom of information legislation: indeed, even the non-statutory predecessor of the Act, the Code of Practice on Access to Government Information, had not at that time come into force. There would therefore have been no expectation at all among those both providing and receiving highly sensitive information about two very public figures that any of that information would, or should, enter the public domain other than through the provisions of the Public Records Act 1958.

28. Taking all of that into account, therefore, it is the Commissioner's view that the personal information covered by section 40 of the Act should not be released as that would not constitute fair and lawful processing in accordance with the requirements of Schedule 1 of the Data Protection Act 1998.

Section 41

29. In support of its view that this information should not be released, the Treasury has also cited section 41 of the Act, the full text of which is contained in the legal annex. In its letter to the Commissioner of 13 December 2005 the Treasury said that `*Substantial information concerning the personal financial and property affairs of the Queen and the Prince of Wales was supplied to HMT and the Inland Revenue in order to facilitate the drawing-up of the MOU, and was supplied on the strict understanding that it would be treated in confidence.*` And, as set out in paragraph 10 above, the Treasury has argued that section 41 could be applied to this information as well as other exemptions because of that confidential basis on which it was supplied. The Treasury, in the same letter cited earlier in this paragraph, went on to say that `*It is in our view highly unlikely that a court would hold that it was in the public interest to disclose the personal tax affairs of the Queen or Prince of Wales (or any other individual).*`

30. Subsection (1) of section 41 of the Act requires two criteria to be met in order for the subsection to take effect. These are that the information was obtained from a third party and that disclosure of the information would constitute an actionable breach of confidence. Even when those criteria are met, however, there exists a common law principle of public interest which can provide a defence to a breach of confidence if it can be demonstrated, in any particular case, that the preservation of confidentiality was outweighed by a wider public interest.

31. It is clear to the Commissioner that the first of the two qualifying criteria for this subsection has been met. In respect of the second, the most frequently cited statement of the requirements was set out in the judgment of Megarry J in *Coco v A N Clark(Engineers) Limited FSR 415.* This statement, which was quoted by the Information Tribunal in the case of *Bluck v The Information Commissioner & Epsom & St Helier University NHS Trust (EA/2006/0090),* reads:

    "In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself { …] must `have the necessary quality of confidence about it.' Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it…'

    In respect of the first of these, the Commissioner is confident that the information sought retains the necessary quality of confidence. The information is clearly not otherwise accessible, nor is it trivial in nature: and, although the MOU itself is firmly in the public domain, much of the information that led up to it is not. As far as the second element is concerned, it is clear that much of the information that was provided by the third party (in this case the Royal Household) was classified: that is, its confidential status was clearly identified by the security marking placed on the particular documents containing it. This, while not necessarily permanent in nature, does at least give the clearest possible indication of the underlying expectation on which the information was supplied. In respect of detriment, other judgments indicate that this element might not always prove to be necessary, depending on the circumstances of the case. The Commissioner would, however,

note the view that there is a general public detriment in the release of information in cases where that release would breach the privacy of individuals. In general terms, therefore, the Commissioner is of the view that section 41 can be applied to the circumstances surrounding the provision of information by the Royal Household to the Treasury in this case.

32. Given, however, the public interest test that is inherent in the common law of confidence, the question for the Commissioner in this particular case is whether or not there is a sufficiently overriding public interest in disclosure to justify release of the information sought. In this context, therefore, it ought to be emphasised that the courts and the Tribunal have recognised on a number of occasions that the maintenance of a duty of confidence is itself a matter of public interest and that in many cases that may prove to be sufficient. In the Bluck case (see previous paragraph) the Tribunal quoted from the case of *The Attorney-General v the Guardian* to the effect that `*as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence….*` The Commissioner recognises, of course, that there is a considerable and justifiable public interest in this matter: what he needs to determine is whether or not that public interest should override the basic duty of confidentiality when it is clear that the tests for determining confidentiality have been met, particularly given that the preservation of the duty of confidence can in itself be described as in the public interest.

33. In the circumstances of this case the Commissioner is satisfied that the personal financial information relating to this request was provided to the Treasury on a confidential basis, with no expectation of its release, and that there has been no agreement from those to whom the information relates that it should be released. The Commissioner has set out earlier (paragraph 26) his view that the entirely legitimate public interest in this matter has been satisfied by the placing into the public domain of the Memorandum of Understanding setting out the general terms of the agreement reached. Given as well the strong public interest that exists in maintaining the duty of confidentiality, the Commissioner is of the view that section 41, as well as section 40, has been correctly applied to the personal financial information provided to the Treasury in this case and that the exemption should therefore apply.

Section 37

34. The Treasury has applied section 37 to much of the material contained in the files examined by the Commissioner. Section 37, the full text of which is contained in the legal annex, states that information is exempt information if it **relates to** (the Commissioner's emphasis) communications with Her Majesty, with other members of the Royal Family or with the Royal Household. Section 37 is a qualified exemption which means that, if the Commissioner finds the exemption to be engaged, he then needs to apply the public interest test to determine whether or not the information ought to be released. In that context it should be noted that this exemption does not require for it to be demonstrated that harm or prejudice would occur if the information were to be released: once the exemption is engaged, it is purely a matter of balancing the public interest.

35. In considering the applicability or otherwise of this section the Commissioner has taken account of the view of the Information Tribunal in the case of *DfEs v the Information Commissioner & the Evening Standard (EA/2006/0006)* where the meaning of the term `relates to' was considered: although, in that case, the meaning of the term was considered in relation to section 35 of the Act rather than section 37, the Commissioner is of the view that similar considerations would apply. In that case, the Tribunal argued that a broad approach should be taken to the meaning of the term `relates to' and that, in general terms, if the essential concern of a particular discussion in a document fell within the ambit of the exemption then it was reasonable to adopt the approach that everything in that document was covered. As the Tribunal put it: *"Minute dissection of each sentence for signs of deviation from its main purpose is not required nor desirable."* The Commissioner has adopted a similar approach to the use of the phrase `relates to' in respect of section 37.

36 In considering the material covered by this request so far, the Commissioner has essentially been looking at personal financial information. However, from the point of view of the working group, that information constituted simply the raw material of its deliberations. The task of the working group involved taking that material, considering its implications, and gradually moving towards the development of an agreement which would determine how matters should ultimately be taken forward. There is, therefore, much material in the files which goes beyond the factual background and is essentially considerative or analytic in nature. To this material the Treasury has applied section 37, as well as other exemptions. The Commissioner has taken the view that it would be most appropriate to look at section 37 first as it would be difficult to argue, in the broad sense suggested in the previous paragraph, that all of this material does not relate to communications with the Royal Household. On that basis, he is entirely satisfied that the exemption is engaged. However, section 37 is a qualified exemption and the Commissioner therefore needs to consider the issue of the public interest.

37. The complainant has argued that, in relation to the Royal Finances, information is covered by the public interest and should be released. In his letter to the Information Commissioner of 22 August 2005, the complainant said: *"as the Head of State of the United Kingdom the Queen is clearly a public figure and, as with elected politicians there is a clear public interest in transparency – especially since the position outlined by the 1993 Memorandum of Understanding is unique to the Royal Family and not granted to any other citizen of this country."*

38. The Treasury said that the Royal Household had been closely involved in the discussions leading up to the publication of the MOU. While recognising, given the identity of the individuals concerned and the unusual nature of the arrangements entered into, the legitimacy of the public interest in this matter, the Treasury has argued that it was also in the public interest that the Royal Family should be able to correspond with the Government in private about matters of sensitivity. The information at issue relates to two individuals holding unique constitutional positions where it is not always easy to differentiate the public role from the private. The Treasury reiterated the point made in relation to the other exemptions discussed earlier to the effect that communication between the Royal Household and the Government was on a confidential basis. This was particularly

so given the nature of the information that formed the basis of that communication. The Treasury took the view that this kind of information would clearly be regarded as confidential if held in respect of any other UK taxpayer and saw no reason, while recognising the uniqueness of the particular taxpayers in question, to take a different view in this case. If indeed this request were to be treated differently, other taxpayers might see it as giving the green light to the public disclosure of similar information held about themselves, which would not be in the public interest.

39. In considering the applicability of the public interest test in this case the Commissioner needs to take into account very similar arguments to those he examined when looking earlier at other exemptions. From the point of view of disclosure the Commissioner recognises the existence of a legitimate public interest in these matters while bearing in mind the importance in such cases of drawing a clear distinction between matters of public interest and matters in which the public might happen to take a particular interest. He has also taken into account the fact that the papers concerned date from 1991 to 1993, the best part of fifteen to twenty years ago: the matters under discussion have long since moved from the realm of the novel to that of the routine and the Prince of Wales has made it clear that he intends to continue the current practice when he ascends the throne, all of which would seem to indicate a sufficient diminution in sensitivity, allied to the public interest that is accepted by all parties involved in this matter, to support an argument in favour of disclosure.

40. However, the Commissioner needs to return again to the two points that he considered in paragraph 33. The MOU has put into the public domain the essential nature of the arrangements that emerged from this deliberative process, without at any time revealing any personal or financial information that might be considered to be a breach of privacy. Is there then, from the point of view of the public interest, any argument for releasing additional information beyond what has already been put into the public domain? Perhaps more important is the issue of what, in practice, forms the basic subject matter of this information request, the personal and financial arrangements of two individuals. It is abundantly clear to the Commissioner that information was only forthcoming from the Royal Household to the Treasury and others involved in this matter, on behalf of the Queen and the Prince of Wales, on the basis of a clear understanding of confidentiality: it is the Commissioner's view that matters are unlikely to have been able to proceed on any other basis, particularly given that information was being made available by two individuals who were (and remain) under no legal obligation to pay tax.

41. There is of course the question of whether or not, as the complainant himself suggested, the documents could be edited in such a way as to remove from them any information clearly of a personal nature, thus leaving information which could be released into the public domain. In the Commissioner's view, however, having examined the relevant documents, it would be virtually impossible to edit them in that way: the details that would need to be removed form such an integral part of what is written that what would be left would be rendered largely meaningless and add nothing of value to what has already been made available.

42. It is therefore the Commissioner's view that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Other exemptions

43. As noted earlier, the Treasury has also cited sections 35 and 42 of the Act in relation to the information sought in this request. Given that he believes that the information can be withheld on the basis of the exemptions dealt with earlier in this Notice, the Commissioner has not considered the possible applicability of these exemptions to the material at issue.

The Decision

44. The Commissioner's decision is that the Treasury correctly applied sections 37, 40 and 41 of the Act to the information sought by the complainant: However, the Commissioner has also decided that the Treasury did not apply section 17 (1) subsections (b) and (c) of the Act to the request correctly as it did not inform the complainant of all of the exemptions on which it was relying in order to withhold the information requested and why it was relying on them.

Steps Required

45. The Commissioner requires no steps to be taken.

Right of Appeal

46. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 24th day of April 2008

Signed ……..

Graham Smith
Deputy Commissioner

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

Section 17. - (1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact,
(b) specifies the exemption in question, and
(c) states (if that would not otherwise be apparent) why the exemption applies

Section 37. - (1) Information is exempt information if it relates to-

(a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household…..

Section 40 (2) Any information to which a request for information relates is also exempt information if-

(a) it constitutes personal data which do not fall within subsection (1), and
(b) either the first or the second condition below is satisfied.

(3) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles, or
(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

Section 41. - (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.