

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 31 March 2010

Public Authority: The Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Summary

The complainant requested information held by the Cabinet Office concerning the Heir to the Throne, The Prince of Wales, remarrying after his divorce. The Cabinet Office provided the complainant with a small amount of information but withheld the remainder on the basis of sections 21 – information reasonably accessible to the applicant; 37(1)(a) – communications with the Royal Family and Household; 36 – prejudice to the effective conduct of public affairs; 40 – personal data; and 42 – legal professional privilege. The Cabinet Office also refused to confirm or deny whether it had received legal advice from the Law Officers on the basis of sections 35(1)(c) and 35(3). With one exception, the Commissioner has concluded that the Cabinet Office is entitled to rely on sections 21, 37(1)(a), 40 and 36 to withhold various parts of the requested information. The Commissioner is also satisfied that the Cabinet Office is entitled to refuse to confirm or deny whether it holds legal advice from the Law Officers. However, the Commissioner has also decided that the Cabinet Office is not entitled to rely on section 21 to withhold one document as it did not inform the complainant, when refusing the request, where he could find this document.

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.

Background

2. In 1992 the Prince and Princess of Wales formally separated. They divorced in August 1996.
3. In February 2005 Lord Falconer, the then Lord Chancellor and Secretary of State for Constitutional Affairs, made a written ministerial statement to the House of Lords concerning the impending marriage between The Prince of Wales and Mrs Camilla Parker Bowles. The statement confirmed that the government was satisfied that it was lawful for His Royal Highness and Mrs Parker Bowles to marry by way of a civil ceremony in accordance with the Marriage Act of 1949.
4. The Prince of Wales married Mrs Parker-Bowles in April 2005.

The Request

5. The complainant submitted the following request to the Cabinet Office on 28 December 2005:

'Please would you let me know in writing if you hold any information of the following description:

Information concerning the heir to the throne remarrying after divorce.

If you do hold such information I wish to have:

A copy of the information;
An opportunity to inspect the record;
A summary of the information.'

6. The Cabinet Office contacted the complainant on 26 January 2006 and confirmed that it held some information falling within the scope of his

- request. However, the Cabinet Office explained that such information may be covered by the exemptions provided by sections 37 and 42 of the Act. However both exemptions were qualified and it needed to extend the time it needed to consider the public interest test.
7. On 1 June 2006 the Cabinet Office contacted the complainant again and explained that it had concluded its consideration of the public interest test. The Cabinet Office informed the complainant that it was prepared to disclose some information and this was enclosed with its letter. The Cabinet Office also explained that the remaining information was exempt from disclosure on the basis of the following exemptions: 21, 37(1)(a), 42(1), 36(2)(b)(i) and 36(2)(b)(ii). Furthermore the Cabinet Office explained that it was unable to confirm or deny whether it held any legal advice given to the government by the Law Officers on this matter on the basis of sections 35(1)(c) and 35(3).
 8. The complainant contacted the Cabinet Office on 2 June 2006 and asked for an internal review to be conducted.
 9. The Cabinet Office informed the complainant of the outcome of the review on 26 October 2006. The review upheld the application of the exemptions as cited in the refusal notice and noted that some of the requested information was also exempt from disclosure on the basis of section 40 of the Act.

The Investigation

Scope of the case

10. On 31 October 2006 the complainant contacted the Commissioner and asked him to consider the Cabinet Office's decision to withhold information falling within the scope of his request. The complainant argued that it was likely that the public interest favoured disclosing more information that had been provided to him.
11. A significant proportion of the information which falls within the scope of this request is classified. Therefore the Commissioner is limited as to the amount of detail he can include in this Notice in respect of his analysis of the exemptions cited by the Cabinet Office. Consequently he has sent the Cabinet Office, although for obvious reasons not the complainant, an annex which clarifies his findings in relation to the application of the exemptions to the various documents falling within the scope of the request.

Chronology

12. The Commissioner contacted the Cabinet Office on 7 February 2007 in relation to this complaint. The Commissioner asked to be provided with a general description of information falling within the scope of this request along with an explanation as to which exemptions applied to which parts of the withheld information. The Commissioner also asked the Cabinet Office to confirm or deny to him whether it held legal advice provided by the Law Officers which fell within the scope of this request.
13. The Cabinet Office provided the Commissioner with a response to his enquires on 20 April 2007.
14. The Deputy Commissioner visited the Cabinet Office in July 2007 in order to discuss this case and a number of others. During this visit the Deputy Commissioner was provided with a schedule of the withheld information in this case.
15. On 12 November 2008 the Commissioner contacted the Cabinet Office again and sought clarification on a number of issues in relation to the application of the various exemptions. In particular, the Commissioner sought details concerning the Cabinet Office's reliance on section 36 of the Act. The Commissioner also asked for an opportunity to review the withheld information once again.
16. The Cabinet Office provided the Commissioner with clarification on the application of section 36 in a letter dated 19 January 2009.
17. On 21 January 2009 the Commissioner contacted the Cabinet Office again in order to clarify a remaining issue in relation to the application of the exemptions.
18. The Commissioner received this final clarification from the Cabinet Office on 18 February 2009.
19. The Deputy Commissioner visited the Cabinet Office on 8 April 2009 in order to view the withheld information in its entirety.

Analysis

Exemptions

Section 21 – information reasonably accessible to the applicant

20. This section provides that requested information is exempt from disclosure if it is reasonably accessible to the applicant. The section confirms that information can still be reasonably accessible if it is only accessible through payment of a fee.
21. The rationale behind this exemption is that if there is another route by which someone can obtain information, there is no need for the Act to provide the means of access. Public authorities are under a duty, set out at section 16 of the Act, to 'provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or who have made requests for information'. In the Commissioner's opinion this means that there should be no possibility of applicants being left in any doubt as to how they can obtain the information that they want.
22. In the refusal notice issued to the complainant the Cabinet Office suggested that it was relying on section 21(1) to withhold one document, namely the written statement issued by the Lord Chancellor to the House of Lords which is referred to in the Background section above. The Commissioner is satisfied that at the time of the request this statement was in the public domain and reasonably accessible to the applicant via the electronic version of Hansard available at www.parliament.uk
23. In its submissions to the Commissioner the Cabinet Office also argued that a further document, namely an article in The Times by William Rees Mogg dated 2 September 1996 was exempt from disclosure on the basis of section 21(1) of the Act. However, as the Cabinet Office did not inform the complainant of the existence of this document the Commissioner does not agree that at the time of the request it was reasonably accessible to him: if an applicant does not know the title of a particular document being withheld on the basis of section 21 then it follows that it cannot be reasonably accessible to him.

Section 37(1)(a) – communications with Her Majesty and the Royal Family or Royal Household

24. The Cabinet Office has argued that a number of documents are withheld on the basis of section 37(1)(a) of the Act. This section states that:

‘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’.

25. In line with his approach to the term ‘relates to’ when it appears in other sections of the Act (for example section 35), the Commissioner interprets this term broadly and thus the exemption contained at section 37(1)(a) provides an exemption for information which ‘relates to’ communications with the Royal Family or with the Royal Household rather than simply communications with such parties.

26. Therefore, this exemption has the potential to cover draft letters, memorandums or references to the existence of meetings with the Royal Family or Royal Household. However, information must still constitute, or relate to, a communication to fall within the exemption. So, for example an internal note held by a government department that simply references the Royal Family or Royal Household will not necessarily fall within this definition. It must be evident that the information is intended for communication, or has been communicated, or that it references some other communication falling within the definition.

27. Having examined the documents that the Cabinet Office has withheld on the basis of section 37(1)(a), the Commissioner is satisfied that with one exception, they fall within the broad ambit of section 37(1)(a) and thus are exempt from disclosure.

Public interest test

28. Section 37 is a qualified exemption and is therefore subject to the public interest test set out in section 2(2)(b) of the Act, i.e. whether in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Under the public interest test under section 2 of the Act the presumption is in favour of disclosure so if the arguments on both sides are equally weighted the Act requires disclosure of the information.

Public interest arguments in favour of disclosing the information falling within the exemption

29. The Cabinet Office argued that there was strong public interest in maintaining the constitutional principle that communications between the Queen and the Royal Household and government Ministers and officials are essentially confidential in nature.
30. The Commissioner understands that this principle is based upon the operation of the established convention that the Sovereign has the right to counsel, encourage and warn the government and thus to have opinions on government policy and to express those opinions to Her Ministers. However, whatever personal opinions the Sovereign may hold She is bound to accept and act on the advice of Her Ministers and is obliged to treat Her communications with them as absolutely confidential. Such confidentiality is necessary in order to ensure that the Sovereign's political neutrality is not compromised, in case Her Majesty has to exercise Her executive powers, e.g. initiating discussions with political parties in the scenario of a hung Parliament in order to ensure that a government can be formed.

Public interest arguments in favour of maintaining the exemption

31. There is an inherent public interest in disclosure of information to ensure that the government is accountable for, and transparent about, its decision making processes.
32. Moreover, there is a specific public interest in disclosure of information that would increase the public's understanding of how the government engages with the Royal Family and the Royal Household. This is because the Monarchy has a central role in the British constitution and the public is entitled to know how the various mechanisms of the constitution operate.
33. Linked to this argument, is the fact that disclosure of the withheld information could further public debate regarding the constitutional role of the Monarchy and in particular the remarriage of the Heir to the Throne. Similarly, disclosure of the information could inform broader debate about reform of the British constitutional system.
34. The complainant identified the following arguments in favour of disclosing the information he requested:
35. To uphold public confidence that the Prime Minister had properly considered the issues affecting the Church of England and the constitution;

36. To provide assurance that the Prime Minister is fully consulted on subjects which may affect the future of the state;
37. To ensure that public funds are correctly spent in looking at constitutional matters.

Balance of the public interest arguments

38. In the Commissioner's opinion, given the broad reading of the term 'relates to', the subject matter of information which can fall within the scope of section 37(1)(a) can be very broad because communications, and information relating to such communications, could potentially cover a huge variety of different issues. Therefore establishing what the inherent public interest is in maintaining the exemption contained at section 37(1)(a) is more difficult than identifying the public interest inherent in a more narrowly defined exemption, for example section 42, which clearly provides a protection for legally privileged information.
39. However, the Commissioner believes that there are three public interest factors which can be said to be inherent in the maintaining of the exemption and are relevant in this case
 - Protecting the constitutional principle, identified by the Cabinet Office, that communications between the Queen and the Royal Household and government Ministers and officials are essentially confidential in nature;
 - Protecting the ability of the Royal Family and Household to be consulted by the government on matters of constitutional significance; and
 - Protecting the privacy and dignity of the Royal Family.
40. The Commissioner accepts that there is a significant and weighty public interest in preserving the operation of the convention identified by the Cabinet Office, i.e. it would not be in the public interest for the operation of the established convention to be undermined. This is particularly so given that the convention is designed to protect communications at the heart of government, i.e. between the Monarch and government Ministers.
41. Linked to this argument, and of particular relevance to this case, is the second argument identified in paragraph 39 above. In the Commissioner's opinion, given the unique position which the Royal Family occupy in the British constitution, it is very strongly in the public interest that they, along with members of the Royal Household, are

able to freely and frankly discuss matters of constitutional importance with government.

42. With regard to the final argument, i.e. the privacy considerations inherent within section 37, the Commissioner believes that these should not be dismissed lightly. There is a clear public interest in protecting the dignity of the Royal Family so as to preserve their position and ability to fulfil their constitutional role as a unifying symbol for the nation. Given the nature of the information being requested, which concerns the remarriage of the Prince of Wales after divorce, the Commissioner believes that disclosure of the information would amount to a significant intrusion on the Royal Family's dignity and an invasion of their privacy.
43. In terms of attributing weight to the arguments in favour of disclosure the Commissioner recognises that they touch upon many of the central public interest arguments underpinning the Act, namely ensuring that public authorities are accountable for and transparent about decisions taken; furthering public debate; improving confidence in decisions taken by public authorities. Furthermore, the Commissioner recognises that the decisions and issues in this case are ones that are central to the operation of the British constitutional system to the extent that they relate to the future position of the Heir to the Throne, not only as Head of State but as head of the Church of England. Moreover, the Commissioner notes that at the time of The Prince of Wales' proposed remarriage there was considerable speculation both in the press and academic circles as to the legality and constitutional implications of remarriage.
44. Ultimately, though in reaching a conclusion about where the balance of the public interest lies the Commissioner has to focus on the content of the information. In this case having considered the content of the documents which he accepts fall within the scope of section 37(1)(a), the Commissioner believes the public interest narrowly favours maintaining the exemption. This is because although disclosure would to some extent serve the weighty arguments in favour of disclosure, he believes that disclosure of the information would be likely to result in significant harm to the various interests identified as being inherent to the exemption and relevant to this case.

Section 36 – prejudice to the effective conduct of public affairs

45. The Cabinet Office has argued that some of the documents which do not fall within the scope of section 37(1)(a) are exempt from disclosure on the basis of two exemptions contained within section 36(2) of the Act.

46. The full text of section 36 is included in the legal annex attached to this notice. As the text of the legislation indicates, section 36 operates in a slightly different way to the other prejudice based exemptions contained in the Act. For section 36 to be engaged, information is exempt only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to prejudice any of the activities set out in the sub-sections of 36(2).
47. In this case Cabinet Office has relied upon the sub-sections 36(2)(b)(i) and 36(2)(b)(ii) to withhold the some of the further information. These sub-sections state that:
- ‘(b) would, or would be likely to, inhibit-
- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation’
48. In order to establish whether the exemptions have been applied correctly the Commissioner has:
- Ascertained who is the qualified person or persons for public authority in question;
 - Established that an opinion was given;
 - Ascertained when the opinion was given; and
 - Considered whether the opinion given was reasonable.
49. With regard to the fourth criterion, in deciding whether the opinion was ‘reasonable’ the Commissioner has been led by the Information Tribunal’s decision in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC* (EA/2006/0011 & EA/2006/0013) in which the Tribunal considered the sense in which the qualified person’s opinion is required to be reasonable. It concluded that ‘in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at’ (paragraph 64). In relation to the issue of reasonable in substance, the Tribunal indicated that ‘the opinion must be objectively reasonable’ (para 60).
50. The Commissioner has also been guided by the Tribunal’s findings in that case which indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus ‘does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant’. Therefore, in the Commissioner’s opinion this means that when assessing the reasonableness of an opinion the Commissioner is restricted to focusing on the likelihood of that

inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.

51. With regard to the degrees of likelihood of prejudice, the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. In terms of 'likely to' prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
52. The Commissioner notes that the Cabinet Office has not clearly specified which limb of prejudice it was seeking to rely on. In scenarios where a submission does not specify which limb of likelihood should be relied upon, i.e. would or would be likely, the Commissioner has noted the comments of the Information Tribunal in the case of *McIntyre v The Information Commissioner and MoD* (EA/2007/0068) in which the Tribunal explained that:

'...in the absence of designation as to level of prejudice the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level.' (para 45)
53. Practically then in order to assess whether the opinion provided by a qualified person was reasonably arrived at the Commissioner asked the Cabinet Office to provide him with:
 - A copy of the submissions given to the qualified person in order for them to reach their opinion;
 - Confirmation as to whether the qualified person was in fact provided with any contrary arguments supporting the position that the exemptions were not engaged; and
 - A copy of the reasonable opinion which was subsequently provided.
54. The Commissioner accepts that the opinion was one which was reasonably arrived at: the qualified person was provided with a detailed submission and the opportunity to view the information being withheld and furthermore the opinion was given prior to the refusal notice being issued.

55. With regard to whether the opinion was reasonably arrived at the Commissioner needs to briefly summarise the opinion that was given. In essence it argues that disclosure of this information which records the views and opinion of various individuals on an issue of significant constitutional importance and sensitivity would be likely to inhibit officials and/or Ministers from expressing their views in similar scenarios in the future, or from recording their views in a permanent form. The Commissioner does not dispute the logic of this argument. Furthermore, having considered the content of the documents withheld on the basis of section 36 the Commissioner believes that they are of a sufficiently candid and frank nature that disclosure of them would be likely to have the prejudicial effects described at sections 36(2)(b)(i) and (ii) of the Act.
56. On the basis of the above submissions the Commissioner is satisfied that the opinion is one that was reasonably arrived at **and** reasonable in substance and thus the exemptions contained at sections 36(2)(b)(i) and (ii) are engaged.

Public interest test

57. Section 36(2) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian & Brooke* indicated the distinction between the consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the Act:

'88. The application of the public interest test to the s36(2) exemption involves a particular conundrum. Since under s36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice.'

58. As noted above, the Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'. Therefore, in the Commissioner's

opinion, this means that whilst due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the effective conduct of public affairs.

Public interest arguments in favour of disclosing the information falling within the exemption

59. The Commissioner believes that the public interest arguments in favour of disclosing the information falling within section 36 are very similar to those set out above in relation to section 37(1)(a) and therefore he has not repeated them here.

Public interest arguments in favour of maintaining the exemption

60. The Cabinet Office has argued that there is a clear and strong public interest in it being able to undertake effective decision making, especially in scenarios of significant constitutional importance. In order to be able to do so it is necessary for officials and Ministers to be able to discuss and record their opinions in a free and frank manner.

Balance of the public interest arguments

61. The Cabinet Office's public interest argument in favour of maintaining the exemption focuses on the concept of the chilling effect. Such arguments are directly concerned with the argued loss of frankness and candour in debate and advice which would flow from the disclosure of information. This could result in poorer quality advice and less well formulated policy and decisions.
62. In considering the weight that should be attributed to such arguments the Commissioner has taken into account the scepticism with which the Tribunal has treated chilling effect arguments when they have been advanced by other public authorities in relation to their application under section 35 (formulation or development of government policy). The following quote from the Tribunal in *Foreign and Commonwealth Office v Information Commissioner* (EA/2007/0047) accurately summarises the position of various Tribunal decisions:

'we adopt two points of general principle which were expressed in the decision in *HM Treasury v the Information Commissioner* EA/2007/0001. These were first, that it was the passing into the law of the FOIA that generated any chilling effect, no Civil Servant could thereafter expect that all information affecting government decision making would necessarily remain

confidential Secondly, the Tribunal could place some reliance in the courage and independence of Civil Servants, especially senior ones, in continuing to give robust and independent advice even in the face of a risk of publicity.' (para 26).

63. However, the Commissioner has taken into account the comments of Mr Justice Mitting on an appeal to the High Court against an Information Tribunal decision. Whilst supporting the view expressed many times by the Tribunal that each case needed to be considered on its merits, Mr Justice Mitting disagreed that arguments about the chilling effect should be dismissed out of hand as ulterior considerations. Rather such arguments were likely to be relevant in many cases:

'Likewise, the reference to the principled statements of Lord Turnbull and Mr Britton as "ulterior considerations" was at least unfortunate. The considerations [chilling effects] are not ulterior; they are at the heart of the debate which these cases raise. There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case. It is no part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between.'

64. In light of the case law, and bearing in mind the underlying principles set out above, the Commissioner believes that the actual weight attributed to chilling effect arguments have to be considered on the particular circumstances of each case and specifically by reference to the content of the withheld information itself. A public authority would have to provide convincing arguments and evidence to demonstrate that disclosure of the information in question would result in the harm alleged.
65. The Commissioner has considered very carefully the chilling effect argument advanced by the Cabinet Office in this case. He has concluded that, in all the circumstances, it does deserve to be given particular weight. This is because firstly, having reviewed the withheld information that Commissioner accepts that it is of a genuinely free and frank nature. Given the content of this information the Commissioner accepts that if this information were to be disclosed,

those involved in future discussions about matters of constitutional importance might well refrain in future from making and recording their opinions in such a clear and candid manner.

66. Secondly, in terms of the severity, extent and frequency of the harm that would be likely to occur, the Commissioner recognises that by the time the complainant submitted his request The Prince of Wales had in fact remarried. Therefore the likelihood of further debate on the issue at the heart of the request had reduced. It could be therefore argued that the frequency with which any inhibition to a discussion could occur is potentially limited. However, the Commissioner believes that the chilling effect arguments extend beyond the impact on any discussion about the particular issue in this case. In the Commissioner's opinion, the likelihood of the need for discussions in the future about issues of such constitutional importance is more than hypothetical or remote.
67. The Commissioner's views on the public interest arguments in favour of disclosure are noted above in relation section 37. The balance of the public interest arguments must be considered by reference to the content of the information being withheld. In respect of some of the withheld information the Commissioner believes that the public interest arguments are finely balanced. However, having carefully considered the nature and content of the information, he has concluded that the public interest in maintaining the exemptions at section 36(2)(b)(i) and (ii) outweighs that in disclosure.

Section 40 – personal data

68. The Cabinet Office has also argued that some of the information falling within the scope of the request is exempt on the basis of section 40(2).
69. Section 40(2) of the Act provides an exemption for information which is the personal data of any third party where disclosure would breach one of the conditions set out in section 40(3) of the Act.
70. In order to rely on the exemption the information being requested must therefore constitute personal data as defined by the Data Protection Act 1998 (DPA).
71. Section 1 of the DPA defines personal data as:

'...data which relate to a living individual who can be identified
a) from those data, or
b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'

72. Having reviewed the documents that the Cabinet Office has withheld on the basis of section 40(2) the Commissioner is satisfied that they all contain the personal data of one or more identifiable individuals.
73. The Commissioner understands that the Cabinet Office is seeking to rely on the interaction of sections 40(2) and 40(3)(a)(i) of the Act. Section 40(3)(a)(i) states that personal data is exempt if its disclosure would breach any of the data protection principles. The Commissioner understands that the Cabinet Office believes that disclosure of the redacted information would breach the first data protection principle which states that:
1. Personal data must be processed fairly and lawfully; and
 2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.
74. In deciding whether disclosure of personal data would be unfair the Commissioner takes into account a range of factors including:
- The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and
 - even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
 - The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 ECHR;
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;

- particular circumstances of the case, e.g. established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
75. The Commissioner accepts that the individuals in question had very strong expectations that their personal data would not be disclosed given the confidential nature of the Cabinet Office's deliberations on the subject referenced in the request. Given the context of these discussions, the Commissioner accepts that such expectations were reasonable. Furthermore in the Commissioner's opinion, disclosure of some of the personal data contained within the withheld documents could cause significant distress to a number of individuals, not least because the information focuses on one individual's marital status, albeit that the individual in question is also the Heir to the Throne. Therefore, given the reasonable expectations of the various individuals and the consequences of releasing this information, the Commissioner believes that disclosure of the personal data would be unfair and thus constitute a breach of the first data protection principle. Such information is therefore exempt from disclosure on the basis of section 40(2) of the Act.

Section 42 – legal professional privilege

76. As the Commissioner has concluded that all of the information which the Cabinet Office has withheld on the basis of section 42 is exempt from disclosure on the basis of sections 36, 37 or 40, he has not considered the Cabinet Office's reliance on section 42.

Section 35(1)(c) – Law Officers' advice

77. In addition to relying on the exemptions discussed above to withhold a number of documents, the Cabinet Office also relied on sections 35(1)(c) and 35(3) to refuse to confirm or deny whether it held any legal advice on the subject matter of the request which was provided by Law Officers.
78. Section 35(1)(c) states that:

'Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to –

- (c) the provision of advice by any of the Law Officers or any request for provision of such advice'

79. Section 35(3) states that:

'The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of section (1)'.

80. As the Cabinet Office is a government department and as the Commissioner is satisfied that the information, if it were held, would relate to advice requested from or provided by, the Law Officers, he finds that the exemption is engaged.

Public interest test

81. However, section 35 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in confirming or denying whether information is held.

Public interest arguments in favour of confirming or denying whether the information is held

82. The Cabinet Office acknowledged that there was a public interest in knowing whether the decisions of this nature, i.e. issues of constitutional importance, had been taken with the benefit of sound legal advice, and moreover whether that advice had come from the Law Officers.

83. In considering the arguments in favour of confirming or denying whether the information is held, the Commissioner notes the level of debate in academic circles as well as in the media, both at the time of the Prince of Wales' impending marriage and subsequently. He notes that the issue in this case could be considered to amount to a matter of significance in British constitutional history, given that it relates to the legality of the marriage of the Heir to the Throne. In this respect, he considers it likely that there would have been a widely-held assumption that the government should, and would, have sought the advice of its most senior lawyers.

84. On the other hand, if the advice of the Law Officers had not been sought on an issue such as this, then there would be a strong public interest in this being disclosed as it might raise important issues about the basis on which the government satisfied itself that its interpretation of the relevant legislation was correct.

85. The disclosure that advice had been sought from the Law Officers, if it had been sought, would therefore provide reassurance to the public

that any considerations undertaken by the Cabinet Office was fully informed and made on the basis of legal advice from the most senior lawyers within government.

Public interest arguments against confirming or denying whether the information is held

86. The Cabinet Office argued that there was a strong public interest in ensuring that government departments are able to act free from external pressure when deciding what sort of legal advice to obtain, at what stage, from whom, and in particular whether they should seek advice from the Law Officers. This strong public interest is reflected in the long-standing convention, observed by successive governments, that neither the advice of Law Officers, nor the fact that their advice has been sought, is disclosed outside government.
87. The Cabinet Office argued that given the Law Officers' position as the government's principal legal advisers the routine confirmation that their advice had been sought could give rise to questions as to why they had not advised on other cases. Furthermore, confirmation of the cases on which advice had been sought from the Law Officers would have the effect of disclosing those matters which, in the judgment of the government, have a particularly high political priority or are assessed to be of particular legal difficulty.
88. In this respect, the Commissioner accepts that disclosure of the fact that Law Officers have not advised on an issue may expose the government to criticism for not consulting them and thus not giving sufficient consideration to a particular issue. This could increase the pressure to consult Law Officers in inappropriate cases, or in an unmanageably large number of cases. This in turn might harm efficient government, which would not be in the public interest.

Balance of the public interest arguments

89. The Commissioner notes that, whilst there may be a long-standing convention not to disclose whether Law Officers' advice has been sought, the exemption in section 35 of the Act is not an absolute exemption; instead it is subject to a public interest test. In his view, therefore, Parliament clearly envisaged that it may be appropriate, in some circumstances, to disclose whether Law Officers' advice had been sought.
90. In considering the opposing public interest factors in this case, the Commissioner has the benefit of recent rulings by the High Court in the case of *HM Treasury vs The Information Commissioner and Evan Owen*

([2009] EWHC 1811) and the Information Tribunal (EA/2007/0054) in the case of *Her Majesty's Treasury v Information Commissioner*, both of which address the issue of the public interest with respect to the application of section 35(3). In the latter case, the complainant had requested copies of any legal opinions and other communications held by Her Majesty's Treasury regarding the compatibility of the Financial Services and Markets Bill with the Human Rights Act.

91. Paragraph 27 of the Tribunal decision stated ...

'Since the public is not entitled to know what advice is given, save in exceptional circumstances, such as a decision to go to war, it would be odd if, in less momentous cases, it had the right to know whether advice was taken where such knowledge would or would probably reveal what the advice must have been'.

92. While the Commissioner accepts that the convention attracts significant weight, he does not accept that the convention can only be overturned in exceptional circumstances; he therefore rejects the concept of an 'exceptionality test'.

93. In his view, while sufficient weight must be given to the convention, the operation of the convention is a consideration, rather than a deciding factor, in the assessment of the public interest test. In the Commissioner's view, there will be cases where it is right neither to communicate, nor to confirm or deny, both in cases where information actually is and in cases where no information is held.

94. The Commissioner gives weight to the argument that it would be impossible for the Law Officers to advise on every aspect of government policy having legal implications given the range of legal advice that government requires. As the government's most senior legal advisers, it can be argued that the Law Officers' advice has a particularly authoritative status within government. If the government routinely disclosed the occasions on which the Law Officers had given advice, that could give rise to questions as to why they had not advised in other cases, thus creating pressure for them to advise in cases where their involvement is not justified.

95. In this case, the Commissioner has also taken into account the nature and profile of the topic under consideration and the significance of the view taken by the government on this matter.

96. The Commissioner gives weight to the fact that there is a legitimate public interest in knowing the legal basis for key government decisions and actions. In this case, however, one of the key issues underpinning

the public interest arguments in favour of disclosure is the legality of Heir to the Throne remarrying, which the Commissioner notes is a constitutional matter not one of government policy.

97. In reaching his decision, the Commissioner is mindful that his duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the Act. Accordingly, his decision relates solely to the issue of whether the Cabinet Office was correct neither to confirm nor deny whether it holds information relating to Law Officers' advice. His decision does not relate to the issue of whether any such advice, if it were held, should be disclosed to the complainant, nor of the accuracy or validity of such advice, if it were held.
98. In all the circumstances of the case, the Commissioner considers that the public interest in maintaining the exclusion of the duty to confirm or deny outweighs that in disclosing whether Law Officers' advice is held.

Procedural Requirements

99. Part I of the Act includes a number of procedural requirements with which public authorities must comply.

100. These include section 1(1) which states that:

'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.'

101. Section 10(1) requires a public authority to respond to a request within 20 working days following the date of receipt. Section 10(3) states that a public authority can reasonably extend the time it needs to consider the public interest but it must still comply with the requirements of section 17(1) within 20 working days.
102. Section 17 of the Act which requires a public authority to provide an applicant with refusal notice stating the basis upon which it has refused a request for information.
103. Although the Cabinet Office issued a refusal notice within 20 working days which cited sections 37 and 42 of the Act it later also relied on the

exemptions at sections 21, 36, 40 and 35(3). By failing to provide a refusal notice citing these further exemptions within 20 working days of the request the Cabinet Office breached section 17(1) of the Act.

104. As the Commissioner has decided that one document is not exempt on the basis of section 21 of the Act, in failing to provide this information to the complainant within 20 working days of his request the Cabinet Office breached sections 1(1)(b) and 10(1).

The Decision

105. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- With one exception, the information falling within the scope of the request which was not disclosed is exempt from disclosure on the basis of one of the following exemptions: section 21(1), section 36(2)(b)(i) and (ii); 37(1)(a); or 40(2).
- Furthermore the Cabinet Office is entitled to refuse to confirm or deny whether it holds information falling within the scope of section 35(1)(c) by virtue of section 35(3).

106. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The Cabinet Office incorrectly relied on section 21(1) to refuse to disclose an article in The Times by William Rees Mogg dated 2 September 1996.
- In failing to provide this information to the complainant within 20 working days of his request the Cabinet Office breached section 10(1) of the Act.
- The Cabinet Office also breached section 17(1) by failing to provide a refusal notice which cited sections 21, 36, 40 and 35 within 20 working days of the request.

Steps Required

107. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Disclose to the complainant the document which the Commissioner has decided is not exempt from disclosure on the basis of section 21, namely an article in The Times by William Rees Mogg dated 2 September 1996.
108. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other matters

109. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
110. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should 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. As he has made clear in his 'Good Practice Guidance No 5', published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review.¹ In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 140 working days for an internal review to be completed.
111. In February 2007 the Commissioner also issued guidance on the time public authorities should take when extending the public interest test.² This guidance notes that whilst the Act and the section 45 Code of Practice do not specify how long a public authority can extend the public interest for, even in exceptional cases, the time taken should not exceed 40 working days. Clearly, in dealing with this request the

¹ [Freedom of Information Good Practice Guidance No. 5](#)

² [Freedom of Information Good Practice Guidance No. 4](#)

Cabinet Office took substantially longer than 40 working days to reach its conclusions in relation to the balance of the public interest test.

112. Although the Commissioner acknowledges that this request predated the publication of both pieces of guidance, he expects the Cabinet Office to adhere to the recommend time limits set out in the guidance when undertaking internal reviews and extensions to the public interest in the future.

Right of Appeal

113. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

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 31st day of March 2010

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that -

"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."

Section 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Section 2(1) provides that –

"Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply."

Section 2(2) provides that –

"In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Duty to provide Advice and Assistance

Section 16(1) provides that -

"It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it".

Refusal of Request

Section 17(1) provides that -

"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."

Information Accessible by other Means

Section 21(1) provides that –

"Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."

Section 21(2) provides that –

“For the purposes of subsection (1)-

- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.”

Formulation of Government Policy

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

Section 35(3) provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Personal information.

Section 40(2) provides that –

“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.”

Section 40(3) provides that –

“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

- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Data Protection Act 1998

Part I

1) In this Act, unless the context otherwise requires—

“personal data” means data which relate to a living individual who can be identified—

- (a) from those data, or

- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

Schedule 1

The first principle states that:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in Schedule 2 is met, and

- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Schedule 2

Conditions relevant for purposes of the first principle: processing of any personal data

1. The data subject has given his consent to the processing.

2. The processing is necessary— (a) for the performance of a contract to which the data subject is a party, or (b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4. The processing is necessary in order to protect the vital interests of the data subject.

5. The processing is necessary—

(a) for the administration of justice

(b) for the exercise of any functions conferred on any person by or under any enactment

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department

(d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

6. — (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 reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.