

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 6 December 2010

Public Authority: The Attorney General's Office
Address: 20 Victoria Street
London
SW1H 0NF

Summary

The complainant made a freedom of information request to the Attorney General's Office (AGO) for a document concerning the handling of Royal Wills. The AGO refused the request under section 37(1)(a) (Communications with Her Majesty etc.) and section 41 (Information provided in confidence). The Commissioner has considered the complaint and has found that section 37(1)(a) is engaged and that the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner has not considered whether the section 41 exemption would apply. The Commissioner also found that in its handling of the complainant's request the public authority breached sections 17(1) and 17(3) of the Act (refusal of a request) but requires no steps to be taken.

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 3 January 2008 the complainant made a freedom of information request for a copy of a particular document that had been referred to

in a previous court hearing to which the complainant was a party. The request read as follows:

'I would wish to make an application under Freedom of Information for the document presented as being a Practice Direction in respect of the handling of Royal Wills.

'It was stated at a recent hearing before the Court of Appeal that the Attorney General had been a party to the creation and agreement of such a practice direction.'

3. The public authority acknowledged the request on 31 January 2008 when it informed the complainant that the exemption in section 37(1)(a) applied which provides for an exemption for information which relates to communications with Her Majesty, The Royal Household and the Royal Family. It explained that this was a qualified exemption and that in this case it needed further time to consider the public interest test. It said that it aimed to provide a substantive response by 3 April 2008 at the latest.
4. On 17 April 2008 the public authority wrote to the complainant again to say that it had not yet completed the public interest test and that it would need to extend the deadline once more. It advised the complainant that it now aimed to respond by 16 May 2008.
5. On 16 May 2008 the public authority informed the complainant that it was not yet possible to issue a substantive response to the request as it still needed extra time to complete the public interest test. It now advised that the new deadline was 16 June 2008.
6. The public authority responded substantively on 16 June 2008 when it refused to disclose the information falling within the scope of the request. It explained that the information was being withheld under the exemptions under section 37(1)(a) and section 41 of the Act. It said that the exemption was engaged because the document in question was drawn up through communications with The Queen, via her solicitors Farrer and Co. It concluded that the public interest in maintaining this exemption outweighed the public interest in disclosure and it informed the complainant of the factors it had taken into consideration when balancing the public interest.
7. It explained that information is exempt under section 41 if it was obtained from another person and the disclosure of the information would constitute an actionable breach of confidence. In this case it said that the information had been obtained from Farrer and Co. acting on behalf of The Queen and was provided in confidence, therefore the

exemption was engaged. The public authority noted that whilst section 41 was an absolute exemption, it had considered whether there would be a public interest defence to a breach of confidence and had concluded that there would be no such defence given the strong public interest in maintaining confidences and on the particular circumstances of this case.

8. On 17 December 2008 the complainant contacted the public authority to challenge its decision to refuse his request. The complainant argued that the information he requested was a practice direction and therefore a public document which should be disclosed. Indeed, the complainant submitted that the information should be disclosed because a practice direction cannot be applied by the courts if it is kept secret. The complainant directed the public authority to a transcript from the court case which he had originally referred to in his request where the requested document was referred to by the judge as a 'practice direction'. The public authority treated this as a request for an internal review and presented its findings on 30 April 2009. At this point it upheld its earlier decision to refuse the request under the exemptions in section 37(1)(a) and section 41. The public authority did not accept that the information constituted a practice direction and therefore should be treated as a public document. It said that it was clear from the transcript of the court hearing that whilst the document had misleadingly been referred to as a practice direction it is in fact 'not a formal Practice Direction but the confidential practice agreed between the President of the Family Division, this department and the Palace'.

The Investigation

Scope of the case

9. On 22 June 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's decision to refuse the request by relying on the exemptions in section 37(1)(a) and section 41.

Chronology

10. The Commissioner first contacted the public authority with details of the complaint on 2 July 2009 and asked to be provided with copies of the requested information.

11. The public authority responded to the Commissioner on 3 August 2010 when it said that it would prefer to provide the Commissioner with the withheld information when he was in a position to begin the investigation. It explained that the information was classified as 'Confidential' and was sensitive 'in the broadest sense'. It went on to say that the information was not a formal practice direction as issued by the courts which support the Civil Procedure Rules by setting out procedures that aim to achieve uniformity in practice. It said that this document was different as it records 'the confidential practice on how to deal with Royal Wills as agreed by the Attorney General, the Royal Household and the President of the Family Division'. It reiterated that the document was created through 'confidential discussions with The Queen's solicitors (Farrer & Co.) who conveyed the Royal Household's and Her Majesty's views on both the procedure and principles of applications [to seal Royal wills], in particular in relation to Her Majesty's role in the process'.
12. The Commissioner formally commenced his investigation on 19 March 2010 when he wrote to the public authority to again ask that it provide him with copies of the requested information, clearly marked to show where any exemption(s) was being applied. The Commissioner also asked the public authority to further explain why each exemption was being applied.
13. For section 37(1)(a) the Commissioner asked the public authority to explain how the information relates to communications with Her Majesty, with other members of the Royal Family or the Royal Household and to elaborate on its reasons for concluding that the public interest in maintaining the exemption outweighs the public interest in disclosure.
14. Section 41(1) provides that information is exempt if it was obtained by a public authority from any other person and disclosure to the public would constitute an actionable breach of confidence. The Commissioner asked the public authority to confirm who the information was obtained from and to whom a duty of confidence is owed. The Commissioner then referred the public authority to the case of *Coco v A N Clark* for the most commonly cited test of an actionable breach of confidence.¹ Under this test a breach of confidence will be actionable if:
 - The information has the necessary quality of confidence,
 - the information has been imparted in circumstances importing an obligation of confidence, and

¹*Coco v A N Clark (Engineers) Limited* [1968] FSR 415

- there was an unauthorised use of the information to the detriment of the confider.
15. With this test in mind, the Commissioner asked the public authority to explain why disclosure would constitute an actionable breach of confidence. The Commissioner also noted that whilst section 41 provides an absolute exemption, case law on the common law concept of confidence suggests that there is a public interest defence to a claim of breach of confidence. Therefore the Commissioner asked the public authority to confirm what, if any, consideration it had given to the public interest in disclosing the requested information.
 16. The public authority provided the Commissioner with its representations on the complaint on 14 June 2010. As regards section 37(1)(a) it explained that the document in question had been reviewed before and after the death of Princess Margaret which involved discussions between itself and the solicitors Farrer and Co. (Farrers) acting on behalf of The Queen. It said that Farrers had provided 'instructions as to the contents of the document as well as commenting on the document as a whole'. Therefore it argued that the document had been drafted as a result of communications with The Queen and the Royal Household and so the exemption in section 37(1)(a) was engaged.
 17. The public authority went on to outline why it had concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure. In particular, it highlighted what it referred to as the clear public interest in protecting senior members of the Royal Family from public intrusion into personal matters.
 18. As regards section 41, the public authority confirmed that the information contained in the document reflects the views of The Queen and was provided in confidence by Farrers on her behalf. Therefore a duty of confidence was owed to The Queen. It also said that it did not consider that the test for an actionable breach of confidence as set out in *Coco v A N Clark* was the appropriate test to apply. Instead it said that the document clearly contained confidential information within the scope of the 'traditional law of confidence'. The Commissioner was provided with a detailed submission setting out what the public authority considered to be the correct test. In particular, the public authority argued that it was not necessary for a breach of confidence to result in a detriment to the confider for it to be actionable.
 19. The public authority provided the Commissioner with a copy of the requested information on 16 July 2010.

Findings of fact

20. The document requested by the complainant was mentioned in a case heard before the High Court. In that case the document was referred to as a practice direction.
21. Further reference to this document was made in a subsequent appeal hearing in the Court of Appeal:

'Before and after the death of Princess Margaret there were discussions between the Palace, Farrers, the Attorney General's Secretariat, and the Attorney General and the court which reviewed what Mr Hinks described as the practice of sealing royal wills. The Senior District Judge was involved who sought the views of the former President. Ultimately "a quite lengthy document" was agreed that was reviewed and approved by the former President. The process that this contained involved a system of "checks and balances" that was highly confidential. The primary object of the process was to protect the privacy of the Sovereign. Thus when the two applications came before the former President she had an understanding of the background that she would not otherwise have had.'²

Analysis

22. A full text of the relevant statutory provisions referred to in this section is contained within the legal annex.

Exemptions

Section 37(1)(a) – Communications with Her Majesty, The Royal Household etc.

23. Section 37(1)(a) provides that information is exempt if it relates to communications with Her Majesty, with other members of the Royal Family or with the Royal Household. In this case the public authority has said that the exemption is engaged because the document was drawn up after the death of Princess Margaret which involved discussions between the public authority and Farrers acting on behalf of The Queen. Farrers provided instructions as to the contents of the document as well as commenting on the document as a whole. In doing so it had had to seek the views of The Queen. Therefore, the

² Brown v The Executors of the Estate of HM Queen Elizabeth The Queen Mother and others [2008] EWCA Civ 56 (Ch) 28.

public authority maintains that the information relates to communications with Her Majesty and the Royal Household.

24. It is important to bear in mind that the information does not have to constitute communications with Her Majesty or the Royal Household in order for the exemption to be engaged. The Act only requires that information 'relates to' such communications. In light of this the Commissioner considers that the exemption can safely be given a broad interpretation because the exemption is qualified and where there is no harm to the public interest information should still be disclosed. In deciding on this approach the Commissioner has taken account of the view of the Information Tribunal in the case of *DfEs v Information Commissioner & the Evening Standard* where the meaning of the term 'relates to' was considered. In that case the meaning of the term was considered in the context of the section 35 exemption, although the Commissioner believes that similar considerations apply with regard to section 37. 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."³
25. In this case the public authority has explained that the information was drawn up through communications with Her Majesty and The Royal Household via her solicitors. The Commissioner has carefully reviewed the withheld information and is satisfied that it clearly falls within the broad ambit of section 37(1)(a) and therefore the exemption is engaged.

Public interest test

26. Section 37 is a qualified exemption and therefore is subject to a public interest test under section 2(2)(b) of the Act. Section 2(2)(b) provides that where a qualified exemption applies, information shall only be withheld if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

³ Department for Education and Skills v Information Commissioner & the Evening Standard [EA/2006/0006], para. 58.

27. In this case the complainant has put a great deal of emphasis on his belief that the requested information is in effect a practice direction and therefore should be treated as a public document and disclosed. He maintains that the public interest would be served by disclosure so as to ensure the principle of open and transparent justice.
28. The complainant also argues that the subject of Royal Wills "is cloaked in the greatest secrecy, is completely opaque rather than transparent and potentially sets dangerous precedents as to the administration of the law". Therefore the public interest would be served by greater transparency, he says.
29. Other relevant arguments include greater transparency and understanding of the role of the monarch in our constitutional democracy. 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 in practice.

Public interest arguments in favour of maintaining the exemption

30. The public authority has argued that there is a clear public interest in protecting senior members of the Royal Family, given their unique role, from the press and public intrusion into very private matters. It said that in its view this applies equally to the process as well as the substance of these proceedings as 'disclosure of either may pierce the veil of confidentiality which the court has held to be in the public interest'.
31. As regards the public interest in the privacy of the Royal Family, the public authority said that it should be noted that 'the Members of the Royal Family live their lives in the context of constant publicity and it seems appropriate that their private lives, which we argue include the issue of wills, should be afforded a measure of privacy'.

Balance of the public interest arguments

32. Given the broad reading of the term 'relates to', the subject matter of information which falls within the scope of section 37(1)(a) can also be very broad because communications, and information relating to such communications, could potentially cover a huge variety of issues. Therefore, it is much more difficult to establish what is the inherent public interest which the exemption is designed to protect compared with other more narrowly defined exemptions such as section 42 which clearly provides a protection for information covered by legal professional privilege.

33. The withheld information in this case represents the personal views of The Queen. Therefore the Commissioner considers that the public interest factor which is inherent in maintaining the exemption, and which is relevant in this case, is that of protecting the privacy and dignity of the Royal Family. 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. Furthermore, the Commissioner is also conscious that The Queen, whilst Head of State is also a private individual in her own right and the Commissioner believes that there will always be a strong and inherent public interest in protecting an individual's privacy.
34. The Commissioner is mindful of the fact that the information relates to what is essentially a private matter since it deals with how the wills of members of the The Queen's family should be treated. Although there is often a significant overlap between The Queen's public role as Sovereign and Her private life, the Commissioner considers that the withheld information in this case is clearly about a private matter. Therefore the Commissioner is of the view that there would need to be very strong factors in favour of disclosure in order to overturn the important public interest in maintaining the exemption.
35. The complainant has argued that the information constitutes a practice direction and therefore should be treated as a public document. It is important to note, however, that this is disputed by the public authority which contends that the document in question is not a practice direction within the meaning of the Civil Procedure Rules. Indeed, it is clear to the Commissioner that the document is not a formal practice direction as issued by the courts and so the Commissioner has not given any weight to this specific argument. However, the Commissioner does accept that there is a general public interest in open and transparent justice and information which relates to how the courts carry out their duties. Therefore the Commissioner has given this argument some weight when balancing the public interest. Given that the information relates to communications with Her Majesty the Commissioner also accepts that disclosure would lead to greater transparency in how the Sovereign interacts with other areas of government such as, in this case, the Attorney General as well as the courts. However, the Commissioner finds that these arguments whilst valid are more general in nature and when taking into account the importance of the Sovereign in our constitution and system of government the Commissioner has concluded that such arguments are not sufficient to weigh the public interest in favour of disclosure in this case.

36. The Commissioner has decided that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure. Given that the Commissioner has decided that all of the information is exempt on the basis of section 37(1)(a) and that the public interest clearly favours the maintenance of that exemption, he has not gone on to consider the public authority's application of the section 41 exemption.

Procedural Requirements

Section 17 – Refusal of a request

37. Where a public authority is applying a qualified exemption to a request section 17(3) of the Act provides that it must, within such times as is reasonable in the circumstances, provide an applicant with a notice which states the reasons for claiming that the public interest in maintaining an exemption outweighs the public interest in disclosure. This allows a public authority to extend the deadline for responding to a request in order to carry out the public interest determination for a reasonable amount of time. In this case the complainant submitted his request on 3 January 2008. Whilst the public authority informed the complainant that section 37(1)(a) applied to the request it did not issue a substantive response until 16 June 2008 at which point it provided the complainant with the outcome of its public interest determination.
38. The Commissioner has considered whether the public authority took a reasonable time to arrive at its decision on the public interest test. What is reasonable is not defined in the Act but the Commissioner has issued guidance on this point which states that public authorities should aim to respond to all requests within 20 working days and only in cases involving exceptionally complex public interest considerations will it be reasonable to take longer. The Commissioner's view is that in no case will it be reasonable to take over 40 working days. In this case the public authority took over 5 months to issue a notice setting out its public interest determination and given the circumstances of the case the Commissioner has decided that this was unreasonable and that therefore the public authority breached section 17(3) of the Act.
39. The Commissioner has also considered the public authority's late application of the section 41 exemption. Section 17(1) provides that a public authority shall, within 20 working days, provide a complainant with a refusal notice which states that the information is exempt, specifies the exemption in question and states why the exemption applies. In this case the public authority did not inform the complainant that it was applying the section 41 exemption until it issued its

substantive response on 16 June 2008. This constitutes a breach of section 17(1).

The Decision

40. 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:
- The public authority dealt with the request in accordance with the Act to the extent that it correctly refused to disclose the information under the section 37(1)(a) exemption.
41. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The public authority breached section 17(3) of the Act by failing to inform the complainant of its public interest determination on section 37(1)(a) within such time as was reasonable in the circumstances.
 - The public authority breached section 17(1) by failing to inform the complainant that it was applying the section 41 exemption within 20 working days of receiving the request.

Steps Required

42. The Commissioner requires no steps to be taken.

Other matters

43. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

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. As he has made clear in his *'Good Practice Guidance No 5'11*, 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 considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. In this case the complainant contacted the public authority on 17 December 2008 to challenge its decision to refuse his request. The public authority interpreted this as a request for an internal review but did not present its findings until 30 April 2009. The Commissioner considers this a significant failure to conform to the Code of Practice.

Right of Appeal

44. 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 sent.

Dated the 6th day of December 2010

Signed

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

Legal Annex

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."

Section 17(2) states –

"Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, 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 authority holds the information, or

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

Section 37(1) provides that –

"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, or
- (b) the conferring by the Crown of any honour or dignity."

Section 41(1) provides that –

"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."