

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 March 2011

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

Summary

The complainant requested information relating to consultations with interested parties following the government's proposal to strengthen the protection for Royal Family papers under the Freedom of Information Act. The proposal was made in view of the recommendation by the Dacre review of the 30 year rule that the government should, in parallel with adopting a reduction to a 15 year rule, also consider whether there was a case for enhanced protection for particularly sensitive information. The public authority withheld information on the basis of the exemptions at sections 35(1)(a) (formulation and development of government policy), 37(1)(a) (communications with Her Majesty etc), 40(2) (personal data), 41(1) (information provided in confidence) and 42(1) (legal professional privilege). The Commissioner found that the exemption at section 37(1)(a) was engaged in respect of all of the information held and in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure. He however found the public authority in breach of section 17(1) (failure to issue a refusal notice within 20 working days).

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. Under section 62(1) of the Act, official records are deemed 'historical records' 30 years after they were created (the Public Records Act 1958 was also amended accordingly). Historical records are transferred to the National Archives where, subject to the application of some exemptions under the Act, they are open to public inspection. This arrangement is sometimes referred to as the '30 year rule'. On 25 October 2007 the former Prime Minister Rt Hon Gordon Brown MP announced that he had asked the former Editor-in-Chief of The Daily Mail Newspaper, Mr Paul Dacre, to chair a review of the 30 year rule. The main part of the terms of reference was to consider whether, 'in light of Freedom of Information and other considerations, there should be any changes (and if so what) to the 30 year rule...'
3. On 29 January 2009, the review team published its findings and recommendations in a report also referred to as 'the Dacre Report'¹. The report recommended, amongst other things, a reduction of the 30 year waiting period to 15 years as well as enhanced protection for sensitive categories of information.

The Request

4. On 15 June 2009, the complainant wrote to the public authority under the terms of the Act as follows:

'The following proposal appeared in the PMs statement last week on rebuilding the constitution –

As the Dacre report recommended, we have considered the need to strengthen protection for particularly sensitive material and there will be protection of Royal Family...papers

This was in response to the recommendation in the Dacre Review which read -

We therefore recommend that, in parallel with the adoption of a 15 year rule, the government in consultation with interested parties, may wish to consider whether there is a case for enhanced protection of such categories of information.

¹ <http://www.justice.gov.uk/about/docs/government-response-30-year-rule-review.pdf>

Please disclose the relevant consultations.'

5. On 14 July 2009 the public authority responded. The public authority confirmed that it held information within the scope of the request but all of the relevant information was withheld on the basis of exemptions at sections 35(1)(a), 37(1)(a), 40(2), 41(1), and 42(1).
6. On 14 July 2009 the complainant requested a review of the public authority's decision.
7. On 13 August 2009 the public authority wrote back to the complainant with details of the outcome of the review. The decision to withhold the relevant information on the basis of the above exemptions was upheld.

The Investigation

Scope of the case

8. On 08 September 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant asked the Commissioner to review the public authority's decision to withhold the information.

Chronology

9. On 16 September 2009, before the case was allocated to a case officer, the Commissioner wrote to the public authority to request copies of the information withheld from disclosure ('the disputed information'). Unfortunately there was a delay of nine months in allocating the case to a case officer, due to the volume of complaints at the Commissioner's office.
10. On 17 June 2010, after the case had been allocated, the Commissioner wrote to the complainant to confirm the scope of the complaint and his consequent investigation. The Commissioner also wrote to the public authority again to request the disputed information and any additional representations on the application of exemptions.
11. Between 03 and 24 August 2010, there was a telephone conversation and an email between the Commissioner's representative and the public authority's representative regarding the lack of response to the Commissioner's letter.

12. On 22 September 2010 the Commissioner issued an Information Notice (in order to formally obtain the public authority's response to his letter of 17 June) in accordance with his powers under section 51(1)(b) of the Act.
13. On 01 October 2010 the public authority responded to the Information Notice. The public authority provided the Commissioner with all of the disputed information except the information withheld on the basis of the exemption at section 42(1). The reason for not providing the Commissioner with the information withheld under section 42(1) is detailed in the paragraphs below.

Findings of fact

14. The Constitutional Reform and Governance Act 2010, included amendments to section 37 of the Act². As a result, communications with the Sovereign, the Heir to the Throne and the second in line to the Throne are now absolutely exempt from disclosure under the Act.
15. At the time of the request in this case, however, the Government were considering whether to amend section 37 and other provisions of the Act, following publication of the Dacre Report.

Analysis

Exemptions

16. A full text of the relevant statutory provisions can be found in the legal annex.
17. The public authority did not provide the Commissioner with parts of the disputed information withheld on the basis of section 42(1). The relevant information was withheld from the Commissioner on the basis of section 51(5)(a).
18. The exemption at section 42(1) can be relied on by a public authority to withhold information to which a claim to legal professional privilege could be maintained in legal proceedings.
19. Section 51(5)(a) can be relied on by a public authority to deny the Commissioner access to information for the purposes of an investigation if it constitutes any communication between a

² Specifically in Schedule 7

professional legal adviser and a client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under the Act.

20. The public authority explained that the information exempt under section 42 is legal advice the Cabinet Office or the Royal Household has received concerning the implications and application of exemptions under the Act. The Commissioner accepts that such information would invariably fall within the scope of section 51(5)(a), and in the circumstances of this case, he decided not to challenge the public authority's decision to deny him access to the relevant information on those grounds.
21. However, given that the information withheld under section 42(1) relates to communications with Her Majesty, members of the Royal Family or the Royal Household, the Commissioner decided to first consider whether all of the disputed information (including the information withheld under section 42(1) and not disclosed to the Commissioner) would have in any event been exempt on the basis of the exemption at section 37(1)(a).
22. The Commissioner's interpretation of the term 'relates to' is explained below.

Section 37(1)(a)

23. Information is exempt under section 37(1)(a) if it relates to communications with Her Majesty, with other members of the Royal Family or with the Royal Household.
24. The exemption applies to information which relates to communications with the Royal Family or with the Royal Household rather than simply to actual communications with such parties. The Commissioner interprets the term 'relates to' broadly.
25. A list of the documents which constitute the disputed information can be found in the confidential annex to be disclosed to the public authority only. To make this information available to the complainant would in effect defeat the purpose of the exemption in relation to this case.
26. The public authority additionally identified a number of documents referred to within the disputed information which it considered to be outside the scope of the request. For reasons explained in the confidential annex, the Commissioner agrees with the public authority that the documents in question are outside the scope of the request.

27. The Commissioner has carefully considered the disputed information provided to him, which consists of correspondence and attachments. He is satisfied that it clearly falls within the scope of the exemption at section 37(1)(a) and that any attached document(s) is caught by the exemption on the grounds that, contextually, the document(s) cannot be viewed in isolation. Rather, they should be considered as part of the correspondence to which they are attached.
28. Furthermore, as the Commissioner has already noted above, he is satisfied that, given the breadth of the term 'relates to', the information withheld under section 42(1) and which was not provided to him on the basis of section 51(5)(a) is also exempt on the basis of the exemption at section 37(1)(a).
29. Section 37(1)(a) 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 the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
30. The Commissioner has summarised below the public authority's arguments in favour of and against disclosure.

Public interest arguments in favour of disclosing the requested information

31. The public authority recognised the public interest in the role of the Royal Family and specifically as regards its interaction with the government.
32. In the circumstances of this case, the public authority also acknowledged that there was a public interest in revealing the disputed information given the operation of the Act and Prime Minister's announcement that the government would look to strengthen the protection (in the Act) for sensitive Royal papers.

Public interest arguments in favour of maintaining the exemption

33. The public authority submitted that the disputed information should be considered within the terms of the constitutional convention that the Sovereign has both a right and a duty to counsel, encourage and warn her government. The public authority therefore argued that there is a strong public interest in ensuring that the constitutional position of the Monarchy is not undermined by the disclosure of the disputed information.

34. The public authority additionally drew support for its position from two previous decisions (FS50114757³ and FS50220275) of the Commissioner in relation to communications with The Prince of Wales and the Royal Household.

Balance of the public interest arguments

35. In addition to the public interest in disclosure specified by the public authority (all of which he accepts as relevant in this case), the Commissioner also notes that the disclosure of information serves the general public interest in respect of the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and the informed and meaningful participation by the public in the democratic process.
36. The Commissioner recognises the significant public interest in the disclosure of the relevant consultations with members of the Royal Family and/or the Royal Household regarding proposed amendments to the Act. Specifically, the Commissioner would argue that there is a significant public interest in the disclosure of information which sheds light on the views of both the government and the parties consulted regarding the proposed amendments. These views would have further informed the public debate on the proposed amendments to the exemption for Royal papers and consequently enhanced the transparency of the process.
37. The Act, as is well documented, was passed primarily to introduce a public 'right to know' in relation to public bodies. In view of the government's proposed amendments to section 37 of the Act, the Commissioner considers that there was a significant public interest in the disclosure of the disputed information. This is because there would generally be a significant public interest in disclosing information which relates to the operation of the Act and more so if it relates to proposed limits to the scope of its application.
38. However, the Commissioner has to balance the public interest factors in favour of disclosure with the significant public interest which the exemption at section 37(1)(a) seeks to protect.
39. In case FS50220275, the Commissioner accepted that there is a significant and weighty public interest in preserving the operation of the convention of confidentiality designed to protect communications between the Monarch and Her Ministers. The Commissioner noted

³ This case is currently under appeal to the Information Tribunal

specifically that significant weight needed to be attributed to arguments that the disclosure of such communications could undermine the political neutrality of the Queen and/or the Heir to the Throne. A perception that the Monarch is politically biased strikes at the heart of the constitutional convention and would seriously damage the stability of the constitutional Monarchy.

40. The Commissioner agrees with the public authority that the above considerations are also wholly relevant to the public interest in maintaining the exemption in relation to the disputed information in this case.
41. To illustrate the reality of the possible risk of damage to the operation of constitutional convention, the public authority drew the Commissioner's attention to an article published on 29 January 2009 in the Evening Standard.⁴
42. The Commissioner is satisfied that disclosure of the disputed information would be contrary to the public interest inherent in maintaining the exemption. He accepts that there is a significant and weighty public interest in preserving the operation of the constitutional conventions which apply.
43. Having carefully balanced the relevant public interest factors in this case, the Commissioner considers that, notwithstanding the significant public interest in disclosing information affecting the operation of the Act, the public interest in preserving the confidentiality of communications between the Sovereign, the Royal Family, the Royal Household and government Ministers outweighs, in the circumstances of this case, the public interest in disclosure.
44. Consequently, the Commissioner finds that the disputed information (which includes the information not provided to the Commissioner on the basis of section 51(5)(a)) was correctly withheld on the basis of the exemption at section 37(1)(a). He has therefore not considered the other exemptions relied on by the public authority.

The Decision

45. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

⁴ 'Queen demands to keep Palace secrets for 30 years' – Joe Murphy, Political Editor

Steps Required

46. The Commissioner requires no steps to be taken.

Right of Appeal

47. 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 14th day of March 2011

Signed

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

Legal Annex

Communications with Her Majesty.

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 37(2) 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).”

Legal Professional Privilege

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

Section 42(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”

Information Notices

51.— (1) If the Commissioner—

(a) has received an application under section 50, or

(b) reasonably requires any information—

(i) for the purpose of determining whether a public authority has complied or is complying with any of the requirements of Part I, or

(ii) for the purpose of determining whether the practice of a public authority in relation to the exercise of its functions under this Act conforms with that proposed in the codes of practice under sections 45 and 46,

he may serve the authority with a notice (in this Act referred to as “an information notice”) requiring it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to the application, to compliance with Part I or to conformity with the code of practice as is so specified.

(2) An information notice must contain—

(a) in a case falling within subsection (1)(a), a statement that the Commissioner has received an application under section 50, or

(b) in a case falling within subsection (1)(b), a statement—

(i) that the Commissioner regards the specified information as relevant for either of the purposes referred to in subsection (1)(b), and

(ii) of his reasons for regarding that information as relevant for that purpose.

(3) An information notice must also contain particulars of the right of appeal conferred by section 57.

(4) The time specified in an information notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the information need not be furnished pending the determination or withdrawal of the appeal.

(5) An authority shall not be required by virtue of this section to furnish the Commissioner with any information in respect of—

(a) any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under this Act, or

(b) any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in connection with or in contemplation of proceedings under or arising out of this Act (including proceedings before the Tribunal) and for the purposes of such proceedings.

(6) In subsection (5) references to the client of a professional legal adviser include references to any person representing such a client.

(7) The Commissioner may cancel an information notice by written notice to the authority on which it was served.

(8) In this section "information" includes unrecorded information.