

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 7 March 2011

Public Authority: The National Archives
Address: Kew
Richmond
Surrey
TW9 4DU

Summary

The complainant asked The National Archives (TNA) for access to the closed file FD 23/4224: 'Discussions with Prince of Wales: correspondence via Lord Jellicoe concerning the Prince's interest in alternative medicine: covering dates, 1985-1986'. TNA initially refused to disclose any of the file, relying on the exemptions contained at sections 37(1)(a), 40(2) and 41(1). At the internal review stage TNA disclosed part of the file and relied on the three same exemptions to withhold the remainder of the information. The Commissioner has concluded that the parts of the file that have been withheld are exempt from disclosure on the basis of section 37(1)(a) and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

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. The complainant contacted The National Archives (TNA) on 14 September 2009 and asked to be provided with access to the closed file FD 23/4224: 'Discussions with Prince of Wales: correspondence via

Lord Jellicoe concerning the Prince's interest in alternative medicine: covering dates, 1985-1986'.

3. TNA responded on 27 October 2009 and informed the complainant that all of the information falling within the scope of this request was exempt from disclosure under section 37(1)(a) but it needed further time to consider the balance of the public interest test.
4. On 17 December 2009 TNA contacted the complainant again and informed him that it had completed its consideration of the public interest test and concluded that the public interest favoured maintaining section 37(1)(a). TNA also noted that some of the information was exempt from disclosure on the basis of sections 40(2) and 41(1).
5. The complainant contacted TNA on 8 January 2010 and asked for an internal review to be conducted. The complainant argued that it was pointless to withhold the file given that it related to matters that happened a long time ago and from the title of the file it is clear that it concerns The Prince of Wales' interest in alternative medicine. The complainant also noted that The Prince of Wales was open about his interest in the subject and noted that in 1993 he set up a charity to promote alternative medicine, The Prince's Foundation for Integrated Health.
6. TNA contacted the complainant on the following dates and explained that it needed further time to complete its consideration of his internal review request: 8 February, 8 March and 7 April 2010.
7. On 20 April 2010 TNA contacted the complainant again and explained that it had concluded that some of the information contained in the file could be released and that a redacted version of the file would be made available for public viewing from 27 April 2010. The complainant was provided with details as to how he could access this redacted version of the file. However, the internal review went on to explain that the remaining sections of the file were exempt from disclosure on the basis of the exemptions cited in the refusal notice of 17 December 2009.

The Investigation

Scope of the case

8. The complainant contacted the Commissioner on 30 April 2010 in order to complain about TNA's decision to withhold the remaining parts of the

file. The complainant argued that the balance of the public interest favoured disclosure of the entire file.

Chronology

9. The Commissioner contacted TNA on 18 June 2010 and asked to be provided with the parts of the file that had been withheld from the complainant along with submissions to support the application of the exemptions cited in the refusal notice.
10. TNA responded on 16 July 2010 and provided reasoning to support its reliance on the various exemptions and explained that it would provide the Commissioner with a copy of the withheld information once this case had been allocated to case officer for investigation.
11. The Commissioner contacted TNA on 13 December 2010 and explained that this case had now been allocated to a case officer and therefore asked TNA to provide a copy of the requested information. The Commissioner also explained that as a consequence of him considering a number of earlier complaints concerning very similar requests for The Prince of Wales' correspondence with government departments he was already in possession of very detailed submissions from a number of public authorities to support the application of sections 37(1)(a), 40(2) and 41(1). The Commissioner explained that he was happy to take these submissions fully into account when considering this complaint, along with TNA's previous submissions, and therefore did not need TNA to provide him with any further submissions to support the application of these exemptions. However, the Commissioner explained to TNA that if it felt that these submissions were not equally applicable in this case, or if it felt that there were additional submissions beyond those previously provided to him which it felt were relevant to this case, he would welcome any further submissions that TNA might wish to make.
12. TNA provided the Commissioner with a copy of the file requested by the complainant (both the parts that had been disclosed and the parts that remained withheld) on 21 January 2011. In this response TNA also confirmed that it did not wish to provide any further submissions to support its reliance on the three exemptions cited in its correspondence with the complainant.

Findings of fact

13. As noted in the preceding paragraphs the Commissioner has based his analysis of the exemptions in this particular case partly on the submissions he received from a number of public authorities when the investigating a previous set of similar complaints. The decision notices on these earlier cases were issued between December 2009 and June 2010. However for consistency and ease of reference the remainder of this Notice suggests that information or a particular submission has been provided by TNA when it may have been the case that it was provided another public authority, most notably, the Cabinet Office.

Analysis

Exemptions

Section 37(1)(a)

14. The Commissioner has initially considered whether the correspondence falling within the scope of the complainant's request is exempt from disclosure on the basis of section 37(1)(a).
15. 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'.
16. The Commissioner interprets The term 'relates to' broadly. Therefore, this exemption has the potential to cover draft letters, memorandums or references to meetings with the Royal Family or Royal Household irrespective of whether such communications have in fact been sent or received or whether such meetings have in fact occurred.
17. 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 fall within this definition unless it specifically relates to a relevant communication.
18. Furthermore, the Commissioner is aware that many members of the Royal Family act as patrons for a wide range of charities. If correspondence held by a public authority relates to those charities and either is or relates to a communication with a member of the Royal Family or the Royal Household then it will fall within the scope of section 37(1)(a). However correspondence simply between one of the

charities which enjoys the patronage of a member of the Royal Family and a public authority will not fall within the exemption, unless it also relates to a communication with a member of the Royal Family or the Royal Household.

19. The Commissioner has reviewed the remaining withheld information in this case and he is satisfied that it all is or relates to communication with a member of the Royal Family or the Royal Household, so is exempt from disclosure under section 37(1)(a).

Public interest test

20. 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. If the public interest arguments on both sides are equally weighted the Act requires disclosure of the information.

Public interest arguments in favour of maintaining the exemption

21. TNA argued that the prime reason for maintaining the exemption is to ensure that the confidentiality that was essential to two conventions was not undermined. The first is the constitutional convention that The Prince of Wales should be educated in, and about, the business of government in order to prepare him for the time when he will be the Sovereign, without that process putting at risk the political neutrality which is essential to the role and functions of the Sovereign. TNA argued that it is essential to the operation of the convention that His Royal Highness should be able to express views to Ministers on important issues of government and moreover should receive their views in response. This also ensures that The Prince of Wales can carry out his role as Privy Councillor and Counsellor of State. As next in line to the throne he also has a statutory duty under the Regency Act 1937 to act for The Queen during her absence or incapacitation. TNA argued that the convention that The Prince of Wales will be informed about the business of government in order to prepare for his reign as Sovereign can only be maintained if both His Royal Highness and government Ministers who advise and inform him about the business of government can be assured that the communications between them remain confidential.
22. TNA explained that this convention is inextricably tied to the role of the Sovereign in the British constitution and the separate constitutional convention for the Sovereign 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. Consequently, The Prince of Wales must not be in a position where his political neutrality is compromised because it cannot be restored on accession to the throne. TNA argued that if correspondence between The Prince of Wales and government Ministers was routinely disclosed His Royal Highness' political neutrality would be put at risk.
23. TNA explained that it was strongly in the public interest that these conventions were not undermined because preserving the political neutrality of the Royal Family was essential to ensuring the stability of the constitutional Monarchy.
 24. Furthermore TNA argued that disclosure of the information could lead to a chilling effect in respect of The Prince of Wales, and those he corresponds with, altering the manner in which they communicate, for example by comments no longer being recorded or the nature in which the comments are recorded being less free and frank. Such an effect would not be in the public interest because it would result in The Prince of Wales being less prepared for the business of government when he is Monarch and furthermore might undermine His Royal Highness' ability to carry out his role as a Privy Councillor or Counsellor of State and any duties he may be called upon to undertake in line with the Regency Act 1937.
 25. TNA has also argued that disclosure of this information may also have a wider chilling effect because it could deter other private individuals from contacting the government if they felt their correspondence would be disclosed under the Act. TNA has argued that it is in the public interest that anyone should feel free to correspond with members of the government on any subject and that such an input has been a valuable source of information about the public's view on many matters. Consequently, a valuable channel of communication of between government and governed could break down to great public detriment. Not only would the government lose access to otherwise unreachable ideas, citizens deprived of this long-established channel for expressing opinions to their political leaders could come to feel alienated from government.
 26. TNA also argued that given the broad scope of section 37(1)(a), the public interest extended to protecting the privacy and the dignity of the

Royal Family. It would not be in the public interest if disclosure of the withheld information infringed this privacy.

Public interest arguments in favour of disclosing the requested information

27. There is a public interest in disclosure of information to ensure that the government is accountable for and transparent in its decision making processes.
28. Moreover, there is a specific public interest in disclosure of information that would increase the public's understanding of how the Government interacts with the Royal Family and the Royal Household and, in particular in the circumstances of this case, the Heir to the Throne. 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. This includes, in the Commissioner's opinion, how the Heir to the Throne is educated in the ways of government in preparation for his role as Sovereign.
29. Disclosure of the information may allow the public to understand the influence (if any) exerted by The Prince of Wales on matters of public policy. If the withheld information demonstrated that a particular public authority or government in general had placed undue weight on the preferences of The Prince of Wales then it could add to the public interest in disclosing the information.
30. Conversely, if the withheld information actually revealed that The Prince of Wales did not have undue influence on the direction of public policy, then there would be a public interest in disclosing the information in order to reassure the public that no inappropriate weight had been placed on the views and preferences of the Heir to Throne. In essence disclosure could enhance public confidence in respect of how the government engages with The Prince of Wales.
31. These two arguments could be seen as particularly relevant in light of media stories which focus on The Prince of Wales' alleged inappropriate interference in matters of government and political lobbying.
32. 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 particularly the Heir to the Throne. Similarly, disclosure of the information could inform the broader debate surrounding constitutional reform.

Balance of the public interest arguments

33. In the Commissioner's opinion, the nature of the content 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 provides specific protection for legally privileged information.
34. The Commissioner believes that the following four public interest factors can be said to be inherent in the maintaining the exemption and relevant in this case:
- Protecting the ability of the Sovereign to exercise Her right to consult, to encourage and to warn Her Government and to preserve Her position of political neutrality;
 - Protecting the ability of the Heir to the Throne to be instructed in the business of government in preparation for when he is King and in connection with existing constitutional duties, whilst preserving his own position of political neutrality and that of the Sovereign;
 - Preserving the political neutrality of the Royal Family and particularly the Sovereign and the Heir to the Throne to ensure the stability of the constitutional Monarchy; and
 - Protecting the privacy and dignity of the Royal Family.
35. The Commissioner believes that the scope of the constitutional convention in respect of the Heir to the Throne is relatively narrow. That is to say it will only cover correspondence in which The Prince of Wales is in fact being educated in the ways and workings of government; it cannot be interpreted so widely as to encompass all of The Prince of Wales' communications with the government. For example, the convention would not cover correspondence about His Royal Highness' charitable work or information of a particularly personal nature. (This is not to say that the withheld information in this case includes examples of either class of information).
36. However, where the information does fall within the convention, the Commissioner accepts that there is a significant and weighty public interest in preserving the operation of this convention, so it would not be in the public interest for the operation of the convention to be undermined. This is particularly so as the convention is designed to

protect communications at the heart of government, between government Ministers and the Heir to the Throne.

37. The Commissioner also accepts the argument that disclosure of the information covered by the convention could undermine The Prince of Wales' political neutrality for the reasons advanced by TNA. The Commissioner believes that significant weight should be attributed to that argument, as it is clearly in the public interest that The Prince of Wales, either as Heir to the Throne or when Monarch is not perceived to be politically biased because political neutrality is key to the position of the Sovereign in a constitutional democracy.
38. The Commissioner believes that arguments concerning political neutrality are still relevant, and indeed attract similar weight, even when the information being withheld does not fall within the scope of the constitutional convention relating to the Heir to the Throne. In other words disclosure of correspondence not strictly on issues related to the business of government could still lead to The Prince of Wales being perceived as having particular political views or preferences and thus could undermine his political neutrality. As noted above, the Commissioner accepts that it is inherent in the exemption contained at section 37(1)(a) that it is in the public interest for the political neutrality of all members of the Royal Family to be preserved.
39. Turning to the chilling effect arguments, as TNA correctly suggests such arguments are directly concerned with the loss of frankness and candour in debate and advice which would flow from the disclosure of information. Such arguments can encompass a number of related scenarios:
 - Disclosing information about a given policy or decision making process, whilst that particular process is ongoing, will be likely to affect the frankness and candour with which relevant parties will make future contributions to that policy/decision making;
 - The idea that disclosing information about a given policy or decision making process, whilst that process is ongoing, will be likely to affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates and decision making processes; and
 - Finally an even broader scenario where disclosing information relating to the formulation and development of a given policy or decision making process (even after the process is complete), will be likely to affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates and decision making processes.

40. In the Commissioner's opinion, given the age of the information, it is only the third scenario that could be said to be relevant to this request given that the discussions relate to decision making that could no longer be described as live.
41. With regard to attributing weight to the argument that disclosure of the withheld information would have a chilling effect on the way in which The Prince of Wales and/or government Ministers would correspond, the Commissioner believes that it is difficult to make an assessment of such an argument given the unique nature of this relationship and thus the lack of any clear precedents.
42. However, the Commissioner is aware of the authorised biography of The Prince of Wales by Jonathan Dimbleby which was published in 1994.¹ In his introduction to this publication, Dimbleby explains that The Prince of Wales provided him with access to His Royal Highness' archives at St James's Place and Windsor Castle. Dimbleby therefore had access to The Prince of Wales' journals, papers and correspondence with Whitehall. In relation to the inclusion of such information in his book Dimbleby explains that:
- 'I have been persuaded that the verbatim publication of the material might have a deleterious effect either on the conduct of British diplomacy or on the confidential nature of communications between the monarchy and Whitehall or Westminster; in these cases I have either withheld information or paraphrased the relevant documents or correspondence. However, when it was obvious that only the culture of secrecy which pervades Whitehall was under threat and not the conduct of good governance, I have not complied with requests to delete pertinent material'.
43. Therefore, it would clearly be incorrect to argue that details of the Prince of Wales' communications with government have never been placed in the public domain. To take but two examples from *The Prince of Wales: A Biography*, at page 582 Dimbleby quotes from a letter sent by His Royal Highness in 1985 to the then Prime Minister, Margaret Thatcher, in addition to quoting from a draft section of the letter which did not make the final version. And at page 809 Dimbleby notes that The Prince of Wales wrote to the then Secretary of State for Defence, Malcolm Rifkind, about the implications of cutting the Army's manpower and quotes from this letter. Although the quote is not particularly lengthy it clearly shows The Prince of Wales' strong views on this issue. The Commissioner has not been provided with any evidence by the Cabinet Office that the inclusion of details of The

¹ J Dimbleby, *The Prince of Wales: A Biography*, (Bath: Chivers Press, 1994)

Prince of Wales' correspondence in this book has resulted in any sort of chilling effect.

44. However, the Commissioner accepts that a direct parallel cannot be drawn between the disclosure of the withheld information which is the focus of this case and the previous disclosures such as in the Dimbleby biography. To some extent, as Dimbleby himself acknowledges, his book was 'self-censored': extracts have not been included that would undermine the confidential nature of communications between the Monarchy. In contrast, disclosure of the withheld information in this case would be without the consent of The Prince of Wales and would result in complete copies, as opposed to extracts or paraphrased sections, of correspondence being revealed.
45. Furthermore the Commissioner believes that an inherent part of the convention is the ability of both the Heir to the Throne and government Ministers to be free and frank when discussing matters of government business. This is to ensure that the Heir to the Throne is instructed in the business of government in the most effective and efficient way possible. In the Commissioner's opinion, disclosure of information falling within the scope of convention would lead The Prince of Wales, and possibly the Minister with whom he corresponds, to feel constrained or more reluctant to take part in the process of His Royal Highness being educated about the business of government. Therefore, given the protection which the Commissioner believes should be provided to the convention itself, it follows that notable weight should be given to the argument that disclosure of information which falls within the scope of the convention would result in a chilling effect.
46. With regard to attributing weight to the chilling effect arguments for correspondence which does not fall within the scope of the convention, the Commissioner does not believe that such arguments automatically attract weight in the way in which correspondence falling within the convention does. Rather, the assessment as to whether a chilling effect will occur will be based upon factors considered in other cases involving an assessment of the chilling effect, most notably the content of the information itself. This is because, in the Commissioner's opinion, in order for a chilling effect argument to be convincing the information which is disclosed has to be more than anodyne in nature, otherwise disclosure is unlikely to dissuade individuals from making frank and candid comments in the future. In the circumstances of this case the Commissioner accepts that if any of the correspondence was considered not to be covered by the convention, it is still of a relatively frank and candid nature and thus some weight should be attributed to the argument that disclosure of this information would result in a chilling effect in the way in which The Prince of Wales drafts his correspondence. (This is not to say that such information, i.e.

information which falls outside the Commissioner's definition of the convention, necessarily falls within the scope of this request.)

47. Again, as with the concept of political neutrality, the Commissioner accepts that a chilling effect on the correspondence falling within the convention could occur even if the withheld information does not fall within the scope of the convention. That is to say, disclosure of information on topics not associated with the business of government would still be likely to affect future correspondence not simply on similar topics but also on topics falling within the scope of the convention.
48. However, the Commissioner is not prepared to accept that disclosure of this information would have a chilling effect on the way in which other individuals communicate with the government. In the Commissioner's opinion it is not logical to suggest that because some of The Prince of Wales' correspondence with government is disclosed, private individuals would fear that their correspondence would also be disclosed. The significant public interest factors which would have to be present to justify such disclosure would almost inevitably be related to the position that His Royal Highness holds rather than simply the content of the information itself. Consequently, the Commissioner considers that the public would easily distinguish disclosure by the government of specific pieces of correspondence with The Prince of Wales under the Act and the potential disclosure of information sent to the government by private citizens. Without any evidence to the contrary the Commissioner considers that such an argument does not attract any particular weight.
49. With regard to the final argument, i.e. the privacy considerations inherent within section 37, the Commissioner's view is 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. To the extent that disclosure of the withheld information would undermine His Royal Highness' dignity by invasion of his privacy, the Commissioner accepts that this adds further weight to maintaining the exemption.
50. However, given the number of public interest arguments in favour of disclosure, a careful balance of all the relevant public interest factors is required. The arguments identified by the Commissioner touch directly on many, if not all, of the central public interest arguments underpinning the Act, namely ensuring that public authorities are accountable for and transparent in their actions, furthering public debate and improving confidence in decisions taken by public authorities. Furthermore, the specific arguments relevant to this case

in relation to The Prince of Wales' relationship with government Ministers deserve to be given particular weight.

51. Nevertheless, the Commissioner does not accept the argument advanced by the complainant that the balance of public interest is materially affected by the fact that the title of the file reveals the topic of the communications with The Prince of Wales. Although The Prince of Wales has spoken and written widely on the identified subject matter leaving the public in no doubt as to His Royal Highness' views on alternative medicine, the Commissioner does not accept that this equates to placing the content of the withheld information into the public domain. Nor does it mean, in the Commissioner's opinion, that The Prince of Wales would not have a reasonable expectation that information relating to his communications would be kept confidential. As noted above the operation of the convention and established practice in relation to communications between senior members of the Royal Family and government have ensured that this is the case. The Commissioner is also satisfied that the content of the information which continues to be withheld by TNA is significantly different in nature to those parts of the file that have now been placed into the public domain.
52. Furthermore, although the Commissioner recognises that the requested information in this case is significantly older than the information contained in other cases he has dealt with regarding The Prince of Wales' correspondence, he does not think that this should materially affect the weight that should be attributed to maintaining the exemption. This is because, in the Commissioner's opinion, both of the conventions discussed above, and the general privacy of The Prince of Wales could still be compromised by disclosure of information dating from some time ago, particular in this case given the fact that the topic discussed is one in which His Royal Highness still has an active interest.
53. In reaching a conclusion as to where the balance of the public interest lies the Commissioner has to focus on the specific content of the information. In this case for the information which falls within the scope of the convention, the Commissioner believes that the public interest in maintaining the exemption is very strong because of the weight that should be attributed to maintaining the convention (i.e. a confidential space in which the Heir to the Throne can communicate with Ministers) and the concepts which underpin it (i.e. political neutrality and confidentiality) along with the weight that should be given to the chilling effect arguments applicable to such correspondence. Even when taken together the Commissioner does not feel that the public interest arguments in favour of disclosing the

particular information which falls within the scope of this request overrides the weighty public interest in maintaining the exemption.

54. In relation to any of the information which may fall outside the Commissioner's understanding of the convention, the Commissioner believes that the public interest is more finely balanced because the argument in favour of maintaining a constitutional convention attracts far less weight. (It should not be inferred that such information is indeed contained within the scope of this request.) Therefore, it would certainly be possible (and easier) to envisage a scenario where disclosure of the correspondence between The Prince of Wales and government Ministers would be in the public interest. However, as noted above just because information does not fall within the scope of the convention this does not mean that its disclosure would not undermine two key concepts inherent to it: political neutrality and the confidentiality of the Heir to the Throne's correspondence with Ministers. Given the content of the withheld information in this case the Commissioner considers that in all the circumstances the public interest in maintaining the exemption outweighs that in disclosure of the requested information.
55. In light of the Commissioner's decision in respect of section 37(1)(a) he has not gone on to consider whether the correspondence falling within the scope of the request is also exempt from disclosure on the basis of sections 40(2) and 41(1).

Procedural Requirements

56. 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.
57. Section 17(1) requires that if a public authority wishes to rely on exemptions to refuse a request it must provide the applicant with a valid refusal notice stating this fact.
58. In this case the complainant submitted his request on 14 September 2009 but TNA did not issue a refusal notice until 27 October 2009 outside of the 20 working day limit. This constitutes a breach of section 17(1).

The Decision

59. 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 parts of the requested file that have been withheld are exempt from disclosure on the basis of section 37(1)(a) and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.
60. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- TNA breached section 17(1) by failing to issue a refusal notice within 20 working days of the complainant's request.

Steps Required

61. The Commissioner requires no steps to be taken.

Other matters

62. The Commissioner notes that on 16 January 2011, prior to this decision notice being issued, the Lord Chancellor and Secretary of State for Justice issued a commencement order which brought into effect the changes made in the Constitutional Reform and Governance Act 2010 to enhance the protection for information relating to communications with the Royal Family and Royal Household. As a result, from 17 January 2011 section 37(1)(b) became an absolute instead of a qualified exemption for information relating to communications with the Sovereign, Heir to the Throne or second in line to the Throne or those acting on their behalf. The exemption for other members of the Royal Family and members of the Royal Household remains qualified. The lifespan of the exemption has also changed from 30 to 20 years (from the date of the information in question) or the lifetime of the relevant member of the Royal Family plus five years, whichever is longer.
63. However, the Commissioner's role in considering complaints under Part I of the Act is limited to considering the circumstances as they existed at the time of the request or at least by the time for compliance with

sections 10 and 17, i.e. within 20 working days following the receipt of the request. The Commissioner's approach follows that set out in a number of Information Tribunal decisions and is endorsed by the High Court.²

64. Therefore in this case the Commissioner has reached a determination of this complaint based upon section 37(1)(a) as a qualified exemption even when cited to withhold correspondence sent by or to the Heir to the Throne. In other words, whilst the Commissioner clearly recognises the effect of the Constitutional Reform and Governance Act 2010 on section 37(1)(a) of the Act, he has not taken this into account when determining this particular complaint because the request was submitted prior to 17 January 2011.

65. Nevertheless the Commissioner notes that the Lord Chancellor and Secretary of State for Justice's explanation for amending section 37(1)(a) was as follows:

'This amendment to the FOI Act is necessary to protect the long-standing conventions surrounding the monarchy and its records, for example the sovereign's right and duty to counsel, encourage and warn her Government, as well as the heir to the throne's right to be instructed in the business of Government in preparation for their future role as monarch'.³

66. The Commissioner's consideration of the public interest test under section 37(1)(a) as set out in this notice fully explored and attributed appropriate weight to these factors.

² See *DBERR v Information Commissioner and Friends of the Earth* (EA/2007/0072) and Office of Government Commerce and Information Commissioner and Her Majesty's Attorney General on behalf of The Speaker of the House of Commons, [2008] EWHC 737 (Admin) (11 April 2008).

³

<http://www.publications.parliament.uk/pa/cm/cmtoday/cmwwms/archive/110118.htm#d2e292>

Right of Appeal

67. 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

68. 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.
69. 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 7th day of March 2011

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 1(3) provides that –

“Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement, the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Effect of Exemptions

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.”

Section 10(3) provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied, the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

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."

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."

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."

Information provided in confidence

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.”