

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 February 2012

Public Authority: Department for Transport
Address: Great Minster House
Horseferry Road
London
SW1P
4DR

Decision

1. The complainant has requested correspondence between the Department for Transport and the Duchy of Cornwall in relation to the Marine Navigation Aids Bill. The Department for Transport refused the request under section 37(1)(a) of the Act which provides an exemption where information relates to correspondence with The Queen, The Royal Family and The Royal Household.
2. The Commissioner's decision is that the section 37(1)(a) exemption is engaged but that the public interest in maintaining the exemption does not outweigh the public interest in disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information to the complainant.
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 13 December 2010, the complainant wrote to the Department for Transport and requested information in the following terms:

“Under the Freedom of Information Act, I would be grateful if you could forward to me copies of the correspondence between your department and the Duchy of Cornwall in relation to the consultation with regard to the Marine Navigation Aids Bill.”

6. The Department for Transport responded on 13 January 2011. It stated that it held the requested information but that it was being withheld under the exemption in section 37(1)(a) of the Act because it relates to communications with the Royal Household. It concluded that the public interest in maintaining this exemption outweighed the public interest in disclosure and set out its reasons for reaching this view.
7. The Department for Transport subsequently carried out an internal review of its handling of the request and wrote to the complainant on 14 March 2011. It said that it was upholding the earlier decision to refuse the request under section 37(1)(a) and provided further reasons why this exemption applied and why it considered the public interest favoured maintaining the exemption.

Scope of the case

8. On 17 March 2011 the complainant contacted the Commissioner to complain about the Department for Transport's decision to refuse his request.

Reasons for decision

9. The complainant has requested copies of correspondence with the Duchy of Cornwall in relation to what was then the proposed Marine Navigations Aids Bill, a private member's bill introduced in 2009 which, amongst other things made provisions affecting the powers and functions of the general lighthouse authorities. The Duchy of Cornwall is all the lands and estates held by the Heir to the Throne, HRH the Prince

of Wales, as Duke of Cornwall. The consent of the Prince of Wales is required if a Bill would affect the interests of the Duchy.¹

10. The Department for Transport has withheld the information it holds under the exemption in section 37(1)(a) of the Act. 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.
11. The complainant maintains that the Duchy of Cornwall is a private estate and separate legal entity to the position of Prince of Wales and that therefore correspondence with The Prince of Wales in his capacity as Duke of Cornwall should be seen as falling outside the scope of the exemption. For its part the public authority has said that no such distinction exists in this context. It says that whilst there is no definition of the Royal Household, it should be taken to include the representatives and advisers of The Queen and the Royal Family. It goes on to say that as a matter of constitutional law there is no distinction between the official and private capacity of The Queen and The Prince of Wales and in any event the exemption in section 37(1)(a) is capable of covering all communications with The Prince of Wales.
12. The Commissioner has reviewed the withheld information which amounts to a letter from the Department for Transport to the Private Secretary to The Prince of Wales followed by a letter from the Secretary to the Duchy of Cornwall to the Department for Transport.
13. First of all, the Commissioner would say that he agrees with the public authority that for the purposes of section 37(1)(a) The Royal Household should be taken to include representatives of The Queen and The Royal Family and that therefore the withheld information would be covered by the exemption. However, even if the Commissioner were to take the complainant's stricter interpretation excluding correspondence with the Duchy of Cornwall it is clear that the exemption would still apply. This is because the first letter was sent to the Private Secretary to The Prince of Wales, rather than the Duchy of Cornwall. The second letter, whilst sent from the Duchy of Cornwall, is a response to the first letter and therefore can be said to 'relate' to that correspondence. It is important

¹ http://interim.cabinetoffice.gov.uk/making-legislation-guide/queens_consent.aspx

to bear in mind that the section 37(1)(a) exemption extends to cover not only communications with The Queen, Royal Family and Royal Household but information that relates to such communications as well. Therefore the exemption can be given a relatively broad interpretation.

14. The Commissioner is satisfied that the information either constitutes communications with the Royal Household or else relates to communications with the Royal Household. Therefore the Commissioner has found that section 37(1)(a) is engaged in this instance.
15. At the time of the request (13 December 2010) section 37(1)(a) was a qualified exemption meaning that even where the exemption applies information may only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosure. Since the request was made, provisions of the Constitutional Reform and Governance Act 2010 have been implemented, amending section 37 so that communications with or on behalf of the Sovereign, Heir to the Throne and second-in-line to the Throne are absolutely exempt. However, given that the changes are not retrospective the Commissioner must base his decision on the law as it was at the time of the request. Therefore, in this case, the public interest test must be applied in respect of the withheld information.
16. The Commissioner considers that the public interest in disclosure lies in knowing more about how The Prince of Wales in his capacity as Duke of Cornwall influences government policy and the process by which his consent is obtained when Parliamentary Bills may affect the interests of the Duchy.
17. As regards the public interest in maintaining the exemption the Department for Transport has said that the arguments against disclosure "stem from the constitutional importance of the Heir to the Throne and Government Ministers being able to correspond freely and frankly". It argues that the correspondence on the giving of the Prince's consent to a bill takes place because of the convention that his consent must be sought where bills affect the Duchy's interests. Such correspondence would, it suggests, fall within the principle of free and frank communications with ministers as any other topic.
18. The Commissioner has considered the competing arguments and reached the view that the public interest favours disclosure. The Commissioner wishes to stress that he has made his decision based on the particular circumstances of this case and on the actual content of

the information itself. In reaching his decision the Commissioner is mindful that the fact that the Department for Transport sought and obtained the consent of The Prince of Wales for the Marine Navigation Aids Bill is already in the public domain. The Commissioner must be careful not to reveal the information itself in this decision notice but having reviewed the information falling within the scope of the request he would simply say that in his view disclosure would reveal very little beyond what is already known but would allow the public to better understand the constitutional convention and the mechanism by which consent is obtained.

19. The Commissioner also views with some scepticism the Department for Transport's argument that this type of information is covered by the principle regarding the Heir to the Throne and Government ministers being able to correspond freely and frankly. The information here is different from other royal communications because it concerns The Prince of Wales being consulted because legislation may affect his interests as Duke of Cornwall. Essentially he is being consulted in his role as a landowner rather than as the Heir to the Throne. In the Commissioner's view the purpose of the principle or convention referred to by the Department for Transport is to prepare the Heir to the Throne for the time when he or she will become Sovereign; to educate him/herself in the business of government. The information in this case has not arisen as part of that process and the Commissioner does not accept that disclosure would undermine the ability of The Queen or The Prince of Wales to correspond with Ministers confidentially. For these reasons the Commissioner has decided that in all the circumstances of the case the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

Right of appeal

20. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

21. 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.
22. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
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Wilmslow
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