

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 June 2019

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office for copies of correspondence between the Prime Minister, Theresa May, and The Duke of York and/or Sarah, The Duchess of York, concerning the wedding of their daughter Princess Eugenie. The Cabinet Office refused to confirm or deny whether it held any information falling within the scope of the request on the basis of the exemption contained at section 37(2) of FOIA, by virtue of section 37(1)(ac) which provides that information is exempt from disclosure if it relates to communications with, or on behalf of, a member of the Royal Family. It also sought to rely on section 40(5) (personal data) of FOIA. The Commissioner has concluded that section 37(2) is engaged and that in all the circumstances of the case the public interest favours maintaining the exemption.

Request and response

2. The complainant submitted the following request to the Cabinet Office on 5 October 2018:

'I would like to request the following information under the Freedom of Information Act...

...Please note that I am only interested in information generated between 5 October 2017 and the present day.

Please note that the reference to Prince Andrew and the Duchess of York should include those two individuals as well as their private offices.

Please note that the reference to the Prime Minister should include the Prime Minister and her private office.

1...Since October 2017 has Prince Andrew and or the Duchess of York written to the Prime Minister about any of the issues listed below.

a...The up coming wedding of their daughter to Princess Eugenie to Jack Brooksbank and arrangements for the event.

b...The cost of the wedding and the possibility of tax payer support for the event.

c...The possibility of an official title for Brooksbank once he is married.

d...The couple's official duties once they are married and or the question of continuing financial support for the couple.

2...If the answer is yes to question one can you please provide copies of this correspondence and communication including emails.

3...Did the Prime Minister reply to the above correspondence and communication?

4..If the answer is to question three is yes can you please provide copies of this correspondence and communication including emails.

In the event that relevant documentation has been destroyed. Can you please supply the following details? In the case of each destroyed piece of correspondence can you provide details of the recipient, sender and date it was generated? In the case of each destroyed piece of documentation can you please say when it was destroyed? If the destroyed documentation continues to be held in another form can you please provide copies of that documentation.'

3. The Cabinet Office responded on 2 November 2018 and refused to confirm or deny whether it held any information falling within the scope of the request on the basis of section 37(2), by virtue of section 37(1)(ac) (communications with other members of the Royal Family), and section 40(5) (personal data) of FOIA.
4. The complainant contacted the Cabinet Office on 3 November 2018 and asked it to conduct an internal review of this decision.
5. The Cabinet Office informed him of the outcome of the internal review on 7 December 2018. The review upheld the applications cited in the refusal notice.

Scope of the case

6. The complainant contacted the Commissioner on 12 December 2018 in order to complain about the Cabinet Office's handling of his request.
7. In relation to this complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.
8. As explained above, the Cabinet Office is seeking to rely on section 37(2) and section 40(5) to refuse to confirm or deny whether it holds information falling within the scope of the request. Therefore this notice only considers whether the Cabinet Office is entitled, on the basis of these exemptions, to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.

Reasons for decision

Section 37 - Communications with the Sovereign, other members of the Royal Family and the Royal Household

9. Section 37(2) of FOIA states that:

'The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).'
10. In the circumstances of this case the subsection within section 37(1) which has been cited by the Cabinet Office is 37(1)(ac). This section states that information is exempt if it relates to:

'communications with other members of the Royal Family (other than communications which fall within any of paragraphs (a) to (ab) because they are made or received on behalf of a person falling within any of those paragraphs).'
11. To engage section 37(2) the requested information (if held) would therefore have to fall within the scope of one of the exemptions contained within section 37(1).
12. As the complainant has requested correspondence The Duke of York and/or Sarah, The Duchess of York, may have exchanged with the Prime Minister the Commissioner is satisfied that if the Cabinet Office held

such information it would be clearly be exempt from disclosure on the basis of section 37(1)(ac) of FOIA. Section 37(2) is therefore engaged.

Public interest test

13. However, section 37(2) is a qualified exemption. Therefore, the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in confirming whether or not the requested information is held.

Public interest arguments in favour of confirming whether or not the requested information is held

14. The complainant argued that there are strong public interest grounds for disclosing any information which fell within the scope of his request. He suggested that whilst members of the Royal Family may be perfectly within their rights to lobby for additional financial support for a one off event like a wedding or an increase in general funding, he argued that the public had a right to know the details of this lobbying and on the grounds on which additional financial support is being granted. The complainant noted that there was a lively debate generated by newspaper reports that Princess Eugenie's wedding had cost taxpayers more than £2m and he suggested that this was proof that the public does have concerns about the extent of public support for members of the Royal Family.

Public interest arguments in maintaining the exclusion to confirm or deny whether the requested information is held

15. The Cabinet Office argued that if it complied with section 1(1)(a) of FOIA this would reveal that information relating to communications with or on behalf of The Duke of York on the matters raised in the request does or does not exist. It argued that the diplomatic and goodwill work carried out by members of the Royal Family is dependent upon the maintenance of the confidentiality of their communications with public authorities. Therefore, the Cabinet Office argued that confirming or denying that information is held could undermine this principle which would be against the public interest.

Balance of the public interest arguments

16. The Commissioner accepts that in order for members of the Royal Family to be able carry out diplomatic and goodwill work they must be able to exchange correspondence with public authorities with the expectation that such information would be treated confidentially. Furthermore, the Commissioner accepts that confirmation as to whether or not the Cabinet Office held the requested information would reveal whether the Duke of York, or Sarah, The Duchess of York, had corresponded with the Prime Minister on specific issues. In the Commissioner's view such a confirmation would represent a direct infringement of the principle that such communications are considered to be confidential. In turn, the Commissioner accepts that such an outcome risks undermining the diplomatic and goodwill work carried out by the members of the Royal Family. In attributing weight to this argument the Commissioner notes that the request concerns a senior member of the Royal Family which in her view arguably increases the risk of this harm occurring if the Cabinet Office complied with section 1(1)(a) in his case. However, the Commissioner acknowledges that complying with section 1(1)(a) would contribute towards the transparency of how the members of the Royal Family and Prime Minister (may) engage on particular topics. She also accepts that there is a genuine and legitimate public interest in how Princess Eugenie's wedding was funded. Nevertheless, taking into account the wider consequences of undermining the confidentiality of such communications, and given the importance of such confidentiality to the work of the Royal Family, the Commissioner has concluded that in the circumstances of this request, albeit by a relatively narrow margin, that the public interest in maintaining the exemption contained at section 37(2) outweighs the public interest in the Cabinet Office confirming whether or not the requested information is held.
17. In light of this finding, the Commissioner has not considered the Cabinet Office's reliance on section 40(5) of FOIA.

Right of appeal

18. 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: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

19. 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.
20. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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SK9 5AF