

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 23 October 2019

Public Authority: HM Treasury
Address: 1 Horse Guards Road
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant has requested copies of correspondence and communications between the Chancellor of the Exchequer and The Queen and or Prince Philip in relation to The Royal Yacht Britannia. The public authority confirmed that it did not hold any environmental information within the scope of the request. Relying on section 37(2) FOIA, the public authority neither confirmed nor denied holding any other information within the scope of the request.
2. The Commissioner finds that the public authority was entitled to conclude that it did not hold any environmental information within the scope of the request.
3. The Commissioner additionally finds that the public authority was entitled to rely on section 37(2) FOIA.
4. No steps are required.

Request and response

5. The complainant submitted a request for information to the public authority on 22 January 2019 in the following terms:

"I would like to make a renewed attempt to obtain information relating to The Royal Yacht under The Freedom of Information Act and The Environmental Regulations.

This new request is a modified version of a request previously submitted in 2017.

It is being submitted following the discovery of correspondence in The National Archives from The Queen's Deputy Private Secretary to Downing Street on the subject of The Royal Yacht.

I enclose one press report from many about the discovery.

<https://www.dailymail.co.uk/news/article-6537539/The-Queen-secretly-lobbied-new-Royal-Yacht.html>

I believe the discovery of the document is significant for a number of reasons. Firstly it shows that both Government departments and The National Archives have previously released into the public domain historic information relating to the communications with The Sovereign. I personally think this is an entirely reasonable course of action and see no reason why this same attitude to historic communications should not influence the department's approach to FOI requests. I fully appreciate the fact that more recent communications should be treated differently. Secondly the existence of this document undermines any need for continued confidentiality because it has already shed light on The Queen's views.

Please note that the reference to The Queen and Prince Philip in the questions below should include those two individuals as well as staff in their private offices including but not limited to their private secretaries, deputy private secretaries and press secretaries.

Please note that the reference to The Chancellor should include the individual who held that office at the time as well as anyone working in their private office.

Please note that I am only interested in information which relates to the period 1 May 1996 to 1 February 1998.

1. During the aforementioned period did The Queen and or Prince Philip write to The Chancellor about The Royal Yacht Britannia. This

correspondence and communication will include but will not be limited to exchanges about the cost, upkeep and maintenance of the Yacht. It will also include but will not be limited to exchanges about its value to the nation; its value to The Royal Family; its voyages (past and present) and its planned replacement/retirement.

2. If the answer is yes can you please provide copies of this correspondence and communication including emails.
3. During the aforementioned period did The Chancellor write to The Queen and or Prince Philip about The Royal Yacht Britannia. This correspondence and communication will include but will not be limited to exchanges about the cost, upkeep and maintenance of the yacht. It will also include but not be limited to exchanges about its value to the nation; its value to The Royal Family; its voyages past and present and its planned replacement/retirement.
4. If the answer is yes can you please provide copies of this correspondence and communication including emails.

If relevant documents generated between the aforementioned period have subsequently been destroyed can you please provide the following information. In the case of each destroyed document can you please state when it was destroyed and why? In the case of each destroyed document can you please provide a brief outline of its contents. In the case of any destroyed correspondence can you please provide details of the date it was generated as well as details of the sender and recipient. Can you please provide a copy of the destroyed information if it continues to be held in another form."

6. The public authority responded on 19 February 2019. Relying on section 37(2) FOIA, it neither confirmed nor denied whether any information was held within the scope of the request. In addition, the public authority confirmed that "no information was held that would fall to be considered under the EIRs."
7. The complainant requested an internal review of this decision on 20 February 2019.
8. On 23 April 2019 the public authority wrote to him with details of the outcome of the review. The review upheld the original decision.

Scope of the case

9. The complainant contacted the Commissioner on 25 April 2019 in order to complain about the public authority's handling of his request. The complaint was set out in the following terms:

"I am unhappy with the public body's refusal to disclose what is likely to be environmental information. I am also unhappy with the organisation's failure to confirm or deny whether it holds other non-environmental information.

I would be grateful if The Commissioner could examine to what extent the documents contain environmental information which should be disclosed under The EIRs. I would also be grateful if The Commissioner could examine the case for releasing other historic information which is of a non environmental nature.

I should point out this is not the first time I have complained about The Treasury and its handling of a request about The Royal Yacht. I refer you to Decision Notice FS50732209. I am submitting this new complaint because I believe recent developments have strengthened the case for transparency. My most request for information about The Yacht was inspired by the discovery - within The National Archives - of written contacts and communications between The Queen's Deputy Private Secretary and Downing Street which were about the vessel. I have enclosed one of the many press reports which covered this find in December of last year. I believe the discovery of this particularly document is significant for a number of reasons. Firstly its existence undermines the need for continued confidentiality because it has already revealed The Queen's views on this subject. There seems little point in now protecting a view point which is public knowledge. Secondly it shows that both Government Departments and The National Archives have in the past been willing to release historical information into the public domain which relates to the communications of The Sovereign. I personally think this is an entirely reasonable course of action and can see no reason why the same approach cannot be applied to requests for historic communications made under the FOI Act or The EIRs.

I have also enclosed another story from The Times newspaper which was published on 30 January 2019 and which suggests the file containing that aforementioned communication is now closed. I note the removal of the file appears to have followed my renewed requests for information to both The Treasury and The Cabinet Office on this issue. In both these requests I make reference to the availability of the file in the archives. The decision to now close the file might be seen in some quarters as a rather cynical and counterproductive move. But in any

case the removal of the file from public view doesn't alter the fact that its contents have been widely reported and that The Queen's views on the issue are now very well known."

10. 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.
11. As mentioned, the public authority has confirmed that it does not hold any information that would fall to be considered under the EIRs. Therefore, the Commissioner has first considered whether the public authority was entitled to conclude that it did not hold any environmental information within the scope of the request.
12. The public authority is also relied on section 37(2) FOIA as the basis for refusing to confirm or deny whether it holds non-environmental information falling within the scope of the request. Therefore, the Commissioner has additionally considered whether the public authority was entitled, on the basis of section 37(2) FOIA, to refuse to confirm or deny whether it holds non-environmental information within the scope of the request.

Reasons for decision

Regulation 5(1) EIR

13. Further to the provision in regulation 5(1), a public authority that holds environmental information shall make it available on request subject to other provisions in the EIR.¹ "Environmental information" is defined at regulation 2(1) of the EIR.²

¹ Regulation 5 EIR - <http://www.legislation.gov.uk/uksi/2004/3391/regulation/5/made>

² <http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made>

14. However, a public authority may by virtue of regulation 12(4)(a) of the EIR refuse to disclose environmental information to the extent that it does not hold that information when an applicant's request is received.³
15. In scenarios where there is some dispute between an applicant and a public authority with respect to whether any information is held by the authority within the scope of the applicant's request, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request). The Commissioner will reach a decision based on the adequacy of the public authority's search for the information and any other reasons explaining why the information is not held.
16. Details of the searches conducted by the public authority were provided to the Commissioner in confidence and for that reason have not been reproduced in this notice. The Commissioner is satisfied that the searches were adequate and rigorous. She has therefore concluded that on the balance of probabilities the public authority does not hold any environmental information within the scope of the request.

Section 37(2) FOIA

17. As mentioned, section 1(1) FOIA provides two rights to applicants. They are:
 - a) The right to be informed in writing by the public authority whether or not it holds the information requested by the applicant, and
 - b) If so, the right to have that information communicated.⁴
18. Both these rights are subject to other provisions in the FOIA.
19. The right in section 1(1)(a) is commonly referred to as a public authority's "duty to either confirm or deny" whether it holds information requested by an applicant.

³ <http://www.legislation.gov.uk/uksi/2004/3391/regulation/12/made>

⁴ Section 1 FOIA - <http://www.legislation.gov.uk/ukpga/2000/36/section/1>

20. There are a number of exclusions in the FOIA from the duty to confirm or deny in section 1(1)(a). Section 37(2) (communications with Her Majesty etc.) is one of such exclusions.
21. The Commissioner next considered whether the public authority was entitled to neither confirm nor deny holding any non-environmental information in scope, relying on section 37(2) FOIA.
22. Section 37 FOIA states:

“(1) Information is exempt information if it relates to—

 - (a) communications with the Sovereign,
 - (aa) communications with the heir to, or the person who is for the time being second in line of succession to, the Throne,
 - (ab) communications with a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne,
 - (ac) 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), and
 - (ad) communications with the Royal Household (other than communications which fall within any of paragraphs (a) to (ac) because they are made or received on behalf of a person falling within any of those paragraphs), or]
 - (b) the conferring by the Crown of any honour or dignity.

(2) 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).”⁵
20. The public authority’s position is that confirming or denying whether it holds information within the scope of the request would itself reveal information relating to communications with The Queen which would otherwise be exempt on the basis of section 37(1)(a) and or would reveal information in relation to communications with The Duke of Edinburgh which would otherwise be exempt on the basis of section 37(1)(ac).

⁵ Section 37 FOIA - <http://www.legislation.gov.uk/ukpga/2000/36/section/37>

21. In response to the complainant's reference to a file at the National Archives (TNA), the public authority stated that the file is not a Treasury file and it is therefore unable to comment on it. The public authority noted that section 37(1)(a) is an absolute exemption so its application by virtue of section 37(2) is unaffected by the discovery of the file in question. With regard to section 37(1)(ac), the public authority argued that it does not follow that the legitimate expectation of The Duke of Edinburgh or the need for confidentiality in this case is undermined by the discovery of the TNA file which is now closed for review. In addition, it should be noted that it is not in the public domain whether Her Majesty The Queen or The Duke of Edinburgh ever corresponded with the Chancellor on this matter. The fact that one document concerning the Royal Yacht was present in a file that is now closed should not mean that the existence or not of correspondence with the Chancellor should now be revealed.
21. In the Commissioner's view it is clear from the provision in section 37 above that information is exempt on the basis of section 37(1)(a) if it relates to communications with Her Majesty The Queen, and is also exempt on the basis of section 37(1)(ac) if it relates to communications with other members of the Royal Family (ie other than those mentioned in paragraphs a to ab).
22. Section 37(2) is also clear that a public authority is excluded from the duty to confirm or deny whether it holds information which is, or if it were held by the public authority would be, exempt from disclosure by virtue of sections 37(1)(a) and (ac).
23. Consequently, the Commissioner is satisfied that confirming or denying whether the public authority holds non-environmental information within the scope of the request would reveal information relating to communications with Her Majesty The Queen and information relating to communications with The Duke of Edinburgh, which would otherwise be exempt under sections 37(1)(a) and (ac).
24. The Commissioner has therefore concluded that the public authority was entitled to rely on the exclusion at section 37(2) as the basis for neither confirming nor denying whether it held any non-environmental information within the scope of the request.

Public interest test

25. The exclusion at section 37(2) FOIA from the duty to comply with section 1(1)(a) FOIA with respect to information that would otherwise be exempt under section 37(1)(ac) is subject to the public interest test set out in section 2(1)(b) FOIA. The exclusion at section 37(2) is absolute if

relied upon by a public authority on the basis that it would reveal information which would otherwise be exempt under section 37(1)(a).

26. More plainly, the exclusion from the duty to confirm or deny in section 37(2) is an absolute exclusion if it is relied upon on the basis that confirming or denying whether the requested information is held by a public authority would reveal information relating to communications with Her Majesty The Queen. The exclusion in section 37(2) is subject to a public interest test if it is relied upon on the basis that confirming or denying whether the requested information is held by a public authority would reveal information relating to communications with other members of the Royal Family (other than those mentioned in paragraphs a to ab).
27. The Commissioner has therefore considered whether in all the circumstances of the case, the public interest in maintaining the exclusion at section 37(2) with respect to information that would otherwise be exempt under section 37(1)(ac) outweighs the public interest in complying with section 1(1)(a) FOIA.
28. The public authority acknowledged that there is a public interest in whether there has been correspondence between the Duke of Edinburgh and the Chancellor on significant topics of the day.
29. It however argued that there is also a countervailing public interest for the existence of such correspondence not to be confirmed. There is a strong public interest in Members of the Royal Family being able to carry out their duties in this way. That they are able to do so depends on the maintenance of the confidentiality of their communications. The effective performance of The Duke of Edinburgh's role is dependent upon maintaining the expectation of confidentiality of communications. This consideration holds true notwithstanding the Times article referred to by the complainant.
30. The public authority further submitted that there was no specific and particularly pressing public interest that would supersede the public interest in maintaining the exclusion. Although Members of the Royal Family are not in the same constitutional position as Her Majesty, the need to maintain the neutrality of the Sovereign, and not to undermine diplomatic and goodwill work of all Members of the Royal Family are still relevant factors in the public interest. Confirming or denying whether information is held in relation to this topic specific request could undermine the neutrality of the Sovereign and the work of Members of the Royal Family.

Balance of the public interest

31. The Commissioner accepts that the effectiveness of the established constitutional relationship between Government and the Royal Family is dependent upon maintaining the confidentiality of their communications with Government. Consequently, she considers that there is a significant public interest in not undermining the constitutional relationship between The Duke of Edinburgh and Government. Confirming or denying whether there have been communications between The Duke and the Chancellor in relation to an issue that has remained not too distant from the headlines⁶ is likely to undermine that relationship.
32. The Commissioner appreciates that the decision not to replace the decommissioned Royal Yacht has generated debate including recently. However, she does not share the view that this fact in itself is a weightier factor in the public interest in support of confirming or denying whether there have been communications between The Duke of Edinburgh and the Chancellor in relation to the Royal Yacht. The damage it could do to relations between Government and The Royal Family should not be underestimated. There is a significant public interest in not undermining the constitutional relationship between Government and the Royal Family. The Commissioner does not share the view that the discovery of the TNA file undermines the significant public interest in not revealing whether there have been communications between The Duke of Edinburgh and the Chancellor in relation to the Royal Yacht.
33. The Commissioner has therefore concluded that on balance, in all the circumstances of the case, the public interest in maintaining the exclusion outweighs the public interest in complying with the duty to confirm or deny whether the public authority holds any non-environmental information within the scope of the request.

⁶ See for example, <http://www.bbc.co.uk/news/uk-politics-37428864>

Right of appeal

34. 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

35. 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.
36. 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.....

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