

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 October 2019

**Public Authority:** Department for International Development  
**Address:** 22 Whitehall  
London  
SW1A 2EJ

#### Decision (including any steps ordered)

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1. The complainant submitted a request to the Department for International Development (DFID) seeking correspondence between the Secretary of State and the Duke and Duchess of Sussex. DFID confirmed that it held information falling within the scope of the request but it refused to disclose this on the basis of section 37(1)(ac) (communications with the Royal Family), section 40(2) (personal data) and section 41(1) (information provided in confidence) of FOIA. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of section 37(1)(ac) and that in all the circumstances of the request the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

#### Request and response

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2. The complainant submitted the following request to DFID on 9 December 2018:

*'Please note that the reference to the Duke and Duchess of Sussex means those two individuals either on their own or together, their private office (s) and their press secretary (ies).*

*I am interested in receiving all information irrespective of whether the individuals are identified as the Duke and or Duchess of Sussex or whether other names and titles are used eg Meghan Markle and Prince Harry.*

*Please note that the reference to Secretary of State means that particular individual and or their private office.*

*1...Since 1 May 2018 has the Duke and or Duchess of Sussex written to the Secretary of State.*

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

*3...Since 1 May 2018 has the Secretary of State written to the Duke and or Duchess of Sussex.*

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

*If you have subsequently destroyed any relevant documentation can you please provide the following details. In the case of each destroyed piece of correspondence and communication can you identify the sender (s) and the recipient. In the case of each destroyed piece of correspondence and communication could you please provide a brief outline of its contents together with the date generated. If the destroyed piece of documentation continues to be held in another form can you please provide a copy.'*

3. DFID responded to the request on 9 January 2019 and explained that complying with the request would exceed the appropriate cost limit and therefore it was seeking to refuse to comply with the request on the basis of section 12(1) of FOIA.
4. The complainant contacted DFID on 12 February 2019 and asked it to conduct an internal review of this response.
5. DFID informed him of the outcome of the internal review on 7 March 2019. The review concluded that the request could be processed within the cost limit. However, the information falling within the scope of the request was considered to be exempt from disclosure on the basis of section 37(1)(ac) (communications with the Royal Family) and section 40(2) (personal data) of FOIA.

## Scope of the case

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6. The complainant contacted the Commissioner on 9 May 2019 in order to complain about DFID's handling of his request. He disputed DFID's decision to withhold the requested information on the basis of the exemptions cited in the internal review and argued that the public interest favoured disclosure of the information.<sup>1</sup>
7. He also argued that it was likely, given the department's brief, that some of the requested information may constitute environmental information and thus should have been considered under the Environmental Information Regulations (EIR).

## Reasons for decision

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### Applicable access regime

8. The Commissioner has examined a copy of the information falling within the scope of the request which DFID is seeking to withhold. She is satisfied that none of this information falls within the definition of 'environmental information' as defined by regulation 2(1) of the EIR.
9. Therefore, the Commissioner is satisfied that the correct access regime under which DFID should have considered this request is FOIA.

### Section 37(1)(ac) – communications with the Royal Household

10. DFID argued that all of the withheld information was exempt from disclosure on the basis of section 37(1)(ac) which provides an exemption for information which 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).<sup>2</sup>*

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<sup>1</sup> During the course of the Commissioner's investigation DFID explained that it also considered some of the withheld information to be exempt from disclosure on the basis of section 41(1) (information provided in confidence) of FOIA.

<sup>2</sup> Sections 37(1)(a) to (ab) provide exemptions for the following information:

(a) communications with the Sovereign,

11. Communications with the members of the Royal Family are not necessarily made directly by, or to, them. In the Commissioner's view the exemption contained at section 37(1)(ac) will also include communications made or received on behalf of officials of the Royal Family.
12. Given that the request specifically sought communications between the Duke and Duchess of Sussex and the Secretary of State, the Commissioner is satisfied that the withheld information falls within the scope of the exemption contained at section 37(1)(ac) of FOIA.
13. However, section 37(1)(ac) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

*Public interest arguments in favour of disclosing the withheld information*

14. DFID acknowledged that there was a general public interest in understanding how members of the Royal Family interact with government ministers.
15. In his submissions to the Commissioner the complainant noted that the internal review response explained that communications between members of the Royal Family and government ministers are conducted under an expectation of confidence. The complainant argued that such a view would appear to prejudice the outcome of any public interest test.
16. Furthermore, the complainant argued that such a view is incorrect. The complainant emphasised that in other decision notices the Commissioner herself has concluded that the Prince of Wales should expect his contacts and communications with government departments and public bodies to be made public, particularly when he is lobbying for issues of interest to him. The complainant argued that the correspondence and communications of the Duke and Duchess of Sussex should be viewed in the same way.

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(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

*Public interest arguments in favour of maintaining the exemption*

17. DFID argued that work carried out by members of the Royal Family in support of the department's work is dependent on the confidentiality of communications between the Royal Family, the Royal Household and DFID. DFID also explained that government departments have to make decisions on which member of the Royal Family to engage in any given project, and it is important to ensure the confidentiality of the process by which these decisions are made. DFID argued that it is also important to protect the neutrality of Members of the Royal Family, and this includes the decisions that their offices make over which government initiatives they are able to provide support to, ensuring incorrect inferences are not made about these decisions.
18. DFID argued that a safe space needs to be provided and protected in order for discussions to take place on these matters. In order to achieve this, DFID argued that there is an expectation by Members of the Royal Family that these discussions, and information about them and broader engagement with Members of the Royal Family will be treated in confidence. DFID emphasised that such work further depends on the goodwill of Members of the Royal Family, and disclosure of information relating to work carried out on that basis against the long-standing expectation of confidentiality might adversely affect the goodwill of Members of the Royal Family to carry out such work in future, which, given the importance attached to such work by ministers, would not be in the public interest.
19. In these circumstances DFID argued that disclosing the withheld information would undermine the ability of the Royal Family, the Royal Household and public authorities to communicate freely and frankly with one other. DFID argued that such an outcome would be against the public interest in view of the important work the Royal Family do in support of the international development work carried out by DFID and broader public policy objectives by other government departments and public authorities.
20. DFID acknowledged that if the information were to indicate that members of the Royal Family were acting or being asked to act in a way which was incompatible with the expected convention of neutrality (for example, by seeking to influence government policy or expressing views on it), then there would be an increased public interest in disclosing the information. However, it argued that no such factors were relevant in this case.

*Balance of public interest arguments*

21. The Commissioner's guidance on section 37 recognises that there is an inherent public interest in protecting the confidentiality of communications with the Royal Family where disclosure would compromise a Family member's ability to carry out their role. In the particular circumstances of this case the Commissioner accepts that such confidentiality is necessary in order to protect the discussions in respect of which members of the Royal Family are asked by government departments to engage on a particular project and also to allow the offices of those family members to take decisions on such approaches without compromising their political neutrality. Moreover, the Commissioner accepts that disclosure could go some way to undermining the expectation of confidentiality of similar correspondence in the future and could begin to undermine the goodwill of the Royal Family to undertake such work. The Commissioner accepts that such an outcome would be firmly against the public interest given the importance attached by ministers to the Royal Family undertaking such work.
22. With regard to the public interest in disclosure, the Commissioner accepts that release of the information would broaden the public's understanding the Royal Family's, and more specifically, the Duke and Duchess of Sussex's relationship with DFID. In the Commissioner's view increasing the transparency around such correspondence is not a factor which should be dismissed lightly. However, as DFID has noted above in its arguments, there is no evidence in the withheld information of the any members of the Royal Family acting or being asked to act in a way which was incompatible with the expected convention of neutrality (for example, by seeking to influence government policy or expressing views on it). In the Commissioner's view this arguably reduces the public interest in disclosure of the withheld information in this case.
23. On this point, the Commissioner acknowledges the complainant's argument regarding previous decisions she has made in respect of correspondence between The Prince of Wales and government departments. However, in the Commissioner's view in the cases where she has ordered the disclosure of information this has been due to the specific factors in a particular case, allied to fact that the Prince of Wales is the heir to the throne, and in light of the Upper Tribunal comments in the *Evans* case regarding the 'advocacy correspondence'.<sup>3</sup> The

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<sup>3</sup> The Upper Tribunal in *Evans v Information Commissioner and others* concluded at paragraph 213 that 'the overall public interest balance will clearly, in the absence of special circumstances, be in favour of disclosure as regards correspondence between Prince Charles

Commissioner is not therefore persuaded that there is a direct read across between the decisions she has made in such cases and the correspondence sought in this case.

24. Taking all of these factors into account the Commissioner has therefore concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
25. In light of this decision the Commissioner has not considered the other exemptions cited by DFID.

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*and ministers in a context where Prince Charles has an interest that government should take a particular course'.*

## Right of appeal

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26. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

27. 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.
28. 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**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**