

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 December 2020

Public Authority: Department for Digital, Culture, Media & Sport
Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested copies of correspondence sent by either Zara Tindall MBE, or her brother Peter Phillips, to the Secretary of State in respect of a particular individual and his business activities. The Department for Digital, Culture, Media & Sport (DCMS) refused to confirm or deny holding any relevant information, as they considered that doing so would, in itself, reveal personal data about the individuals involved, contrary to data protection legislation.
2. The Commissioner's decision is that DCMS were entitled to rely on section 40(5B) of the FOIA to neither confirm or deny holding any information within the scope of the request.
3. The Commissioner does not require any further steps.

Request and response

4. On 16 August 2019, the complainant wrote to DCMS and requested information in the following terms:

'I would like to request the following information under the Freedom of Information Act and the Environmental Information Regulations. Please note that any reference to The Queen's grandchildren Zara Tindall and Peter Phillips in the questions below should be taken to mean those two individuals; their private offices, and anyone specifically acting on their behalf. Please note that the reference to The Secretary of State in the questions below should include The Secretary of State his/herself and

The Secretary of State's private office. Please note that the reference to written communications and correspondence in the questions below should be taken to mean all traditional forms of correspondence including letters and faxes, all emails (irrespective of whether they were received and/or sent through private or official email accounts/addresses) and any communications sent through encrypted messaging services.

Please note that neither Zara Tindall or Peter Phillips enjoys any automatic exemption from the FOI. Please note that they are not exempt from the EIR.

- 1) Since January 2018, have Zara Tindall and/or Peter Phillips (acting together or as individuals) sent written correspondence and communications to The Secretary of State which in any way relates to the following:*
 - (a) The [redacted] businessman [Individual A]. This correspondence and communications will include but not be limited to communications about his actual and proposed investments and his actual and proposed business activities in both the UK and abroad. It will also include but not be limited to his actual and proposed charity commitments in the UK and overseas. It will also include but not be limited to [Individual A's] residency or amount of time spent in the UK. Please note that I am interested in all correspondence and communications irrespective of how it relates to [Individual A].*
 - (b) The [company name] owned by [Individual A]. This will include correspondence and communications about the company's actual and proposed business activities in the UK and abroad. Again, I am interested in all correspondence and communications irrespective of how it relates to [company name].*
 - (c) Any other business which you know is owned by [Individual A].*
- 2) If the answer to question one is yes, can you please provide copies of this written correspondence and communications, including any letters, faxes, emails (sent and received through private and official accounts/addresses) and any communications sent through encrypted messaging services.*
- 3) Did the Secretary of State reply to this correspondence and communications?*
- 4) If the answer to question three is yes, can you please provide copies of this written correspondence and communications, including any letters, faxes, emails (sent and received through private and official*

accounts/addresses) and any communications sent through encrypted messaging services'.

5. DCMS responded to the request on 16 September 2019. The Department refused to confirm or deny holding relevant information and relied on section 40(5B) of the FOIA to do so.
6. Following an internal review DCMS wrote to the complainant on 15 October 2019. The Department upheld their original position.

Scope of the case

7. The complainant contacted the Commissioner on 4 December 2019 to complain about the way his request for information had been handled.
8. The Commissioner considers that the scope of her investigation is to determine whether or not issuing a confirmation or a denial that information is held would breach the GDPR principles.

Reasons for decision

9. Section 40(5B)(a)(i) of the FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 (GDPR) to provide that confirmation or denial.
10. Therefore, for DCMS to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether they hold information falling within the scope of the request, the following two criteria must be met:
 - Confirming or denying whether this information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

11. Section 3(2) of the DPA 2018 defines personal data as:

'any information relating to an identified or identifiable living individual'.

12. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

13. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
14. If DCMS were to confirm whether it held information within the scope of the request they would be confirming whether either Mrs Tindall or Mr Phillips had corresponded with the Secretary of State for Digital, Culture, Media & Sport and that the correspondence relates to Individual A or Individual A's company.
15. Whilst the Commissioner notes that the request does not require DCMS to specify which party (Mrs Tindall or Mr Phillips) any correspondence originated from, she considers that there is a risk that this could be deduced from other information in the public domain or from future requests.
16. The Commissioner would also note that as the request relates to correspondence from only two people, confirming or denying will connect both of them much more closely than if the request was for any correspondence from a larger group of people.
17. The Commissioner therefore accepts that issuing a confirmation or a denial that information is held would, in itself, reveal personal data about all three individuals. The request is worded in such a way that any information DCMS confirmed it held or did not hold would be inextricably linked to the individuals named in the request. Therefore, issuing a confirmation or a denial would reveal information which had those individuals as its focus and would therefore reveal their personal data.
18. For the reasons set out above, the Commissioner is satisfied that if DCMS confirmed whether or not they held the requested information, this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.
19. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent DCMS from refusing to confirm whether or not they hold this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.

Would confirming whether or not the requested information is held contravene one of the data protection principles?

20. The Commissioner considers that the most relevant data protection principle is principle (a).
21. Article 5(1)(a)(GDPR) states that:

'Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject'.

22. In the case of an FOIA request, personal data is processed when the public authority confirms or denies holding information within the scope of the request. This means that the information can only be disclosed – or as in this case the public authority can only confirm whether or not they hold the requested information – if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1)(GDPR), be fair, and be transparent).

Lawful processing: Article 6(1)(f) GDPR

23. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *'processing shall be lawful only if and to the extent that at least one of the conditions listed in the Article applies'*. One of the conditions in Article 6(1) must therefore be met before providing a confirmation or denial in response to the request would be considered lawful.

24. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR, which provides as follows:

'Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child'.

25. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:

- (i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- (ii) **Necessity test:** Whether confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;
- (iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

26. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

- (i) *Legitimate interests*

27. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, the more trivial and personal the interest, the less likely it is that such an interest will outweigh the rights of the data subjects such that disclosure to the world at large would be justified.
28. In submissions to the Commissioner, DCMS apologised for their failure to consider the legitimate interests both in their original response to the complainant's request and at internal review. The Department advised that this omission was due to some key personnel absences at the time of the request and assured the Commissioner that they are aware of the need to consider the legitimate interests in requests of this nature.
29. DCMS acknowledged that there is always a general, inherent interest in governmental transparency, and therefore, to confirm or deny whether they held information within scope of the request would provide transparency on what, the Department contended, was no more than a general interest.
30. In addition, DCMS recognised that *'there is always a legitimate public interest in matters concerning the Royal family'*, and the fact that the Royals are public figures increases the legitimate interest in their activities. However, the Department advised that they considered that the legitimate public interest in their private lives and their public lives are two very different things, and attract different weight. DCMS contended that the further down the line of succession a Member of the Royal Family is, the less significant the legitimate public interest in their activities (within reason). DCMS stated that the fact that Mr Phillips is 15th in line to the throne, and Mrs Tindall is 18th¹, means that the legitimate public interest in their private business ventures is somewhat reduced.
31. DCMS recognised that public interest in the business ventures of those Royals (such as Mr Phillips and Mrs Tindall) who are not in receipt of the Sovereign Grant had been heightened recently due to the decision of the Duke of Sussex and his family to step back from Royal duties and work to become self-sufficient. However, the Department respectfully contended that the public interest in a prominent Royal, who is 6th in

¹ www.royal.uk/succession

line to the throne, is greater than that in those who are 15th and 18th in line to the throne.

32. By extension, DCMS contended that Mr Phillips and Mrs Tindall's expectations of privacy are likely to be greater when compared to other more senior members of the Royal Family. Consequently, DCMS stated that they considered that should either party have communicated with the department they would reasonably expect their personal data to be processed fairly and not disseminated to the public. DCMS stated that, *'the business dealings of individuals are inherently private, and we would contend this is more so when the Royals in question are not working Royals and so are not in receipt of the Sovereign Grant and play a limited public role'*.
33. The Commissioner notes that the complainant has highlighted that both Mrs Tindall and Mr Phillips have (or have had) business links to Individual A and therefore there is a legitimate interest in knowing whether they have used their elevated status to lobby ministers on Individual A's behalf.
34. In submissions to the Commissioner, DCMS acknowledged that there have been some stories in the media concerning the business relationship between Mrs Tindall and/or Mr Phillips on the one hand and Individual A on the other. However, DCMS contended that *'these stories can hardly be said to have attracted significant attention, especially on the part of Mr Peter Phillips who seemingly appears very briefly in the stories you reference'*. The Commissioner acknowledges the lesser prominence of Mr Phillips in the reported stories but does not agree with the Department's claim that the stories have not attracted significant attention. The stories were reported in a number of national newspapers, including the Daily Mail, Mail On Sunday, The Telegraph, and The Express.
35. With regard to the complainant's contention that there is a legitimate interest in the Department confirming or denying it holds relevant information as *'the public has a right to know if they (Mrs Tindall and Mr Phillips) have been exploiting their Royal connections to benefit [Individual A] and his companies'*, DCMS stated that it was unclear how a confirmation or denial by the Department in this request would expose the suggested exploitation of the Royals. DCMS stated that, *'even if the Department were to, hypothetically, confirm we held information, all it would show is that the persons in question have corresponded about an individual whom they work with, or his companies, however, it would not necessarily follow that the content would be illuminating in the manner suggested'*.
36. DCMS stated that the fact that it is public knowledge that Mr Phillips and Mrs Tindall are involved with Individual A does not, in their view, change

the fact that to provide a confirmation or denial of having the very specific information that has been requested, would contravene principle (a) of Article 5(1) of the GDPR. DCMS contended that, *'there is a difference between knowing that the individuals work with Individual A, and knowing whether they have corresponded either on his behalf, or of their own volition, concerning one of his ventures'*.

37. DCMS stated that there is legitimate interest in allowing individuals to conduct lawful business in a manner they see fit. They contended that from the stories reported, there is no suggestion that there has been any wrongdoing on the part of Mr Phillips and/or Mrs Tindall. Therefore, they stated that it was not clear what legitimate public interest there would be in the Department confirming or denying whether they have information such as that requested by the complainant.
38. The Commissioner acknowledges the point made by DCMS that even if they were, hypothetically, to confirm that they held information requested by the complainant, that would not reveal the content of any such correspondence, and would only show that Mr Phillips and/or Mrs Tindall had corresponded with the Secretary of State about an individual whom they work with, or his companies. Nevertheless, the Commissioner considers that there is a legitimate interest in knowing when and where ministers are being corresponded with by members of the Royal Family, particularly where third parties are involved. This is a legitimate interest which DCMS could satisfy by issuing a confirmation or denial that relevant information is held. The Commissioner therefore considers the legitimate interests test has been met and has thus gone on to consider the Necessity test.

(ii) Is confirming whether or not the requested information is held necessary?

39. 'Necessary' means more than desirable, but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity, which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA, as to whether the requested information is held, must therefore be the least intrusive means of achieving the legitimate aim in question.
40. In submissions to the Commissioner, DCMS contended that in order for confirmation or denial to be a necessity, there must be *'a pressing social need for confirmation or denial which outweighs the privacy rights of the individuals in question'*. The Department contended that whilst confirmation or denial may be desirable for transparency reasons, and may also satisfy public curiosity in the topics to which the request relates, there is no pressing social need for such a response. They had

therefore concluded that there is no necessity in confirming or denying that information is held that outweighs the privacy rights of the individuals concerned.

41. The Commissioner considers that DCMS has failed to apply the necessity test properly because they failed to identify correctly the legitimate interests in issuing a confirmation or a denial that information was held.
42. In the circumstances of this case, the Commissioner considers that the legitimate interest in understanding whether or not Mrs Tindall and/or Mr Phillips have or have not been corresponding with the Secretary of State in relation to Individual A cannot be satisfied in any way other than by DCMS issuing a confirmation or a denial that they hold relevant information. She therefore considers that the Necessity test is met and has gone on to consider the balancing test.

(iii) Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

43. Even where issuing a confirmation or denial that information is held is necessary to satisfy a legitimate interest, the Commissioner must still balance the legitimate interests against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not they held the requested information in response to an FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
44. In submissions to the Commissioner, DCMS advised that they had balanced any legitimate interest in confirming or denying that the requested information was held against the data subjects' interests and fundamental rights and freedoms. The Department stated that they considered that any legitimate interest is overridden by the interests, rights and freedoms of Mrs Tindall and Mr Phillips. DCMS stated that they considered that confirming whether the requested information is or is not held would have an adverse impact upon their privacy. Taking into account the fact that the two individuals are not working Royals, DCMS were of the view that their right to privacy outweighs any legitimate interest in confirming or denying that information is held.
45. DCMS also emphasised and contended that there is a legitimate interest in ensuring that the Department does not undermine any future NCND responses by either confirming, or denying, information is held in this specific request. DCMS advised that they had relied on NCND responses in previous cases of a similar nature, after having considered the circumstances of each particular case. The Department contended that

were they to confirm or deny that they held information in this case, then such a response would erode the application of the NCND approach in similar cases in future.

46. DCMS had not contacted any of the data subjects to seek their consent for them to confirm or deny that they held their personal data – nor were they obliged to do so. The Commissioner is not aware of any reason to suggest that any of the data subjects have given their consent – or that they would be likely to do so if asked. If DCMS were to issue a confirmation or denial that they held information, the Commissioner considers that it would be doing so without consent and, in all likelihood, against the reasonable expectations of the data subjects that consent would be sought.
47. Although both Mrs Tindall and Mr Phillips are grandchildren of Her Majesty the Queen, neither is entitled to use 'HRH' title and as non-working Royals, they are not subject to the Sovereign Grant and neither undertake engagements on behalf of the Queen.
48. That said, both individuals have a higher profile than ordinary members of the public. Mrs Tindall in particular has a high profile in her own right as an Olympic medallist, former BBC Sports Personality of the Year and wife of a former England rugby captain.
49. Nevertheless, the fact that an individual may have a high profile does not mean that they give up their right to privacy or that they should not have a reasonable expectation that their right to correspond (or not correspond) with a Secretary of State should be protected.
50. In this particular request, the complainant has not just sought correspondence from particular individuals, but the correspondence those individuals have engaged in in relation to a particular subject.
51. Whilst the Commissioner recognises that higher profile individuals may have their correspondence handled (or at least approved) by a more senior individual within DCMS, she still does not consider that this alone is sufficient to remove an individual's expectation of privacy. Ordinary members of the public would not expect the fact or the content of their private correspondence with a government department to be disclosed to the world at large. The Commissioner considers that Mrs Tindall and Mr Phillips are still entitled to have this expectation.
52. In addition, the Commissioner also recognises that Individual A's rights must be respected as well. If DCMS confirmed that relevant correspondence had been exchanged, they would be confirming that the correspondence was about Individual A. The request implies that any relevant correspondence may have been at the instigation of Individual A – but there is no requirement from the wording of the request for any relevant correspondence to have been instigated by Individual A, or

even for him to have known about it. Nevertheless, providing a confirmation or denial would risk suggesting that Individual A had acted inappropriately – when there is no evidence to support such a theory.

53. The Commissioner is therefore not convinced that any legitimate interests in confirming or denying that information is held are sufficiently strong enough to override the fundamental interests of the data subjects. She thus does not consider that there is a lawful basis for the processing of this personal data and, accordingly, confirmation or denial under the FOIA would be unlawful.
54. As confirmation or denial would be unlawful, such processing would breach the first data protection principle and therefore DCMS were entitled to rely on section 40(5B) of the FOIA in the manner that they did.

Environmental information

55. In both his request and request for an internal review, the complainant asked DCMS to consider its responsibilities under the Environmental Information Regulations 2004 and respond accordingly.
56. Having considered the matter, the Commissioner is not convinced that any relevant information that DCMS held (if in fact they held any) would be self-evidently environmental – and the complainant has not advanced any arguments to explain why it would be. The Commissioner is therefore satisfied that it was appropriate for DCMS to handle this request under the FOIA.
57. However, given the similarities between section 40(5) of the FOIA and regulation 13(5) of the EIR, the Commissioner considers that DCMS would have been able to rely on the latter exception to neither confirm nor deny holding any relevant environmental information.

Right of appeal

58. 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 123 4504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

59. 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.

60. 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

Alexander Ganotis
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