

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

Date: 04 January 2023

Public Authority: Foreign, Commonwealth & Development Office
Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant has requested information held by Foreign, Commonwealth & Development Office concerning the Duke and Duchess of Sussex.
2. The Commissioner's decision is that Foreign, Commonwealth & Development Office was entitled to rely on section 40(5B)(a)(i) to neither confirm nor deny that it held the requested information.
3. The Commissioner does not require the public authority to take steps to ensure compliance with the legislation.

Request and response

4. On 2 February 2022, the complainant requested information from FCDO by saying as follows:

"I would like to request the following information via the Freedom of Information Act and the Environmental Information Regulations, (EIRs) and I would be grateful if you could forward this request onto the most appropriate person within the department.

Please note that I am only interested in information generated between 1 December 2019 and 1 December 2020.

Please note that the Duke and Duchess have now agreed not to use their HRH titles. They also do not carry out any official duties on behalf of the royal family and or the Crown and or the British government. It therefore follows that disclosure cannot have any toxic or detrimental effect on any public or diplomatic work.

Please note that the reference to the Duke and or Duchess of Sussex in the questions below should include either and or both those individuals. It should also include any legal representative writing and or communicating on behalf of the Duke and or Duchess. It should also include any press and publicity representative writing and or communicating on behalf of the Duke and or Duchess.

It should also include any member of the Duke and or Duchess's private office writing and or communicating on behalf of the Duke and or Duchess. It should also include any representative and or employee of the couple's Archewell Foundation writing and or communicating on behalf of either the Duke and or Duchess of Sussex

Please note that the reference to correspondence and communications in the questions below should include all traditional forms of correspondence such as letters and or faxes and or memos. It should also include all emails irrespective of whether they were sent and or received via official and or private accounts. It should also include all Gmail messages. It should also include all telephone text messages. It should also include all messages sent through encrypted messaging services including but not limited to WhatsApp. It should include all communications sent through diplomatic channels.

Please note that I would like to request actual copies of the correspondence and communication rather than just excerpts from that correspondence and communication. In the case of any letters can you provide a copy of the letter complete with any letterheads, other design features and signatures. If you feel information should be redacted, can you redact it where it appears in the letter. That way I will be able to judge the location and extent of the redaction.

Please note that the reference to the Secretary of State in the questions below should include the Secretary of State and or anyone in his/her private office able to correspond and communicate on their behalf.

Please note that I am interested in all correspondence and communication irrespective of the title and or form of address used by the Duke and or Duchess of Sussex. e.g. The Duke may refer to himself as Prince Harry. Alternatively, he may adopt a military title/rank.

I have confined my request to a particular time frame to try and ensure it remains within the time and cost constraints laid down by the relevant access regimes. But can you let me know if you hold relevant

information outside this time frame. I will then submit another request for that.

1...During the aforementioned period have the Duke and or Duchess of Sussex written to and or communicated with the Secretary of State about any and or all of the issues listed below. I am interested in all correspondence and communication which either mentions any and or all of the following AND OR which in any way relates to any and or all of the following.

(i)...The Duke and Duchess's decision to move to the United States and or the consequences of that move for the couple themselves.

(ii)...The couple's ranking and or position in the royal family following their move to the United States and the extent -if at all -that the couple will be able to attend functions and or perform duties on behalf of either the royal family and or the Crown and or the British government and or the Commonwealth.

(iii)...The Commonwealth and or the extent -if at all -to which the Duke and or Duchess might be able to continue to support and or work on behalf of the Commonwealth.

(iv)...Invitations for the Duke and or Duchess to attend social events at British Embassies and or British High Commissions and or British consulates in the United States and or other countries and or overseas territories. This correspondence and communication will include but will not be limited to any rules and or guidance and or etiquette pertaining to the Duke and Duchess's attendance at those events.

(v)...Invitations for the Duke and or Duchess to attend social events at the embassies and or high commissions and or consulates of countries other than the UK. This correspondence and communication will include but will not be limited to any rules and or guidance and or etiquette pertaining to the Duke and Duchess's attendance at those events.

(vi)...The Invictus Games.

(vii)..Prince Harry's upcoming autobiography/memoir and the possible contents of that book and the implications of the book for the UK's reputation overseas and its relationship with other foreign powers.

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

3...During the aforementioned period did the Secretary of State write to and or communicate with the Duke and or Duchess of Sussex about any and or all of the issues and matters listed in question one (i) to (vii).

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

5...If information relevant to this request has been destroyed can you state what has been destroyed. e.g. Was it a letter and or an email and or a Gmail message?

In the case of each piece of destroyed documentation can you identify the author(s) and the recipient (s). Can you state when the material was destroyed and why. If destroyed information continues to be held in another form, can you, please provide that information".

5. On 22 February 2022, FCDO responded and refused to confirm or deny that it held the requested information.
6. The complainant requested an internal review, FCDO sent him the outcome of its internal review on 11 April 2022. It upheld its original position.

Reasons for decision

7. The following analysis sets out why the Commissioner has concluded that the FCDO was entitled to rely on section 40(5B)(a)(i) in this particular case.
8. Section 40(5B)(a)(i) of 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 UK General Data Protection Regulation ('UK GDPR').
9. The FCDO submitted that it issued a neither confirm nor deny response (section 40(5)(B)(a)(i)) for all the categories of information requested, on the basis that issuing a "no information held" response would contravene the data protection principles. If it were to confirm whether it does or does not hold relevant information, that would, in effect, be a confirmation as to whether either the Duke or Duchess of Sussex have corresponded with the Foreign Secretary about the topics specified during the period in question. This is, it says, consistent with the previous ICO decision (Reference: IC-87583-

R5M3¹ of 11 March 2021), and this would constitute the disclosure of the Duke and Duchess of Sussex's personal data.

10. Having established that a confirmation or denial that it held the information would constitute the disclosure of personal data, it then considered whether this disclosure would contravene the data protection principles. It can only disclose personal data where it is lawful for it to do so. To determine that disclosure is lawful, it would need to be shown that (a) a legitimate interest is being pursued in the request for information, (b) confirmation as to whether information is held or not is necessary to meet the legitimate interest in question, and (c) the legitimate interest in making the request overrides the legitimate interests or fundamental rights and freedoms of the data subjects.
11. In this case, it is its view that even if the request pursues a legitimate interest (namely transparency about communications between the Foreign Secretary and members of the Royal family, transparency around the use of public funds etc), the rights and interests of the Duke and Duchess of Sussex override that legitimate interest.
12. This is in line with ICO DN IC- 87583-R5M3 which states that "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 The Duke and Duchess are still entitled to have this expectation". It therefore concluded that the Duke and Duchess' reasonable expectation that their correspondence will remain confidential overrides any legitimate interest in disclosure.
13. The Commissioner considers that for the FCDO to be entitled to rely on section 40(5B)(a)(i) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data;and

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2021/2619441/ico-87583-r5m3.pdf>

- 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?

14. Section 3(2) of the Data Protection Act 2018 defines personal data as:- "any information relating to an identified or identifiable living individual".
15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. The Commissioner is satisfied that if the FCDO confirmed whether or not it held the requested information this would result in the disclosure of a third party's (i.e. Duke and Duchess of Sussex) personal data. The first criterion set out above is therefore met.
18. 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 the FCDO from refusing to confirm whether it holds 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.
19. The Commissioner considers that the most relevant data protection principle is principal (a).
20. 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"
21. In the case of a FOIA request, the personal data is processed when it is disclosed in response to 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 it holds 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

22. 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 disclosure of the information in response to the request would be considered lawful.
23. The Commissioner considers that the condition most applicable on the facts of this case would be the one 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”
24. 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.
25. 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.
26. 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 interest(s) 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.
27. Given the standing, roles and public personas of the Duke and Duchess of Sussex, the Commissioner is satisfied that there is a

legitimate interest in knowing whether the requested information is held.

28. '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.
29. In the circumstances of this case, the Commissioner considers that the legitimate interest in understanding whether or not The Duke and/or Duchess corresponded with the Secretary of State cannot be satisfied in any way other than by the FCDO issuing a confirmation or a denial that they hold relevant information. He therefore considers that the necessity test is met and has gone on to consider the balancing test.
30. 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.
31. The Commissioner continues to recognise "that higher profile individuals may have their correspondence handled (or at least considered) by a more senior individual within the Foreign Office, including the Foreign Secretary, he 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 The Duke and Duchess are still entitled to have this expectation"².
32. For the reasons set out above, the Commissioner does not consider that the legitimate interests in confirming or denying that the requested information is held are sufficiently strong to override the fundamental interests of the data subjects and the public interest in protecting the individuals' privacy. He does not, therefore consider that there is a lawful basis for the processing of this personal data

² Paragraph 79, IC-87583-R5M3

and, accordingly, confirmation or denial under the FOIA would be unlawful.

33. As confirmation or denial would be unlawful, such processing would breach the first data protection principle and therefore the FCDO is entitled to rely on section 40(5B)(a)(i) of the FOIA in the manner that they did.

Environmental information

34. In both his request and request for an internal review, the complainant asked the FCDO to consider its responsibilities under the Environmental Information Regulations 2004 and respond accordingly.
35. Given the wording and nature of his request, the Commissioner is not convinced that any relevant information the FCDO 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 the FCDO to handle this request under the FOIA.
36. However, given the similarities between section 40(5) of the FOIA and regulation 13(5) of the EIR, the Commissioner considers that the FCDO would have been able to rely on the latter exception to neither confirm nor deny holding any relevant environmental information.

Right of appeal

37. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

38. 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.
39. 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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