

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 June 2024

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant has requested any correspondences between the Lord Chancellor and named individuals regarding Richard John Bingham. The Ministry of Justice (MoJ) relied on sections 40(2) and 41 of FOIA to withhold the information.
2. The Commissioner's decision is as follows:
 - the MoJ has correctly relied on sections 40(2) and 41 of FOIA to withhold the information.
 - The MoJ breached sections 10(1) and 17(1) by failing to issue a refusal notice until after 20 working days.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 24 November 2023, the complainant wrote to the MoJ and requested information in the following terms:

"1 ...Between 1 January 1998 and 1 January 2000 did any of the individuals and organisations listed below write to and or communicate with the Lord Chancellor about Richard John Bingham, the 7th Earl of Lucan. (Also known as Lord Lucan). You will be aware that the 7th Earl of Lucan who has been missing since 1974 was pronounced dead in 2016. I am interested in all correspondence and communication which

mentions and or in any way relates to the 7th Earl of Lucan. I am interested in all correspondence and communication irrespective of which title or form of address is used for the 7th Earl. I anticipate that this correspondence and communication will include but will not be limited to matters relating to his subsequent disappearance in 1974 and or his presumed death and or his son's claim on his title.

(i)...George Charles Bingham now known as the 8th Earl of Lucan and or Lord Lucan. Formerly known as Lord Bingham. He is the son of the seventh Earl.

(ii)...Lady Camilla Bloch KC, the daughter of the seventh Earl.

(iii)...Any legal representatives acting on behalf of George Charles Bingham and or Camilla Bloch and or any other relative of the missing 7th Earl.

(iv)...Metropolitan Police.

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

3... Between 1 January 1998 and 1 January 2000 did the Lord Chancellor write to and or communicate with any of the individuals and organisations listed in question one about Richard John Bingham, the 7th Earl of Lucan. (Also known as Lord Lucan). I am interested in all correspondence and communication which mentions and or in any way relates to the 7th Earl of Lucan. I am interested in all correspondence and communication irrespective of which title or form of address was used for the 7th Earl. I anticipate that this correspondence and communication will include but will not be limited to matters relating to the Earl's subsequent disappearance in 1974 and or his presumed death and or his son's claim on his title.

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

5. The MoJ responded on 3 January 2024. It provided some information within the scope of the request, but advised the remaining information was been withheld under section 40(2) and section 41. A position which the MoJ upheld at the internal review stage.

Scope of the case

6. The complainant contacted the Commissioner on 17 February 2024 to complain about the way their request for information had been handled.

7. The Commissioner considers that the scope of his investigation is to establish whether the public authority is entitled to withhold the requested information under sections 41 and 40(2) of FOIA.

Reasons for decision

Section 41 – information provided in confidence

8. Section 41(1) of FOIA states that information is exempt from disclosure under the FOIA if:
 - a) it was obtained by the public authority from any other person (including another public authority), and
 - b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
9. Therefore, for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party and the disclosure of that information has to constitute an actionable breach of confidence.
10. The withheld information in this case consists of three letters between an individual and the MoJ.
11. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:
 - whether the information had the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and,
 - whether an unauthorised use of the information would result in detriment to the confider.
12. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure. Although, it is still necessary to show that disclosure of such information would be an unauthorised use of the information.

13. The Commissioner has assessed each of these criteria in turn, taking into account the submissions provided to him.

Was the information obtained from another person?

14. With regard to the requirements of section 41(1)(a), the Commissioner accepts that some of the withheld letters (and therefore the information they contain) were received by the MoJ from a third party.
15. Although there is also some correspondence from the MoJ, the content of that correspondence is so intertwined with the information provided in the letters received that it is impossible to separate the information provided by a third party whilst still retaining the comprehensibility of the correspondence. The Commissioner is therefore satisfied that all the information contained within these documents has been provided by a third party.

Does the information have the necessary quality of confidence?

16. In the Commissioner's view information will have the necessary quality of confidence if it is not otherwise accessible and it is more than trivial.
17. The complainant advised the commissioner that as the correspondence and communication are likely about the presumed death of an individual (which is a matter of public record) and a claim on a title, the information should be a matter of public record.
18. Whilst the Commissioner acknowledges the complainant's position, he is satisfied that, having viewed the withheld information, that it has the quality of confidence. Whether the complainant thinks the information should be in the public domain is irrelevant. The information as a whole is clearly not in the public domain nor is it trivial.

Was the information imparted in circumstances importing an obligation of confidence?

19. Based on the content of the information, and the manner in which it was shared with MoJ, the Commissioner is satisfied that this criterion is met.

Would disclosure be of detriment to the confider?

20. The MoJ advised it would be an invasion of privacy resulting from a disclosure of private and personal information which can be viewed as a form of detriment in its own right.
21. Although he will not reveal the exact contents of the withheld information, the Commissioner considers it reasonable to deduce from the request that any information within scope will relate to the family

affairs of the Lucan's. Revealing such information would be an invasion of the family's privacy.

Is there a public interest defence to the disclosure of the information?

22. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, for section 41 to apply, any breach must be "actionable". A breach will not be actionable if there would be a strong public interest defence for disclosure. This is not the same as a public interest test. There is a strong expectation that public authorities will maintain confidences and any disclosure must be a proportionate means of achieving a strong public interest.
23. The MoJ advised that the withheld information does not reveal evidence (or allegation) of misconduct, illegality, or gross immorality. It would not serve to protect public safety (e.g., public awareness or potential danger or threat). Some information has already been disclosed (under the FOIA) in relation to the decision of the claim.
24. The MoJ concluded that individuals and organisations may be discouraged from confiding in public authorities if they don't have a degree of certainty that this trust will be respected. The MoJ explained that if it were to breach this trust, by disclosing the information, then the flow of information could diminish, making it more difficult to carry out its functions effectively.
25. Having considered the above, the Commissioner is satisfied that the MoJ would not have a public interest defence. The disappearance of Lord Lucan may be a matter of public curiosity, but the Commissioner does not consider it to be a particularly strong public interest. Moreover, the withheld information would, in the Commissioner's view, reveal little about the 7th Earl's disappearance. The correspondence relates largely to family matters – albeit that the request anticipates that such matters could have a bearing on a claim to a peerage. The fact that the 8th Earl, despite having now inherited his father's title, does not sit in the House of Lords further diminishes any public interest in how he might have inherited his title.
26. The Commissioner is therefore satisfied that an action for a breach of confidence would be likely to succeed and therefore section 41 of FOIA is engaged. He will now consider whether the MoJ was entitled to rely on section 40(2).

Section 40 - personal information

27. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
28. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
29. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
30. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

"any information relating to an identified or identifiable living individual".
32. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
33. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
34. 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.
35. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information does relate to the data subject(s). This is because the withheld information consists of the address of a specific individual who is named. The address of a named individual is quite obviously information which both relates to and identifies an individual.
36. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

37. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

38. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

39. Article 5(1)(a) of the UK GDPR states that:

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

40. In the case of an 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 if to do so would be lawful, fair and transparent.

41. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

42. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“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”¹.

¹ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

43. In considering the application of Article 6(1)(f) of the UK 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 disclosure of the information 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.
44. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

45. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
46. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
47. The complainant advised the Commissioner that they believe that the correspondence and communication in question is likely about the presumed death of a particular individual and a claim on a title. The complainant stated that these matters would be of interest to members of the public.
48. The Commissioner also recognises that there is always a public interest in public authorities acting in an open and transparent manner.
49. However, given that the information in question is an address, the Commissioner is not satisfied that publication could meet these legitimate interests – let alone that it is necessary.
50. The Commissioner is satisfied that there is no legitimate interest in disclosure. Disclosure would therefore be unlawful and the information would be exempt under section 40(2) of FOIA.

Procedural matters

51. Section 1(1) of FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
52. Section 10(1) of FOIA requires these actions to be taken within 20 working days of receipt of the request.
53. Under section 17(1) a public authority that is relying on an exemption to withhold information should give the applicant a refusal notice stating that fact within the same timescale.
54. In this case, the MoJ did not issue the complainant with such a refusal notice until after 20 working days. This represents a breach of section 17(1) and 10(1) of FOIA.

Right of appeal

55. 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

56. 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.
57. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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