

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 October 2017

Public Authority: The British Broadcasting Corporation ('the BBC')

Address: Broadcast Centre
White City
Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant has requested access to information held in the BBC Archives in Reading. The BBC initially withheld the information under the derogation, but during the course of the Commissioner's investigation, the BBC cited section 37(1)(ac), the exemption relating to communications with other members of the Royal Family.
2. The Commissioner's decision is that the BBC correctly applied section 37(1)(ac) in this case. The Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

3. On 15 May 2017, the complainant wrote to the BBC and requested the following information:

"Please note that I am only interested in information which relates to the period 1 January 1967 to 1 January 1970.

1. During the aforementioned period did Prince Philip exchange correspondence and communications with either the Director General and or the Chairman of the BBC.

2. If the answer is yes, can you please provide copies of this correspondence and communications. Please note that I am interested in receiving both sides of the correspondence and communications.'

4. The BBC responded on 9 June 2017. It confirmed that it held a few documents relevant to the request; *'correspondence regarding the importance of Science programmes, and correspondence on behalf of the Duke of Edinburgh relating to a Royal Family documentary proposal.'*
5. The BBC explained that it did not believe that the information was caught by FOIA because it was held for the purposes of 'art, journalism or literature'. It explained that Part VI of Schedule 1 to FOIA provides that information held by the BBC and the other public service broadcasters is only covered by FOIA if it is held for 'purposes other than those of journalism, art or literature'. It concluded that the BBC was not required to supply information held for the purposes of creating the BBC's output or information that supports and is closely associated with these creative activities. It therefore would not provide any information in response to the request for information. The BBC does not offer an internal review when the information requested is not covered by the Act.

Scope of the case

6. The complainant contacted the Commissioner on 11 July 2017 to complain about the way his request for information had been handled.
7. In particular, the complainant argued that this is historical information and although academics have access to the Written Archive Centre in Reading, the press are advised to seek access via FOIA, which is then derogated.
8. On 28 July 2017 the Commissioner contacted the BBC to ask that it revisit the request and provide its more detailed arguments about why it believed that the information requested falls within the derogation.
9. On 23 August 2017 the BBC stated that it had revisited the request and reviewed its response to the complainant. *'It is the BBC's position that the requested information is exempt from disclosure under section 37(ac) of the FOIA as the information requested constitutes 'communications with other members of the Royal Family'.*
10. The BBC also clarified that it only held one piece of correspondence that is pertinent to the request.
11. The Commissioner asked that the complainant be informed of the new exemption and this was done on 29 August 2017.
12. On 6 September 2017 the Commissioner invited the complainant to withdraw his case as it was her opinion that the requested information

was correspondence with other members of the Royal Family and that the BBC was correct in its refusal to disclose this information.

13. However, the complainant declined to withdraw his case and wrote to the Commissioner on the same day. He argued that:

'I do not think the Prince enjoys an automatic exemption under the FOI and EIRs particularly regarding historic information.

I maintain there are strong public interest grounds in disclosure.'

14. The Commissioner considers the scope of this case to be to determine if the BBC has correctly applied section 37(1)(ac) to the withheld information.

Reasons for decision

Sections 37(1)(a) and (ac)

15. Section 37(1) states that information is exempt information if it relates to –

(a) communications with the Sovereign,
(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).

16. Sections 37(1)(a) is a class-based and absolute exemption. This means that if the information in question falls within the class of information described in the exemption in question, it is exempt from disclosure under the Act. It is not subject to a balance of public interest test.

17. Section 37(1)(ac) of FOIA is not an absolute exemption and is subject to a balance of public interest test.

18. The BBC explained that the one remaining piece of withheld information includes communications between a member of the Royal Family and another person at the BBC. The Duke of Edinburgh is the Queen's spouse and therefore a member of the Royal Family.

19. From the Commissioner's guidance, under Section 63(2E) of FOIA, an authority cannot apply sections 37(1)(ac) if the later of the following dates has passed:

- a period of five years from the date of the 'relevant death'; or

- a period of 20 years from the creation of the record containing the information.
20. The Commissioner notes that a period of 20 years has elapsed since the date of the requested information (1967-1970) but the 'relevant death' relates to the 'individual to whom the communication relates'. As the communication in this case relates to the Duke of Edinburgh, section 37 may be applied to this information.
21. Having viewed the withheld information the Commissioner is satisfied that it falls, by definition, within the exemption. The Commissioner therefore finds that this information is exempt under section 37(1)(ac) and will consider the public interest test.

Public interest test

Public interest in favour of disclosure

22. The BBC argue that *'there is a public interest in transparency regarding information about how public authorities and the Sovereign, heir to the throne, Royal Family and Royal Household conduct their public duties. There is also clearly a public interest in the way that the monarchy and public institutions like the BBC operate and interact as they are publicly funded institutions.'*
23. The complainant has argued that *'clearly the Prince felt strongly enough about the issues involved to put pen to paper and I think licence fee viewers and the general public have a right to know how he is seeking to influence BBC programming'* and *'highlighting the extent to which members of the Royal family are trying to lobby and influence public bodies including the BBC.'*

Public interest in favour of maintaining the exemption

24. The BBC referred to the Commissioner's guidance and stated that *'there is a public interest in ensuring that the Royal Family can undertake confidential communications in the course of their public duties. Correspondence and other communications to public authorities that contain the opinions of the Royal Family on public matters are sensitive as their disclosure could undermine the Royal Family's capacity to effectively engage in future discussions with public authorities.'*
25. The BBC also stated that *'the principle of preserving the confidentiality around royal communications does not diminish over time'*.

Balance of the public interest

26. The BBC stated that *'On balance, there is an overwhelming public interest in preserving the confidentiality of correspondence ...ensures a*

degree of frank communication in the interests of public authorities who may have cause to correspond with the Royal Family regarding editorial content about the Royal Family.'

27. The Commissioner does consider that there is a public interest in openness and transparency of documents relating to the Royal family, and in this case specifically the Duke of Edinburgh.
28. However, having viewed the withheld information, the Commissioner is satisfied that the correspondence was part of a public role performed by the Duke of Edinburgh and performance of the role was dependent upon maintaining the confidentiality of communications with public authorities. The Commissioner refers to her own guidance that '*There is an inherent public interest in preserving that confidentiality where disclosure would compromise a Family members' ability to carry out their role.*'
29. The Commissioner understands the complainant's view on the historical nature of the information but accepts the BBC's view that the principle of confidentiality around royal communications continues as the general subject matter in the correspondence is still 'live'.
30. The Commissioner has therefore concluded that on balance, in all the circumstances of the case, the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption and section 37(1)(ac) is correctly applied in this case .

Other matters

31. The Commissioner notes the concern of the complainant that the BBC, although claiming to be transparent, is attempting to side step his issue of access as a journalist to their historical records in the Written Archive Centre in Reading. It is not within the remit of the Commissioner to consider this general access. The Commissioner can only consider the particular request under FOIA to the recorded information in this case.

Right of appeal

32. 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@hmcts.gsi.gov.uk

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

33. 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.
34. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF