

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

Decision notice

Date: 20 November 2018

Public Authority: The Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office for copies of correspondence either The Queen or the Duke of Edinburgh may have exchanged with the Prime Minister between May 1996 and February 1998 about the Royal Yacht. The Cabinet Office refused to confirm or deny whether it held any information falling within the scope of the request on the basis of the exemption contained at section 37(2) of FOIA, by virtue of sections 37(1)(a) (communications with the Sovereign) and 37(1)(ac) (communications with, or on behalf of, a member of the Royal Family). The complainant sought to challenge the Cabinet Office's reliance on section 37(2) in relation to correspondence with the Duke of Edinburgh. He also argued that the Cabinet Office was likely to hold environmental information falling within the scope of his request and that such information should be provided to him under the Environmental Information Regulations. The Commissioner has concluded that section 37(2) is engaged in respect of correspondence the Prime Minister may have had with the Duke of Edinburgh and that in the circumstances of the case the public interest favours maintaining the exemption not to confirm or deny whether the requested information is held. She has also concluded that on the balance of probabilities the Cabinet Office does not hold any environmental information falling within the scope of the request.

Request and response

2. The complainant submitted the following request to the Cabinet Office on 8 December 2017:

'I would like to request the following information under the Environmental Information Regulations (EIRs).

Please note that the reference to The Queen and Prince Philip should include The Royal Couple as well as their private secretaries and their press secretaries.

Please note that I am only interested in information which relates to the period 1 May 1996 to 1 February 1998.

If you are ALREADY aware of relevant information being held outside the time period please let me know and I will submit another request.

1...During the aforementioned period did the Prime Minister exchange correspondence and communications with The Queen and or Prince Philip which in any way related to The Royal Yacht Britannia. This correspondence and communications will include but will not be limited to exchanges about the cost, upkeep and maintenance of the Yacht. It will also include but will not be limited to exchanges about its value to the nation; its value to the Royal Family; its voyages (past and present) and its planned replacement/retirement.

2...If the answer is yes can you please provide copies of this correspondence and communication including emails. Please do also provide transcripts and recordings of any relevant telephone conversation. Please note that I would like to receive both sides of the correspondence and communication.

3...If relevant documents have been subsequently destroyed can you please provide the following. In the case of each destroyed document can you please state when it was destroyed and why. In the case of each destroyed document can you please provide a brief outline of its contents. Can you please provide a copy of the destroyed information if it continues to be held in another form.'

3. The Cabinet Office responded on 11 January 2018. Under FOIA it refused to confirm or deny whether it held any information falling within the scope of the request on the basis of section 37(2) by virtue of sections 37(1)(a) (communications with, or on behalf of, the Sovereign) and 37(1)(ac) (communications with, or on behalf of a member of the Royal Family). With regard to section 37(1)(ac), the Cabinet Office concluded that the public interest favoured neither confirming or denying whether any information was held. Under the EIR, the Cabinet Office confirmed it did not hold any environmental information falling within the scope of this request.

4. The complainant contacted the Cabinet Office on 13 January 2018 in order to request an internal review of this response.
5. The Cabinet Office informed him of the outcome of the internal review on 15 June 2018. The review upheld the position adopted in the refusal notice.

Scope of the case

6. The complainant contacted the Commissioner on 27 February 2018 in order to complain about the Cabinet Office's handling of his request. He raised the following two grounds of complaint with the Commissioner:
7. Firstly, the complainant sought to challenge the Cabinet Office's reliance on section 37(1)(ac), by virtue of section 37(2), to refuse to confirm or deny whether it holds any correspondence Prince Philip may have exchanged with the Prime Minister on this subject. (He did not seek to challenge the Cabinet Office's reliance on section 37(1)(a), by virtue of section 37(2), to refuse to confirm or deny whether it held any correspondence The Queen may have exchanged with the Prime Minister on this subject.)
8. Secondly, he also argued that the Cabinet Office was likely to hold environmental information falling within the scope of his request.
9. With regard to the Cabinet Office's reliance on section 37(2), it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: Section 1(1)(a) provides an applicant with the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant with the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.
10. As explained above, the Cabinet Office is seeking to rely on section 37(2) to refuse to confirm or deny whether it holds information falling within the scope of the request. Therefore, this notice only considers whether the Cabinet Office is entitled, on the basis of these exemptions, to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.

Reasons for decision

Complaint 1: Section 37 - Communications with the Sovereign, other members of the Royal Family and the Royal Household

11. Section 37(2) of FOIA states that:

'The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).'

12. In the circumstances of this complaint the relevant subsection within section 37(1) which has been cited by the Cabinet Office is 37(1)(ac). This section states that information is exempt if it 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)'

13. To engage section 37(2) the requested information (if held) would therefore have to fall within the scope of one of the exemptions contained within section 37(1).

14. As the complainant has requested correspondence the Duke of Edinburgh may have exchanged with the Prime Ministers in post during the scope of the request, namely John Major and Tony Blair, the Commissioner is satisfied that if the Cabinet Office held such information it would be clearly be exempt from disclosure on the basis of section 37(1)(ac) of FOIA. Section 37(2) is therefore engaged.

Public interest test

15. However, section 37(2) is a qualified exemption. Therefore, the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in confirming whether or not the requested information is held.

Public interest arguments in favour of confirming whether or not the requested information is held

16. The Cabinet Office acknowledged that there is some public interest regarding the Royal Yacht and in knowing whether there is any correspondence between the spouse of the Monarch and the Prime Minister about it at the time.
17. The complainant did not advance any specific arguments to support his view that the public interest favoured confirming whether or not the Cabinet Office held any information correspondence between the spouse of the Monarch and the Prime Minister on this issue.

Public interest arguments in maintaining the exclusion to confirm or deny whether the requested information is held

18. The Cabinet Office argued that it was expected that correspondence between members of the Royal Family and the Prime Minister would be treated confidentially. Consequently, if it complied with section 1(1)(a) of FOIA in relation to this request, and thus revealed whether or not the Duke of Edinburgh had corresponded with the Prime Minister on a particular topic, such confidentiality would be undermined. The Cabinet Office argued that this could hinder the open dialogue between the Royal Family and Prime Minister and undermine the constitutional position of the Monarchy an outcome which would be firmly against the public interest. The Cabinet Office also argued that there is no specific or particularly pressing public interest in refuting a hypothetical argument that The Duke corresponded with the Prime Minister concerning the Royal Yacht.

Balance of the public interest arguments

19. The Commissioner agrees with the Cabinet Office that there is strong public interest in ensuring that the Royal Family can exchange free and frank correspondence with the Prime Minister. Confirmation as to whether or not the Cabinet Office held the requested information would reveal whether the Duke of Edinburgh had discussed a specific issue with the Prime Minister of the day over a particular time period. In the Commissioner's view such a confirmation would represent a significant risk of a chilling effect on any future correspondence. The Commissioner also considers there to be a significant public interest in ensuring that the Royal Family is not politicised and in her view revealing the topics and subjects on which they exchanged (or may have exchanged) correspondence with the Prime Minister presents a real risk of this occurring. The Commissioner acknowledges that complying with section 1(1)(a) would contribute towards the transparency of how the Royal Family and Prime Minister engage on particular topics. She also accepts that there is some public interest, albeit arguably quite a limited one, in

understanding whether the Duke corresponded with the Prime Minister of the day about the Royal Yacht. However, she also agrees with the Cabinet Office that there is no specific and particularly pressing public interest in confirming whether the requested information is held. Therefore, the Commissioner has concluded that in the circumstances of this request the Commissioner is satisfied that the public interest in maintaining the exemption contained at section 37(2) outweighs the public interest in the Cabinet Office confirming whether or not the requested information is held.

Complaint 2 – Does the Cabinet Office hold any environmental information falling within the scope of this request?

20. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose requested information if it does not hold that information when the applicant's request is received.
21. The Cabinet Office's position is that it does not hold any environmental information falling within the scope of this request. The complainant has challenged this and argued that it is highly likely that the Cabinet Office holds information falling within the scope of this request and likely that this information constitutes environmental information.
22. In circumstances such as this where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
23. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request. In order to do so, the Commissioner will consider the nature of the searches undertaken by the public authority for any environmental information falling within the scope of the request along with any further explanations from the public authority to support its position that the requested information is not held.
24. The Cabinet Office explained to the Commissioner that it had conducted both electronic and physical searches to determine if any environmental information falling within the scope of the request was held. It explained that although any records held for the period of the request would be held only on paper files. However, the electronic search was to identify any files that would hold information for the years in question. The hard copy files for the relevant years were then read through to see if there were any references falling under the EIR to the Royal Yacht, and there were none.

25. In the Commissioner's opinion the Cabinet Office has conducted focused and logical searches that were sufficiently detailed to ensure that if any environmental information was held falling within the scope of the request it would have been located. She is therefore of the opinion that on the balance of probabilities the Cabinet Office does not hold any environmental information falling within the scope of this request and therefore is entitled to rely the exception provided by regulation 12(4)(a) of the EIR.

Right of appeal

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@hmcts.gsi.gov.uk
Website: 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
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