

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 July 2024

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

Decision (including any steps ordered)

1. The complainant has requested information issued to sensitivity reviewers in order to carry out their work under the Public Records and National Archive Acts for the period 2021 to March 2023, with specific reference to the handling of royal matters.
2. The Cabinet Office initially advised that the information requested was exempt under section 27(prejudice to international relations) of FOIA, subsequently revising the exemption relied upon to section 37(1)(ac)(communications with other members of the Royal Family). The Cabinet Office later advised that the information was instead exempt in its entirety under section 37(1)(a)(communications with the Sovereign). This absolute exemption was upheld at internal review.
3. During the Commissioner's investigation, the Cabinet Office advised that in addition to section 37(1)(a), they were also applying sections 36(2)(b)(i) and (ii)(prejudice to effective conduct of public affairs) to the information requested.
4. The Commissioner has found that the Cabinet Office has correctly interpreted the scope of the request and that the information requested is exempt from disclosure under section 37(1)(a). However, in their handling of the request, the Commissioner has found that the Cabinet Office breached sections 10(1) and 17(1) of FOIA.
5. The Commissioner does not require any steps to be taken by the Cabinet Office.

Request and response

6. On 9 March 2023, the complainant wrote to the Cabinet Office and requested information in the following terms:

'I'm requesting under FOI the guidance instructions issued to sensitivity reviewers to carry out their weeding duties, with specific reference to the advice on handling royal matters'.

7. On 10 March 2023 the Cabinet Office requested clarification from the complainant as to what was meant by 'weeding duties'. The complainant responded with a re-worded request on the same date. He asked for:

'May I see the guidance manual issued to sensitivity reviewers in order to carry out their work under the Public Records and National Archive Acts for the period 2021 to date, with specific reference to the handling of royal matters'.

8. The Cabinet Office acknowledged receipt of the request on 15 March 2023. The Cabinet Office wrote to the complainant on 12 April 2023 and confirmed that they held information relevant to his request and this was exempt from disclosure under section 27 (prejudice to the UK's international relations) of FOIA. They advised that they were extending the time for a substantive response under section 10(3) in order to consider the public interest test and that they hoped to provide him with a substantive response by 12 May 2023.
9. The Cabinet Office subsequently wrote to the complainant on 12 May 2023 and advised him that the information requested was exempt under section 37(1)(ac)(communications with other members of the Royal Family). There was no mention of section 27. The Cabinet Office advised that they were further extending the time for a response under section 10(3) and that they hoped to provide the complainant with a substantive response by 12 June 2023.
10. The Cabinet Office wrote to the complainant on 12 June 2023 and confirmed that the information requested was exempt under section 37, 'which is concerned with protecting information relating to communications with or on behalf HM The King, other members of the Royal Family or Royal Household'. The Cabinet Office advised that they needed to extend the time to consider the public interest test and stated that they hoped to provide the complainant with a response by 10 July 2023.
11. The Cabinet Office sent three further letters to the complainant on 10 July, 9 August 2023 and 7 September 2023, extending the time for consideration of the public interest test.

12. On 27 September 2023, the Cabinet Office provided the complainant with their substantive response to his request. In a change to their previous position, the Cabinet Office stated that the information within scope of the request which they held was exempt under section 37(1)(a)(communications with the Sovereign). This being an absolute exemption, the Cabinet Office stated that they were not required to carry out a public interest test.
13. The complainant requested an internal review of the decision on the same date. He stated that:

‘There is no reason why the guidance manual should not be made available. I do not believe section 37(1)(a) applies as this is not communication with the Sovereign but simply instructions given to sensitivity reviewers which presumably go beyond royal matters’.
14. The Cabinet Office acknowledged the request for a review on 28 September 2023 and informed the complainant that they would endeavour to provide him with the review within 20 working days.
15. On 27 October 2023, having not received the review, the complainant sent a chaser email to the Cabinet Office. He sent a further chaser email on 31 October 2023.
16. The Cabinet Office wrote to the complainant on 1 November 2023 and acknowledged the Commissioner’s advice to public authorities that they should take no longer than 40 working days (in exceptional cases) to complete an internal review. They apologised to the complainant for having been unable to provide the review within the timeframe advised by the Commissioner but assured him that the review was still being conducted and that it would be issued to him as soon as it was concluded.
17. On 24 November 2023, having still not received the outstanding internal review, the complainant wrote to the Cabinet Office and advised them that as the 40 working days deadline had expired, he would be taking the matter to the Commissioner.
18. The Cabinet Office provided the complainant with the internal review on the same date. The very brief review upheld the decision to withhold the requested information under section 37(1)(a) of FOIA. With reference to the contention made by the complainant (see paragraph 13), the Cabinet Office advised that, ‘the wording of the exemption which states that it is engaged if the information relates to communications with or on behalf of the Sovereign. Its effect is not confined to actual communications’.

Scope of the case

19. The complainant contacted the Commissioner on 14 December 2023 to complain about the way his request for information had been handled.
20. In submissions to the Commissioner, the complainant advised that the same information request to the Foreign Commonwealth & Development Office had 'produced some information and section 37 was not deployed'. The complainant also stated that:

'My request was 'guidance instructions issued to sensitivity reviewers, with specific reference to the advice on handling royal matters'. Royal matters covers many subjects which do not come under 'communications with or on behalf of the Sovereign'.

The specific reference may be to royal matters but I also asked to see 'the guidance manual issued to sensitivity reviewers', which presumably included advice not specific to the Royal Family'.

21. During the course of the Commissioner's investigation, the Cabinet Office advised that in addition to section 37(1)(a), they were also applying sections 36(2)(b)(i) and (ii) to the information requested.
22. The Cabinet Office provided the Commissioner with copies of the withheld information and detailed submissions, parts of which were provided in confidence.
23. The Commissioner considers that the scope of his investigation is to determine the interpretation of the request and whether the Cabinet Office were correct to withhold the requested information.

Reasons for decision

Scope of the request

24. In submissions to the Commissioner, the Cabinet Office advised that:

'We interpreted this as a request for sections of the guidance issued to sensitivity reviewers which advised on the handling of information relating to the Royal Family and the Royal Household. We regard this as a reasonable interpretation of the request, indeed it is the most natural reading of the request'.

25. The Commissioner agrees with the Cabinet Office's interpretation of the request, which is an objectively reasonable one. The wording of the complainant's request, 'with specific reference to the handling of royal matters', made it specific to those matters only. If the complainant had

wished to have sight of the guidance manual issued to sensitivity reviewers more generally, then he should not have narrowed the description of the information requested in this way (although it would have been helpful had the Cabinet Office explained this in their response to the complainant's internal review grounds). The Commissioner is therefore satisfied that the scope of the request only encompasses the parts of the guidance which specifically deal with royal matters.

Section 37(1)(a) – Communications with the Sovereign

26. Section 37(1)(a) of FOIA states:

'(1) Information is exempt information if it relates to –

(a) communications with the Sovereign'.

27. The exemption also covers communications made or received by a person or organisation who is acting on behalf of the Sovereign or the Heir to the Throne, for example, HRH's private secretary or a representative of Buckingham Palace. It is also an absolute exemption and not subject to the public interest test¹.
28. The Cabinet Office provided the Commissioner with the two pieces of information which they hold which are in scope of the complainant's request.
29. The Cabinet Office stated that the guidance is issued to sensitivity reviewers and creates general rules for handling information relating to communications with any member of the Royal Family or the Royal Household.
30. In submissions to the Commissioner, the Cabinet Office correctly stated that information **relating** to communications with or **on behalf of** the Sovereign engages the absolute exemption at section 37(1)(a) of FOIA.
31. The Cabinet Office noted that 'the exemptions at section 37 are generally interpreted broadly and provide an exemption from disclosing information if it covers communications with or on behalf of the Sovereign. Such information includes communications from the Sovereign's Private Office. Therefore, communications, and information relating to those communications, made or received by a person who is acting on behalf of the Sovereign, engage the exemption'.

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/communications-with-his-majesty-and-the-awarding-of-honours-section-37/>

32. Having had sight of the withheld information, and confidential submissions provided by the Cabinet Office, the Commissioner is satisfied that the withheld information is exempt from disclosure under section 37(1)(a). Unfortunately, he is unable to expand further upon his decision in this notice without revealing the content of the withheld information. Consequently, the Commissioner's detailed analysis is contained in a Confidential Annex, a copy of which will be provided to the Cabinet Office only.
33. As he has found that the withheld information is exempt under section 37(1)(a), the Commissioner has not gone on to consider sections 36(2)(b)(i) and (ii).

Procedural matters

34. Under section 1(1) of FOIA a public authority must (a) confirm whether it holds information that has been requested and (b) communicate the information to the applicant if it is held and not exempt information.
35. Section 10(1) states that a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
36. Under Section 17(1) a public authority must issue a refusal notice in respect of any exempt information within the same timescale.
37. Section 10(3) of FOIA allows a public authority to claim an extension to the statutory 20 working days limit, if necessary, but only to consider the balance of the public interest test.
38. In this case, the Cabinet Office originally informed the complainant that the information requested was exempt under section 27, subsequently switching reliance to section 37(1)(a). More than four months later, during which time the Cabinet Office had repeatedly informed the complainant that they were considering the public interest test, the Cabinet Office provided the complainant with their substantive response to his request, withholding the information under section 37(1)(a), an absolute exemption.
39. The Commissioner considers that the above chronology shows that the Cabinet Office did not apply sufficient care and attention when considering the complainant's request. It should not have taken long to determine that the information was exempt under section 37(1)(a) and that consequently, no public interest test was required. In submissions to the Commissioner, the Cabinet Office accepted this analysis.

40. The Commissioner has found that the lengthy delay in providing a valid response in this case means that the Cabinet Office breached sections 10(1) and 17(1) of FOIA, and considers these breaches to be of significance.

41. The Commissioner would impress upon the Cabinet Office the importance of only utilising section 10(3) where it is necessary and then only for so long as is reasonable in the circumstances. The Commissioner is of the view that public authorities should not extend the time to consider the public interest test for more than a further 20 working days (i.e. in addition to the 20 working days provided under section 10(1)) except in exceptional circumstances.

Right of appeal

42. 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

43. 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.
44. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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