

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 February 2022

Public Authority: Department for Levelling Up, Housing and Communities

Address: 2 Marsham Street
London

Decision (including any steps ordered)

1. The complainant has requested copies of any correspondence and communications to the Secretary of State from The Duke and Duchess of York concerning Ghislaine Maxwell made between the period 1 January 2002 to 31 December 2002.
2. The Department for Levelling Up, Housing and Communities ("the DLUHC") refused to confirm or deny whether it held the requested information and cited sections 40(5) (third party personal data) and 41(2) (information provided in confidence) as its basis for doing so.
3. The Commissioner's decision is that the DLUHC is entitled to rely on section 40(5B) of the FOIA to neither confirm or deny whether it holds the requested information.

Background

4. The Commissioner understands that The Duke of York ("The Duke") has publicly indicated that he has known Ghislaine Maxwell ("Maxwell") since her time as a student at the University of Oxford, from which she graduated in 1985.
5. The Commissioner also understands that, through Maxwell, The Duke met, and became associated with, the late American financier Jeffery

Epstein ("Epstein") from the late 1990's onwards, and with whom Maxwell had been closely associated with since the early 1990s.

6. The Commissioner has previously outlined (in various decision notices¹ that considered information requests for correspondence concerning Epstein) the publicly known nature of The Duke's association with Epstein and Maxwell, from the onset of their meeting until Epstein's death (in August, 2019) and The Duke's resignation from public roles (in May, 2020).
7. The Commissioner is aware that subsequent events relating to Maxwell led to her being arrested and charged with sex trafficking and perjury in July 2020; both subjects being closely related to her association with Epstein. In December 2021, Maxwell was convicted in relation to the trafficking charges.

Request and response

8. On 6 July 2020, the complainant wrote to DLUHC and requested information in the following terms:

"I would like to request the following information under The Freedom of Information and The Environmental Information Regulations.

I understand my request will take 20 working days to process but I would be grateful if you could acknowledge receipt.

Please note that I am only interested in information generated between 1 January 2002 and 31 December 2002.

Please note that the reference to The Duke and Duchess of York in the questions below should include those two individuals when they were acting alone and those two individuals when they were acting in together. It should also include anyone in their private office (s) able to correspond and communicate on their behalf.

¹ Decision Notices IC-48512-H8C6 (February 2021), IC-45633-L6J5 (March 2021), IC-46355-S1V1 (March 2021), IC-46087-C2X1 (March 2021), IC-46721-Q5P3 (March 2021), IC-87583-R5M3 (March 2021), IC-49738-N7J1 (March 2021), and IC-47804-H2J0 (March 2021).

Please note that the reference to the Secretary of State should include the Secretary of State him or herself as well as anyone in his/her private office able to correspond on their behalf.

Please note that the reference to correspondence and communications in the questions below should be taken to mean all traditional forms of correspondence and communications such as letters and faxes, all emails irrespective of whether they were sent through private or official accounts and all messages sent through encrypted messaging services.

If for whatever reason you are aware of correspondence and communications between the aforementioned individuals which was sent/received outside the stated time period can you let me know of the relevant dates and I will submit a new request. If the department holds information on behalf of a predecessor department I would be grateful if you could provide that information.

Please note that I am only interested in correspondence and communications which specifically mention the society heiress Ghislaine Maxwell by name. I am interested in receiving all correspondence and communications no matter how it relates to Ms Maxwell.

Please note that neither the Duke and Duchess of York has any official role or programme of official duties. It therefore follows that disclosure of documents will not have any toxic effect on their roles/duties.

1...During the aforementioned period did The Duke and Duchess of York (acting individually or as a couple) write to or communicate with the Secretary of State and did they refer to Ghislaine Maxwell in that correspondence and communication.

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

3...During the aforementioned period did the Secretary of State write to either or both the Duke and Duchess of York and did he or she refer to Ghislaine Maxwell in that correspondence and communications.

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

5...Can you please let me know if any relevant correspondence and communications have – for whatever reason – been destroyed. In the case of each piece of destroyed correspondence and communication can you state when it was destroyed and why. In the case of each piece of destroyed correspondence and communication can you identify

the author (s), the recipient (s) and the date generated. If the destroyed correspondence and communication continues to be held in another form can you please provide relevant copies."

9. The DLUHC responded on 5 August 2020. It stated that it refused to either confirm or deny that information was held under sections 40(5) and 41(2).
10. Following an internal review the DLUHC wrote to the complainant on 5 October 2020. It maintained its original response.

Scope of the case

11. The complainant contacted the Commissioner on 6 October 2020 to complain about the way their request for information had been handled, and specifically that the DLUHC was not entitled to withhold the requested information under sections 40(5) and 41(2).
12. The Commissioner notes that the request was originally submitted to the Ministry of Housing, Communities and Local Government. During the course of investigation, the public authority's name changed to DLUHC.
13. The scope of this case and of the following analysis is whether the DLUHC is entitled to withhold the information under section 40(5).

Reasons for decision

Section 40 - personal information

14. 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 General Data Protection Regulation EU2016/679 ("GDPR") to provide that confirmation or denial.
15. Therefore, for DLUHC to be entitled to rely on section 40(5B) 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
 - 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?

16. Section 3(2) of the DPA 2018 defines personal data as:-

"any information relating to an identified or identifiable living individual".

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

18. 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.

19. If the DLUHC was to confirm whether it held information within the scope of the request it would be confirming whether either The Duke and/or Duchess had corresponded with the Secretary of State² between the period 1 January 2002 to 31 December 2002, and that the correspondence related to Maxwell.

20. The Commissioner would note that as the request relates to correspondence from only three people, confirming or denying will connect them much more closely than if the request was for any correspondence from a larger group of people.

21. The Commissioner therefore accepts that issuing a confirmation or a denial that information is held would, in itself, reveal personal data about The Duke and/or Duchess and Maxwell. The request is worded in such a way that any information the DLUHC confirmed it held or did not hold would be inextricably linked to The Duke and/or Duchess and Maxwell. Therefore, issuing a confirmation or denial would reveal information which had those individuals as its focus and would therefore reveal their personal data.

22. For the reasons set out above, the Commissioner is satisfied that if the DLUHC confirmed whether it not it held the requested information, this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.

² During the time period specified in the request, the relevant Secretary of State was John Prescott, and the public authority's name was The Office of The Deputy Prime Minister.

23. However, 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 DLUHC from confirming whether or not 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.

Would confirming whether or not the requested information is held contravene one of the data protection principles?

24. 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"

25. 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

26. 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.
27. The Commissioner considers that the condition most applicable on the facts of this case would be that 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"³.

³ 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".

28. 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.

29. 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

30. 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.

31. In its submissions to the Commissioner, the DLUHC acknowledged that there is a legitimate interest in transparency for its own sake. The

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the 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”.

DLUHC considers that to this extent, there is a legitimate interest in confirmation or denial, albeit limited.

32. The Commissioner has previously considered the perceived relevant legitimate interests in the aforementioned decision notices (paragraph 6). Whilst those decisions related to correspondence concerning Epstein, in the circumstances of this matter - and specifically the strong interconnection of Maxwell with Epstein in both public and private life - the Commissioner considers it appropriate to have regard to them.
33. As identified in those decision notices, at the time of the complainant's request there was considerable media coverage about the exact nature of the relationship between The Duke and (to a lesser extent) Duchess with Epstein. This media interest began following official allegations of sexual offences by Epstein in March 2005, and resultant conviction in 2008. However, during the time-scale specified by the request, no charges had yet been made against either Epstein or Maxwell, and the Commissioner must consider that such a factor limits the public interest in the confirmation or denial that the information is held.
34. However, the Commissioner is mindful that, for the timescale specified in the request for this case, The Duke had been appointed to a trade envoy role, in which position he would have had greater scope and opportunity, should he wished to have done so, to lobby on behalf of, or otherwise assist Epstein and Maxwell.
35. Whilst it may be proportionate to discount what only later became known about Epstein and Maxwell, the Commissioner considers that there is a legitimate interest in knowing whether The Duke and/or Duchess corresponded with the Secretary of State during 2002 with a view to lobbying for, or assisting their then friends Epstein or Maxwell. This is a legitimate interest which the DLUHC could satisfy by issuing a confirmation or denial that relevant information is held. The Commissioner therefore considers - similar to the aforementioned decision notices relating specifically to Epstein - that the legitimate interests test has been met and has thus gone on to consider the necessity test.

(ii) Is confirming whether or not the requested information is held necessary?

36. '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.

37. In submissions to the Commissioner, the DLUHC accepted that the legitimate interest in understanding whether or not The Duke and/or Duchess of York lobbied on behalf of Maxwell cannot be satisfied in any way other than by a confirmation or denial of whether it holds the requested information. However, the DLUHC considers that the sort of communications envisaged by the requester, if they existed, would not have anything to do with The Duke or Duchess' public role, they would be private.
38. 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 in relation to Maxwell cannot be satisfied in any way other than by the DLUHC issuing a confirmation or a denial that they hold relevant information. The Commissioner therefore considers - similar to the aforementioned decision notices relating specifically to Epstein - that the necessity test is met and has gone on to consider the balancing test.

(iii) Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

39. Even where issuing a confirmation or denial that information is held is necessary to satisfy a legitimate interest, the Commissioner must still balance the legitimate interests in confirming whether or not the requested information is held against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
40. In submissions to the Commissioner, the DLUHC set out that in this particular request, the complainant has not just sought correspondence from particular individuals, but the correspondence those individuals have engaged in in relation to a particular individual. The DLUHC explained that ordinary members of the public would not expect the fact or content of their private correspondence with a government department to be disclosed to the world at large. The DLUHC considers that the Duke and Duchess are still entitled to have this expectation.
41. The DLUHC confirmed that there was no reason to suggest that either of the data subjects have given their consent, or that they would be likely

to if asked. DLUHC therefore considered that if it were to issue a confirmation or denial of whether it holds the requested information would be without consent and, in all likelihood, against the reasonable expectations of the data subjects.

42. The DLUHC considers that the Duke and Duchess would suffer damage or distress were it to confirm whether or not the requested information is held. The DLUHC considers that confirmation or denial of whether it holds the requested information would be a breach of the Duke and Duchess' privacy and would be unfair, since the same considerations apply to members of the Royal Family as would apply to any other individual, who would not expect their personal data to be released to the public in such a way.
43. The DLUHC is of the view that the rights and freedoms of the individuals in this case far outweigh the legitimate interests of the public in knowing whether the requested information is or is not held.
44. The Commissioner notes that for the period of time (1 January 2002 to 31 December 2002) covered by the request, The Duke was a senior working Royal, in receipt of the Sovereign Grant. The Duchess, whilst retaining a royal title, is not a prominent member of the Royal Family and does not have a programme of official engagements. Nevertheless, she retains a high public profile for a number of reasons, such as being the mother of Princess Beatrice and Princess Eugenie.
45. Nevertheless, 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.
46. In this particular request, the complainant has not just sought correspondence from particular individuals, but the correspondence those individuals have engaged in in relation to a particular subject.
47. Whilst the Commissioner recognises that higher profile individuals may have their correspondence handled (or at least considered) by a more senior individual within the DLUHC (and its predecessor bodies), including the Secretary of State, the Commissioner 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.

48. The Commissioner would note that this case can be distinguished from those concerning 'advocacy correspondence' to government departments by The Prince of Wales. In the Upper Tribunal case of *Evans v Information Commissioner [2012] UKUT 313 (AAC)*⁴ it was acknowledged that it was widely known that The Prince of Wales has written to ministers in the past. In *Evans* the Tribunal found that Mr Evans was entitled to disclosure of 'advocacy correspondence' as "*It will generally be in the overall public interest for there to be transparency as to how and when The Prince of Wales seeks to influence government, although there are cogent arguments for non-disclosure, the public interest benefits of disclosure of 'advocacy correspondence' falling within Mr Evans's requests will generally outweigh the public interest benefits of non-disclosure*". Section 37 FOIA was amended by the Constitutional Reform and Governance Act (CRAG) 2010 which introduced the new section 37(1)(aa) to the FOIA. Section 37(1)(aa) exempts information from disclosure if it relates to communications with the heir to, or the person who is for the time being, second in line of succession to the Throne. As an absolute exemption there is no public interest test. However, The Duke and Duchess of York do not hold such positions of influence, and therefore cannot be said to have a similar reasonable expectation that their personal data would be disclosed.
49. The Commissioner has considered whether any already publicly available information on the subject may affect the reasonable expectations of The Duke and/or Duchess. The Commissioner is unaware of any public or official record of such information which would give rise to an expectation of disclosure. However, this is also a valid argument for providing a confirmation or denial, in order to bring transparency to this area.
50. In Decision Notice FS50807609 (June 2019) which concerned an information request to the Cabinet Office for copies of correspondence between the then Prime Minister, Theresa May, and The Duke of York and/or Duchess of York, concerning the wedding of their daughter, Princess Eugenie, the Commissioner accepted that in order for members of the Royal Family to be able to carry out diplomatic and goodwill work, they must be able to exchange correspondence with public authorities with the expectation that such information would be treated confidentially. The Commissioner found that providing such a confirmation (or denial) would "*represent a direct infringement of the principle that such communications are considered to be confidential*". In

⁴ <https://www.judiciary.uk/judgments/evans-v-information-commissioner/>

attributing weight to this argument, the Commissioner noted that the request concerned a senior member of the Royal Family, which in the Commissioner's view, arguably increased the risk of harm occurring if the Cabinet Office complied with section 1(1) (a) in that case.

51. The Commissioner accepted that there was a genuine and legitimate public interest in how Princess Eugenie's wedding was funded, but *"taking into account the wider consequences of undermining the confidentiality of such communications, and given the importance of such confidentiality to the work of the Royal Family"*, the Commissioner concluded that in the circumstances of that request, albeit by a narrow margin, that the public interest in maintaining the exemption (section 37(2) in that case) outweighed the public interest in the Cabinet Office confirming whether or not the requested information was held.
52. In the above case, the Commissioner reached their conclusion, albeit by a narrow margin, because there was some public debate at the time about the amount of public money being spent on the security of the wedding.
53. By contrast, in the present case, the Commissioner recognises that although there is considerable public debate and interest surrounding The Duke's friendship and association with Epstein and Maxwell, that debate and public interest does not strongly focus on the period covered by the complainant's request but rather some years later (primarily after Epstein's criminal convictions).
54. For the reasons set out above, and mindful that the request is largely speculative in nature, 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. The Commissioner does not, therefore consider that there is a lawful basis for the processing of the this personal data and, accordingly, confirmation or denial under the FOIA would be unlawful.
55. As confirmation or denial would be unlawful, such processing would breach the first data protection principle and therefore the DLUHC is entitled to rely on section 40(5B) of the FOIA in the manner that they did.
56. Having found that the DLUHC is entitled to rely on section 40(5B) to refuse to confirm or deny whether they held the information requested, the Commissioner has not gone on to consider the application of section 41(2).

Environmental information

57. In their request, the complainant asked the DLUHC to consider their responsibilities under the Environmental Information Regulations 2004 and respond accordingly.
58. Given the wording and nature of their request, the Commissioner is not convinced that any relevant information the DLUHC 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 DLUHC to handle this request under the FOIA.
59. However, given the similarities between section 40(5) of the FOIA and regulation 13(5) of the EIR, the Commissioner considers that the DLUHC would have been able to rely on the latter exception to neither confirm nor deny holding any relevant environmental information.

Right of appeal

60. 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@justice.gov.uk

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

61. 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.
62. 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

Daniel Perry
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF