

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 7 March 2024

**Public Authority:** Cabinet Office

**Address:** 70 Whitehall  
London  
SW1A 2AS

#### **Decision (including any steps ordered)**

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1. The complainant submitted a request to the Cabinet Office for file PREM 19/3917, "ROYAL FAMILY. Marriage and separation of Prince Andrew". The Cabinet Office withheld the file on the basis of the exemptions contained at sections 23(1) (security bodies), 37(1)(a) (communications with the Sovereign), 40(2) (personal data) and section 41(1) (information provided in confidence).
2. The Commissioner's decision is that these exemptions only provide a basis to withhold some of the information contained in the file.
3. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.
  - Provide the complainant with a copy of the information identified in the confidential annex to this decision notice.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. The complainant submitted the following request to the Cabinet Office on 23 February 2022:  
  
"Please release this file [PREM 19/3917. ROYAL FAMILY. Marriage and separation of Prince Andrew] which is now over 30 years old, much of the information is in the public domain and there is a strong public interest".
6. The Cabinet Office responded on 21 October 2022 and confirmed that it held the requested information but it considered this to be exempt from disclosure on the basis of section 40(2) of FOIA.
7. The complainant requested an internal review on 24 October 2022. The Cabinet Office responded on 25 November 2022 and upheld the application of section 40(2).

## Scope of the case

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8. The complainant contacted the Commissioner on 5 December 2022 in order to complain about the Cabinet Office's decision to withhold the requested file. His grounds of complaint to support his case are set out below.
9. During the course of the Commissioner's investigation the Cabinet Office explained that it also considered some parts of the file to be exempt from disclosure on the basis of section 23(1) (security bodies), 37(1)(a) (communications with the Sovereign) and/or 41(1) (information provided in confidence).
10. The scope of the Commissioner's investigation is therefore to assess whether the various exemptions cited by the Cabinet Office provide a basis to withhold the contents of the file.

## Reasons for decision

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### Section 23(1) – security bodies

11. Section 23(1) provides an exemption for information if it was directly or indirectly supplied to a public authority by, or relates to, any of the

bodies specified in subsection (3).<sup>1</sup> It is an absolute exemption and not subject to the public interest test.

12. The Cabinet Office withheld a small portion of the file on the basis of this exemption. The Commissioner has reviewed the information in question and is satisfied that it clearly falls within the scope of the exemption contained at section 23(1).

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

13. Section 37 of FOIA states:

“(1) Information is exempt information if it relates to-

(a) communications with the Sovereign”

14. 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 test.
15. The Cabinet Office argued that portions of the file fell within the scope of this exemption. The Commissioner agrees that the vast majority of the information to which the Cabinet Office has applied section 37(1)(a) does fall within the scope of this exemption. However, there is a small amount of information for which he does not accept that this is the case. The Commissioner has identified this information in a confidential annex, a copy of which will be provided to the Cabinet Office only (identification of the information in question in this notice would reveal the content of it).

### **Section 40(2) – personal data**

16. The Cabinet Office applied section 40(2) to all of the information contained within the file. However, the Commissioner has not considered the application of this exemption to information which he has already concluded is exempt from disclosure on the basis of section 23(1) or section 37(1)(a).
17. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the

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<sup>1</sup> A full list of the bodies in section 23(3) is contained available here <https://www.legislation.gov.uk/ukpga/2000/36/section/23>

requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

18. In this case the relevant condition is contained in section 40(3A)(a)<sup>2</sup>. 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').
19. 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.
20. 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?**

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

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

22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
23. 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.
24. 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.
25. The Cabinet Office argued that all of the information on the file is the personal data of the Duke of York or Sarah, Duchess of York (the Duke and Duchess). This is on the basis that the information relates to them as identifiable individuals, in the context of their marriage and separation.

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<sup>2</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

26. The Commissioner agrees with this assessment and accepts that all of the information on the file is the personal data of the Duke and Duchess.

**Would disclosure contravene principle (a)?**

27. 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”.

28. 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.

29. 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.

30. 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”<sup>3</sup>.

31. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

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<sup>3</sup> 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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) 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”.

- 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.
32. 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

33. 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, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
34. The complainant noted that the file is over 30 years old, that much of the information is in the public domain and that there is a strong public interest in disclosure of the information given that the Duke of York is a public figure and of legitimate interest.
35. The Cabinet Office acknowledged that there is legitimate interest in the requested information (albeit as noted below, it did not accept that the withheld information was in the public domain).
36. The Commissioner agrees that there is a legitimate interest in the disclosure of the requested information and that this limb of the test is met.

### Is disclosure necessary?

37. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

38. The Cabinet Office acknowledged that disclosure would be necessary to meet the legitimate interest being pursued by the request and there would be no other means of meeting that request.
39. The Commissioner also agrees with this assessment and therefore accepts that this limb of the test is met.

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

40. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
41. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
42. The complainant's arguments regarding the legitimate interest in disclosure are set out above.
43. The Cabinet Office argued that disclosure of the information would be unfair, given the reasonable expectations of the Duke and Duchess and the consequences of disclosure.
44. With regard to assessing such reasonable expectations, the Cabinet Office noted that one factor is whether information of the nature requested is already in the public domain, and the source of such a disclosure(s). It explained that none of the information contained in the file is in the public domain. The Cabinet Office argued that given that the right to privacy has not been waived by any of the parties to the correspondence, it is reasonable to argue that disclosure would go against The Duke's and Duchess's reasonable expectations that the personal information relating to them would not be processed in this way. In support of this position the Cabinet Office emphasised the nature of communications relating to Members of the Royal Family and government, which has historically and necessarily taken place under an expectation of confidence, give rise to this expectation.



45. With regard to the consequences of disclosure, the Cabinet Office argued that The Duke and Duchess would suffer damage or distress if it were to disclose the information. The Cabinet Office argued that apart from the injury to their rights as data subjects, disclosure would result in breach of The Duke's and Duchess's privacy. This 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.
46. Furthermore, the Cabinet Office argued that if any Member of the Royal Family or their advisers came to doubt the presumption that communications with the Prime Minister are confidential, they and their advisers would be more circumspect in their communications and would be deprived of opportunities to convey their views on other topics in the course of the established constitutional relationship and channel of communications between government and the Royal Family. The Cabinet Office argued that the public interest in preserving this constitutional position outweighs the general public interest considerations in favour of disclosure.
47. The Cabinet Office argued that since no official information has been made public, it would be reasonable to suggest that disclosure would cause distress to The Duke and to the Duchess.
48. Furthermore, the Cabinet Office argued that disclosure would breach the individuals' rights under Article (8)(1) of the European Convention on Human Rights (ECHR) as given effect by the Human Rights Act 1998 (HRA). Article 8(1) protects the right to respect for a person's family life, private life, home and correspondence. The Article 8 right is qualified; where the authority can show that its action (interference with the right) is lawful, necessary and proportionate in order to meet the legitimate aims laid out in Article 8(2), which are to: protect national security, protect public safety, protect the economy, protect health or morals, prevent disorder or crime, or protect the rights and freedoms of other people. The Cabinet Office argued that none of these legitimate aims apply and therefore disclosure would be unlawful, unnecessary, and disproportionate, and so interfering in these individuals' Article 8 rights would not be justified.
49. In summary, the Cabinet Office argued that insofar as the public may be interested in the information contained in the file, this is not the same as suggesting that there is an overriding necessity to disclose the information to meet the legitimate interest being pursued in the request. In the Cabinet Office's view it was difficult to detect the overriding legitimate interest and benefit to the public in disclosing information. Rather if the necessity test were met, the Cabinet Office argued that disclosure would so prejudice the privacy and the confidentiality to



which The Duke and Duchess are entitled that it would not be warranted.

50. In reaching a decision on the balance of legitimate interests, the Commissioner notes that there is a range of information contained within the file. For some of this information the Commissioner accepts that disclosure of it would result in a genuine and potentially significant infringement into the privacy of the Duke and Duchess, and that they would be unlikely to expect that such information would be disclosed. For such information, in the Commissioner's view there is also a limited legitimate interest in its disclosure. As a result, for this information the Commissioner has therefore concluded that there is an insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. Therefore, for such information the Commissioner considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful. This information is therefore exempt from disclosure on the basis of section 40(2) of FOIA.
51. However, for the remaining information in the file the Commissioner is not persuaded that its disclosure would result in a particularly significant infringement of privacy to the Duke and Duchess given the content of the information itself. In respect of the reasonable expectations of the Duke and Duchess for such information, the Commissioner recognises the established convention that communications relating to Members of the Royal Family and government, have taken place under an expectation of confidence. However, in the Commissioner's view it is important to take into account the passage of time and age of the information, as well as its content, when assessing the validity of such expectations. He does not consider it to be sustainable to argue that the expectation is that any such communications will always remain confidential. In this case the information in question is nearly 40 years old. In addition, whilst the Commissioner accepts that there is still arguably an expectation that more personal aspects of such correspondence are treated confidentially – and thus to disclose these would genuinely be against the Duke and Duchess' expectations - he does not consider this to be the position for all of the information falling within the scope of the request. Furthermore, for such information the Commissioner also considers that there is a significant legitimate interest in its disclosure.
52. As a result, for such information the Commissioner has determined that there is a sufficient legitimate interest in disclosure to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of this information would be lawful.

53. In reaching this decision the Commissioner has noted that Cabinet Office's argument at paragraph 46 that disclosure of the information could deprive members of the Royal Family opportunities to convey their views in the course of the established constitutional relationship and channel of communications between government and the Royal Family. The Commissioner does not consider this argument to be relevant to the considerations under section 40; in his view such an outcome would not result in an invasion of the privacy of the Duke or Duchess which is what, in the context of this request, this exemption is concerned with. Rather, such arguments are ones potentially relevant to other exemptions, eg section 36(2)(c), the effective conduct of public affairs or the public interest assessment in respect of the sub-sections of section 37(1) which are qualified.
54. Furthermore, the Commissioner notes the Cabinet Office's position regarding disclosure of the information and HRA. The Commissioner's position, as outlined in his section 40 guidance, is that the considerations involved in assessing the data protection legitimate interests assessment are similar when assessing whether an interference with a right in the HRA is necessary. Therefore, if the legitimate interests assessment is met, then disclosure is unlikely to contravene the HRA. The Commissioner considers this to be the position in this request.
55. Even though it has been demonstrated that disclosure of parts of the requested information under FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
56. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
57. The requirement for transparency is met because as a public authority, the Cabinet Office is subject to FOIA.
58. As a result, for some of the information, the Commissioner has decided that the Cabinet Office has failed to demonstrate that the exemption at section 40(2) is engaged.
59. In summary the Commissioner has found that section 40(2) only applies to some of the information falling within the scope of the request. The Commissioner has set out in greater detail in the confidential annex why he has reached these findings. The Commissioner cannot include such analysis in this decision notice because such analysis has to refer to the content of the withheld information itself.

**Section 41 – information provided in confidence**

60. The Cabinet Office argued that it was relying on this exemption to withhold information provided by Buckingham Palace on behalf of Queen Elizabeth II on her views on matters relating to the Duke and Duchess.
61. The Commissioner considers that any such information falling within the scope of this description has already been found to be exempt from disclosure on the basis of section 37(1)(a). Therefore he has not considered the Cabinet Office's reliance on section 41(1) of FOIA in this decision notice.

## **Right of appeal**

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62. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

63. 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.
64. 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**  
**Senior Case Officer**  
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