

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 January 2023

Public Authority: Department for Digital, Culture, Media and Sport

Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested correspondence and communications to and from the then Prince of Wales (now King Charles III) in his capacity as the then Duke of Cornwall regarding the Prince's Consent for the Data Protection Act 2018 within a specific time frame. After excessive delay in responding, the Department for Digital Culture Media and Sport ("DCMS") said it held an email containing a letter seeking the Prince's Consent. DCMS disclosed the letter but said that it was withholding the email under section 37(1)(aa) (Communications with the heir to the Throne). It also explained that some information within that email was also being withheld under section 40. It denied holding other information also described in the requests. It upheld its position at internal review.
2. The Commissioner's decision is that DCMS is entitled to rely on section 37(1)(aa) as its basis for refusing to provide the withheld information described in the request. In failing to respond within 20 working days, DCMS has not complied with its obligations under section 10 of the FOIA.
3. No steps are required.

Request and response

4. Following an earlier, broader request, the complainant wrote to DCMS on 12 November 2020 and requested information in the following terms:

"Inspired by this reply [to the earlier request] I would now like to submit a new request for information about the issue of Prince's Consent for the Data Protection Act 2018.

I would like to resubmit my original request but with one exception. I would like to change the time frame. So I am now only interested in information generated between 1 May 2017 and 1 December 2017.

1...During the aforementioned period did the then Secretary of State write to the Prince of Wales seeking Prince's consent for the Data Protection Act 2018 (then known as the Data Protection Bill)?

2...If the answer to the question one is yes, can you please provide a copy of this correspondence and communication?

3...Did the Prince reply to this request for Prince's Consent?

4...If the answer to question three is yes can you please provide a copy of this correspondence and communication?

5...If the Prince and the Secretary of State continued to exchange correspondence and communications on the issue of Prince's consent for this particular bill can you please provide copies of this correspondence and communication. Please provide copies of the Prince's correspondence to the Secretary of State and the Secretary of State's correspondence to the Prince.

5. Having received no response, the complainant contacted DCMS about this again on 1 and 29 July 2021. He chased a response again on 12 August 2021 and asked DCMS to conduct an internal review of its handling of his request.¹
6. DCMS finally responded on 21 October 2021. It apologised for the delay. It explained that pandemic restrictions on movement had played a part in this delay because it was unable readily to review physical files. It said that it held information within the scope of requests 1 and 2 and

¹ If a public authority does not respond to a request within 20 working days and does not respond to any chasing letter, the Commissioner recommends the requester to contact him about this rather than seek an internal review from the public authority of its failure to respond. The Commissioner can then contact the public authority about this directly and, if it does not take voluntary action, he can formally require it to respond by issuing a decision notice. This will also assist the Commissioner in tracking more quickly any pattern of non-response and he may take further regulatory action where he identifies such a pattern.

provided the letter it had sent to the Prince's Private Secretary seeking consent. It said that the email containing the letter was exempt from disclosure under section 37(1)(aa) – communications with the heir to the Throne. It also explained that some information in the letter it supplied had been redacted under section 40(2) because it was the name and signature of a junior member of staff who was not in a public facing role. It explained that it held no information within the complainant's requests 3, 4 and 5.

7. The complainant requested an internal review on 22 October 2021. He argued that the Prince's consent related to his position as the Duke of Cornwall and that the requested information could not, therefore be covered by the exemption cited. He also queried why DCMS did not hold information in respect of requests 3, 4 and 5 because without it, the government would not have been able to proceed with the bill.
8. DCMS acknowledged receipt of the request for internal review on 19 November 2021 but said it needed further time to respond. It gave a target date for response by 20 December 2021.
9. It did not provide a letter setting out the outcome of its internal review until 6 May 2022 where it upheld its use of section 37(1)(aa).
10. Regarding request 4 [which assumes a positive response to request 3] it said "We understand that the absence of information in relation to point 4 may be of concern, but after a further thorough search, we still have not been able to find this. As to where this information is we do not know".
11. Regarding request 5, it said that it had been unable to find any information within the scope of the request and that there was "no suggestion that the department should (or indeed does) hold information within the scope of that part of your request".

Scope of the case

12. The complainant contacted the Commissioner on 26 May 2022 to complain about the way his request for information had been handled.
13. He disputed that section 37(1)(aa) could apply to correspondence with the Prince of Wales in his capacity as Duke of Cornwall – which was the case here. In further correspondence to the Commissioner (following an email sent to him explaining the Commissioner's initial view) he claimed that other public authorities had disclosed information which related to the then Prince Charles' role as Duke of Cornwall and the late Queen

Elizabeth II's role as Duke of Lancaster. They had, he asserted, agreed with him that section 37 could not be used to withhold information "relating to the operation of either Prince's or Queen's consent." He added that he recalled that the Commissioner has also previously agreed with this. The Commissioner asked him to provide evidence of such correspondence but none was forthcoming.

14. The Commissioner has considered whether section 37(1)(aa) applies to the email that has been withheld in this case.

Reasons for decision

Background

15. The Duchy of Cornwall was established by Edward III as a private estate to provide financial independence to his son and heir. From that date, where the eldest child of the monarch is male, he becomes the Duke of Cornwall. The then Princess Elizabeth II did not become Duke of Cornwall when her father became King George VI and she became heir to the Throne. Income from the Duchy reverted to the Crown during that period.

16. The Commissioner notes in passing that the person who was the Prince of Wales and the Duke of Cornwall at the time of the request is now King Charles III. However, that is not relevant to his decision making in respect of this complaint.

17. According to Erskine May (which is the repository of UK parliamentary procedure):

"The Prince's consent is required for a bill which affects the rights of the principality of Wales and earldom of Chester, or which makes specific reference to, or special provision for, the Duchy of Cornwall; and the Prince's consent may (depending on the circumstances) be required for a bill which amends an Act which does any of those things."²

18. According to a guidance document published by the Office of Parliamentary Counsel explaining the concept of King's or Prince's consent:
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² [Prince of Wales's consent - Erskine May - UK Parliament](#)

"3.16 Prince's consent was also required for the bill for the Data Protection Act 1998 and the bill for the Data Protection Act 2018 because, in each case, of the bill's express application to data processed by the Duchy of Cornwall."³

The Commissioner's decision

19. Section 37(1)(aa) states:

Information is exempt information if it relates to—

(aa) communications with the heir to, or the person who is for the time being second in line of succession to, the Throne,

20. This is an absolute exemption which means that if information falls within the class of information described in it, that information is exempt from disclosure. The application of this exemption is not subject to a balance of public interest test.
21. The complainant fundamentally disagrees with DCMS' assertion that the information in question falls within the class of information described in the exemption. He argues that it relates to the Prince of Wales in his role of the Duke of Cornwall and not in respect to his role as the heir to the Throne. He argued that had Parliament intended for the exemption to apply to titles other than that of the Prince of Wales, it would have specified this in the legislation.
22. The Commissioner notes that the Duke of Cornwall can only ever be the heir to the Throne. As such, it follows that information which relates to communication with the heir to the Throne necessarily falls within the definition of exempt information described in section 37(1)(aa). He is satisfied that the information described in request 2 falls within this class.
23. The Commissioner notes that DCMS chose not to apply section 37(1)(aa) in respect of the letter which it supplied to the complainant, namely the letter it had sent to the Prince's Private Secretary seeking consent. Strictly speaking, this letter would also fall within the class of information described in section 37(1)(aa). However, the fact that DCMS chose not to apply it to the letter does not undermine its use of section 37(1)(aa) in respect of the information it did withhold.

³ [King's and Prince's Consent - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

24. While taking into account any other legal obligations which a public authority might have with respect to requested information, a public authority is not obliged to rely on an exemption under the FOIA so may choose to disclose requested information that falls within the scope of any exemption.

Conclusion

25. DCMS was entitled to rely on section 37(1)(aa) in respect of the information it withheld in this case because it clearly falls within the class of information described in that exemption.

Section 10

26. Section 10 requires public authorities to respond to a request made under the FOIA within 20 working days. DCMS failed to do so by a considerable margin. It contravened the requirements of section 10 when it did so.
27. It also failed to provide a timely response to the complainant's request for internal review (see Other Matters).

Other matters

28. The Commissioner notes that there was a significant delay in responding to the complainant's request for an internal review in respect of his request.
29. Part VI of the FOIA section 45 Code of Practice makes it desirable practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information and that the procedure should encourage a prompt determination of the complaint.
30. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
31. DCMS failed to provide a response to the complainant's request for internal review after several months in this case.

32. The Commissioner notes that DCMS has made considerable efforts recently to improve its request handling performance. He welcomes this. However, he is keeping these improvements under review and may consider additional regulatory action where that improved performance is not maintained.

Right of appeal

33. 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

34. 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.
35. 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

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