



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2019/0333P

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Marion Saunders
and
Stephen Shaw

Between

Christopher Hastings

Appellant

And

**The Information Commissioner
HM Treasury**

Respondents

**Determined, by consent, on written evidence and submissions
Considered on the papers on 21 September 2020.**

DECISION AND REASONS

DECISION

1. The appeal is partially allowed as described below and this determination constitutes a substituted decision notice in relation to the part of appeal that is allowed. For the reasons explained below, no further action is required by HM Treasury (HMT).

MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 105, together with additional open documents and a closed bundle.

INTRODUCTION

4. The Appellant submitted the following requests to HM Treasury (HMT) on 5 October 2018:

"I would like to request the following information under the Freedom of Information Act... Please do treat any environmental information as a request for information under The Environmental Information Regulations (EIRS). Please note that I am only interested in information generated between 5 October 2017 and the present day. Please note that the reference to Prince Andrew and the Duchess of York should include those two individuals as well as their private offices. Please note that the reference to The Chancellor should include the Prime Minister and her private office.

1...Since October 2017 has Prince Andrew and or the Duchess of York written to The Chancellor about any of the issues listed below.

a..The upcoming wedding of their daughter to Princess Eugenie to Jack Brooksbank and arrangements for the event.

b...The cost of the wedding and the possibility of tax payer support for the event.

c...The possibility of an official title for Brooksbank once he is married.

d...The couple's official duties once they are married and or the question of continuing financial support for the couple.

2...If the answer to Question one is yes can you please provide copies of this correspondence and communication including emails.

3...Did The Chancellor reply to the above correspondence and communication?

4..If the answer is to question three is yes can you please provide copies of this correspondence and communication including emails.

In the event that relevant documentation has been destroyed. Can you please supply the following details? In the case of each destroyed piece of correspondence can you provide details of the recipient, sender and date it was generated? In the case of each destroyed piece of documentation can you please say when it was destroyed? If the destroyed documentation continues to be held in another form can you please provide copies of that documentation."

5. On 2 November 2018, HMT responded neither confirming nor denying that any information was held within the scope of the request. HMT relied upon s37(2) FOIA and s40(5B) FOIA.
6. There was an internal review of the decision on 3 November 2018 and on 19 February 2019 HMT wrote to the Appellant stating that the review upheld the original decision.
7. The Appellant contacted the Commissioner on 20 February 2019 in order to complain about the HMT's failure to provide him with the information he requested. On 4 July 2019 the Appellant asked the Commissioner to

additionally consider whether any part of his request should have been handled under the EIR.

THE LAW AND COMMISSIONER'S DECISION

8. The right of access provided by FOIA is set out in section 1(1) and is separated into two parts, both of which are relevant in this case.
9. Section 1(1)(a) FOIA gives an applicant the right to know *whether* a public authority holds the information that has been requested.

10. Section 37 FOIA states:

- “(1) Information is exempt information if it relates to –
- (a) communications with the Sovereign,
 - (aa) communications with the heir to, or the person who is for the time being second in line of succession to, the Throne,
 - (ab) communications with a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne,
 - (ac) 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), and
 - (ad) communications with the Royal Household (other than communications which fall within any of paragraphs (a) to (ac) because they are made or received on behalf of a person falling within any of those paragraphs), or (b) the conferring by the Crown of any honour or dignity.

(2) 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).

11. The Commissioner's approach in the decision notice of 27 August 2019 was to consider the case under this section as it clearly related to communications with the Royal Family as covered by s37(1)(ac) FOIA. That would certainly be the position in relation to any communications

with the Duke of York, but is not so clear-cut in relation to any communications with the Duchess of York, and we will return to this question below.

12. The Commissioner also decided that the EIR were not relevant to this case. This was because 'based on the wording of the request, it is unlikely that any information held would constitute environmental information within the meaning of regulation 2(1) EIR' (§20). The Commissioner also made reference to a written explanation from HMT that had been provided in confidence in this case.

13. Having decided that the information requested, if it existed, would be covered by s37(1)(ac) FOIA, the Commissioner found as follows:-

22. Section 37(2) is also clear that a public authority is excluded from the duty to confirm or deny whether it holds information which is or if it were held by the public authority would be exempt from disclosure by virtue of section 37(1)(ac).

23. The Commissioner is satisfied that confirming or denying whether the information requested by the complainant is held would reveal information which would otherwise be exempt under section 37(1)(ac).

24. The public authority was therefore entitled to rely on the exemption at section 37(2) FOIA.

14. The Commissioner then went on to consider whether the reliance on s37(2) FOIA could be maintained once the public interest test in s2(1)(b) FOIA was applied.

15. The Appellant argued that there was a strong public interest to know whether members of the Royal Family had been 'lobbying' for financial and other benefits which would be 'above and beyond any constitutional responsibilities they have'. HMT recognised that there was a public

interest in understanding the roles of members of the Royal Family, and in confirming whether or not HMT held any correspondence with Duke of York about the wedding of Princess Eugenie and related events. It also pointed out that there was some information about the wedding available on the Royal Household website, and that the accounts of the Royal Household are published, audited by the National Audit Office and laid before Parliament.

16. The other public interest arguments deployed against confirmation or denial were (a) the strong public interest in members of the Royal Family carrying out their duties while maintaining confidential communications; (b) there was no particular or pressing public interest in any information there might be; (c) media speculation was not the same as public interest; (d) the topic-specific nature of the request meant that confirmation or denial would reveal whether the information did or did not exist; (e) the need not to undermine the work of the Royal Family; (f) the Duke of York's official role meant he had an expectation of confidentiality of communications.

17. The Commissioner concluded that:-

'... in order for members of the Royal Family to be able 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. Furthermore, the Commissioner accepts that confirmation as to whether or not the public authority held the requested information would reveal whether the Duke of York, or Sarah, Duchess of York, had corresponded with the Chancellor on specific issues. (§35)

18. The Commissioner thought that such a confirmation 'would represent a direct infringement of the principle that such communications are considered to be confidential'. (§36). There was a genuine public interest in how the wedding was funded but the Commissioner concluded 'the

public interest in maintaining the exemption contained at section 37(2) outweighs the public interest in complying with section 1(1)(a)'.

THE APPEAL AND RESPONSES

23. The Appellant filed an appeal to the decision notice on 12 September 2019.

He said that he thought it was highly likely that at least some of the information held would come within the EIR (in which there is no exemption such as that set out in s37(2) FOIA) given the implications of a Royal Wedding for the environment. The Appellant also raised the public interest in knowing whether the Royal Family had been lobbying ministers to improve 'their financial or constitutional position'. He noted that the Duchess of York did not have a programme of official duties which entitled her to privacy in her communications and doubted whether disclosure of documents would have an adverse effect on the Duke of York's discharge of official duties. He was concerned about a blanket ban of Royal correspondence and communications. He questioned whether the Duke of York carried out official duties on a 'goodwill basis' and raised some issues about the Duke's relationship with Jeffrey Epstein which he thought the Commissioner should have considered. He is concerned that in relation to the EIR, the Commissioner has taken into account 'confidential assurances' from the HMT.

24. In response, the Commissioner and HMT re-iterate the points made in the decision notice. The Commissioner makes more detailed submissions about the applicability of the EIR which we will consider below. The HMT has made reference to additional matters in the public domain already, such as details of the Sovereign Grant, and answers to parliamentary questions about the costs of policing the wedding and spending by other departments in relation to the wedding.

25. The Commissioner's Response also asserts that the Duchess of York is a member of the Royal Family and therefore the exemption in s37(1)(ac) FOIA applies to her. The Commissioner makes reference to her guidance on this issue which reads, in full, as follows:-

28. There is no strict legal definition of the term 'Royal Family'. As a general rule it should be taken to mean all individuals who are entitled to hold the title of 'Majesty' or 'Royal Highness' and their spouses.

29. If the authority is in any doubt about the status of the individual concerned, it should consult the website of the British Monarchy (www.royal.gov.uk) as this contains an official list of the current members of the Royal Family.

30. Section 37(1)(ac) doesn't cover communications with persons who have subsequently become members of the Royal Family. This means that, if a person has joined the Royal Family through marriage, any communications that predate their membership of the Family will not be covered by the exemption.

31. By the same measure, if the information relates to an individual who has lost their Royal status, the exemption will only cover the period during which that person was a member of the Royal Family.

26. Referring to the official website mentioned in paragraph 28 of the Commissioner's own guidance, it appears that the Duchess of York is not included in the list of members of the Royal Family. That she is not a member is certainly the view of the HMT in its Response to the Appeal, and it seems to us that this is most likely to be right.

27. On that basis, as argued by HMT, the Tribunal will need to consider the applicability of s40 FOIA to the Duchess of York (s40 FOIA would also apply to the Duke of York as well, of course). We are able to do that even though the Commissioner did not consider s40 FOIA in the decision notice, as explained in *IC v 1. Malnick; 2. ACOBA* [2018] UKUT 72 (AAC):-

109. We summarise the effect of our analysis on the role of the FTT where

a public authority has relied on two exemptions ('E1' and 'E2') and the Commissioner decides that E1 applies and does not consider E2. ...where the FTT disagrees with the Commissioner's conclusion on E1 it must consider whether E2 applies and substitute a decision notice accordingly.

28. The Appellant has filed a number of replies to these Responses. His main points continue to be the strength of the public interest in the Duke of York being able to have confidential communications, and whether that is applicable when the request is for information which does not relate to official duties, and the relevance (generally and with particular reference to the Duke of York) as to whether official duties are carried out on a good will basis or not.
29. He has also made references to events which have occurred since HMT and the Commissioner made their decisions (such as the revelation by the Duke of York of personal details in the Newsnight interview in late 2019). These references are not relevant to the Tribunal which is charged with considering whether there has been an error of law in the Commissioner's decision made in August 2019.
30. We have also received two witness statements from HMT. There is a witness statement from Eirian Walsh Atkins who is a Deputy Director in the Cabinet Office with responsibility for freedom of information dated 4 February 2020. This provides general background to freedom of information and the Royal Family, details of information already in the public domain, the principle that communications between the Royal Family and ministers should remain confidential (subject to the public interest test) to assist the discharge of public duties, and the reasonable expectation of privacy for members of the Royal Family.
31. There is also a statement from David Fairbrother, of the same date, who is the Treasury Officer of Accounts at HMT and whose responsibilities include

the payment of the Sovereign Grant to the Royal Household. His statement explains how the Appellant's request was dealt with, but also sets out HMT's role in relation to the finances of the Royal Family, the information in the public domain and the accountability mechanisms which already relate to the Royal Family's finances. There are redacted sections of the statement which are necessarily only available to the Tribunal in a closed version, which deal with the issue in question in this case: whether or not HMT holds the information requested.

DISCUSSION

Environmental Information Regulations

32. It is important to decide whether the EIR are engaged in this case because, as the Appellant notes, there is no equivalent to s37(1)(ac) FOIA in the EIR. Regulation 2 EIR contains the following definition of environmental information:-

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on-

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a)
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).

33. Regulation 5 EIR obliges a public authority that holds environmental information to make it available on request, subject to other provisions of the EIR. However, the case-law makes it clear that, although there should be a wide interpretation of what is 'environmental information', information 'which has only a minimal connection with the environment is not environmental information': see *DfT, DVSA and Porsche Cars GB Ltd v IC and Cieslik* [2018] UKUT 127 (AAC), §33.

34. The only part of the request in this appeal which could conceivably have a connection with the environment relates to information as to the arrangements for the wedding. It seems to us that this is the epitome of a case where there is only a tenuous relationship with the environment, in the sense that any event where a number of people congregate will have some influence on the environment. There is no part of the definition of environmental information in reg 2 EIR which comes close to including the information which relates to arrangements for a wedding. In our view, the Commissioner was correct to treat this as a case where the FOIA provides the applicable statutory framework.

Section 37 FOIA

35. In our view, in relation to the Duke of York and any communications which may exist in relation to him and the HMT the position clearly comes within the exemption in s37(1)(ac) FOIA. As that is the case, then s37(2) FOIA applies to permit HMT (subject to the public interest test) to neither confirm

nor deny that the requested information is held.

36. Therefore, the real issue is whether the balance of the public interest nevertheless requires HMT to confirm or deny that it holds the information.

37. It is recognised that there is a public interest in understanding details about a royal wedding, how it is arranged and funded and how it will affect the future of the married couple. There is a public interest in knowing whether the Duke of York requested financial or other assistance in paying for the wedding. However, it is sheer speculation as to whether any requests were made, and the available evidence is that the Duke of York supports his children from private income (see his website referred to by HMT). There are also a number of accountability mechanisms described by Mr Fairbrother which provide oversight of the finances and funding of the Royal Family.

38. We understand the Appellant's doubts about the nature of the Duke of York's public duties, and whether confirming or denying whether the information is held would have much of an effect on those duties (as they were at the time of the request), carried out on a goodwill basis or not.

39. However, in our view there is a strong public interest in allowing free communications between the Royal Family and ministers to enable the Royal Family to carry out its public functions, and to help maintain the political neutrality, its dignity and its constitutional role in unifying the nation. It is not a blanket ban on disclosing whether documentation exists as the public interest balance can come down in favour of an applicant in appropriate cases.

40. But in this case, given the nature of the information sought, the other financial oversight mechanisms available, and the information already in the public domain about the wedding, there is, in truth, not a great public

interest in knowing whether the Duke of York did or did not contact HMT about the cost of the wedding (which was the real issue in the purview of HMT), or about the other issues mentioned (which do not seem to be within the purview of HMT in any event).

41. In our view, this low public interest in confirming or denying that the information is held, means that it is outweighed by the public interest in confidentiality of communications between the Royal Family and ministers, and the other matters mentioned in paragraph 39. In other cases, where the public interest in confirming or denying might be higher, we can envisage the balance being struck differently, but not on the facts of this case.

Section 40 FOIA

42. As the Appellant has asked for disclosure of communications from the Duchess of York, and as the Duchess of York is not a member of the Royal Family, the exemption in s37(1)(ac) FOIA does not apply to any such communications. For that reason, HMT have relied upon s40 FOIA to resist confirming or denying whether such communications are held. As mentioned above, there is no reason why s40 FOIA will not also apply to the Duke of York.

43. Section 40 (2) FOIA reads as follows:-

(2) Any information to which a request for information relates is also exempt information if –

- (a) it constitutes personal data which does not fall within subsection (1) (personal information of the applicant], and
- (b) the first, second or third condition below is satisfied.

44. Section 3(2) of the DPA 2018 defines personal data as “any information relating to an identified or identifiable living individual”.

45. The relevant condition (as referred to in s40(2) FOIA) in this case is found in s40(3A)(a):

- (3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act –
(a) would contravene any of the data protection principles.

46. Under s40(7) FOIA the relevant data protection principles in this case are to be found in Article 5(1) of the GDPR. Materially, Article 5(1)(a) reads:-

Personal data shall be:

- (a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency').

47. Further, by Article 6(1) GDPR:-

Processing shall be lawful only if and to the extent that at least one of the following applies:

- (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

...

- (f) 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...

48. The issue in this case is whether on the basis of section 40(5B) FOIA HMT is entitled to refuse to confirm or deny whether it holds personal data falling within the scope of the request. S40(5B) reads, materially:-

(5B) The duty to confirm or deny does not arise in relation to other information if or to the extent that any of the following applies –

- (a) giving a member of the public the confirmation or denial that would have to be given to comply with section 1(1)(a) –
(i) would (apart from this Act) contravene any of the data protection principle

49. Thus s40(5B)(a)(i) FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the data protection principles to provide that confirmation or denial.
50. If HMT confirmed that it held information falling within the scope of the request it would reveal whether the Duchess of York had communicated with HMT about the matters referred to in the request, namely issues concerning her daughter's wedding and associated matters. This would clearly disclose something of biographical significance about the Duchess of York and so amounts to her personal data, as well as the personal data of others such as Princess Eugenie and Mr Brooksbank.
51. In relation to lawfulness, there is a legitimate interest in the public knowing whether there has been communication with HMT about the wedding, as explained above in the discussion of the application of s37(2) FOIA, and that analysis is referred here. HMT has acknowledged the general interest in transparency and accountability.
52. However, in our view it would not be necessary for HMT to confirm or deny whether the requested information is held in order to serve this particular interest, given the information already available in the public domain.
53. Even if confirmation or denial were necessary to serve the interest, in our view (for the reasons set out above in relation to public interest and s37 FOIA), the legitimate interest is not a strong one. It does not, in our view, override the reasonable expectation of privacy of the Duchess of York (and the Duke of York, Princess Eugenie and Mr Brooksbank) in relation to communications with ministers, information about a family wedding and its costs, and whether or not the bridegroom was to receive a title, and whether or not the couple would carry out official duties.
54. For those reasons, in our view, the exemption to the duty to confirm or deny whether the information is held, contained in s40(5B) FOIA was rightly

applied by HMT in this case in relation to any communications between the Duchess of York and HMT, and would also apply to any communications from the Duke of York.

CONCLUSION

55. To the extent that the Commissioner found that s37(1)(ac) FOIA applies to communications with the Duchess of York, then this appeal succeeds as, in our view (and that of HMT) that is not the case. However, there is no further action for HMT to take as we have found that s40(5B) FOIA would apply to such communications.
56. Therefore, the appeal is allowed in part and to the extent it is allowed, this decision constitutes a substituted decision notice. Otherwise the appeal is dismissed.

Stephen Cragg QC

(Judge of the First-tier Tribunal)

Date: 5 October 2020.

Date Promulgated: 6 October 2020