

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 30 July 2015

**Public Authority:** The National Archives  
**Address:** Kew  
Richmond  
Surrey  
TW9 4DU

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to a file, listed as 'PREM 19/355' about the private papers of the late Duke of Windsor.
2. The Commissioner's decision is that The National Archives (TNA) has correctly applied section 37(1)(a) – communications with the sovereign, and section 40(2) – personal information, to the information. TNA also cited section 41 – information provided in confidence, but as he found that all the information is exempt under section 37 and 40, the Commissioner has not gone on to consider the application of section 41.
3. The Commissioner does not require any steps to be taken as a result of this decision notice.

#### Request and response

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4. On 15 April 2014 the complainant wrote to The National Archives and requested information in the following terms:

*"I would like to request access to the contents of a file which is still listed as being closed on the National Archives catalogue.*

*The file is listed as PREM 19/355 and is about the papers of the late Duke of Windsor. According to the catalogue the file is held by the National Archives and is classed as being closed until 2027."*

5. On 2 June 2014 TNA wrote to the complainant and informed him that it considered a number of exemptions applied to the information. These

included sections 40 – personal information, section 41 – information provided in confidence and section 42 – information covered by legal professional privilege. Section 42 is subject to the public interest test and TNA advised the complainant that it needed additional time to consider that test.

6. TNA provided its full response on 28 August 2014. It refused to provide the requested information and cited sections 40(2) (by virtue of section 40(3)(a)(i)) 41(1), 23 and 24 which relate to national security bodies and national security.
7. Following an internal review TNA wrote to the complainant on 31 October 2014. It maintained its position with regard to sections 40(2) and 41(1) of the FOIA. In addition it claimed the information was also exempt by virtue of section 37(1)(a) – communications with the sovereign. However it relinquished its reliance on sections 23 and 24.

## **Background**

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8. The public catalogue which can be viewed on TNA's website describes file PREM 19/355 as "Royal Family. Duke of Windsor's papers: allegations by Duc de Grantenil that they were stolen by secret agents".
9. The prefix 'PREM' identified the file as relating to records of the Prime Minister's office. The file is dated 10 May 1979 to 18 June 1980.
10. The file contains correspondence on false allegations that some papers of the Duke of Windsor were stolen by secret agents after his death. The purpose of the file and the correspondence which it contains is to address these allegations and to establish the position for the Crown, with regard to the transfer and acquisition of the Duke's papers to the Royal Archives.

## **Scope of the case**

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11. The complainant contacted the Commissioner on 3 November 2014 to complain about the way his request for information had been handled by TNA. He was concerned with both the time taken to deal with his request and its ultimate decision to withhold the information.
12. The Commissioner considers the scope of this case to be to determine if TNA has correctly applied sections 37(1)(a), 40(2) and 41(1) to the withheld information.

13. During the Commissioner's investigation TNA explained that sections 37(1)(a) and 40(2) had been applied to all the information held within the file. Section 41 had only been applied to some of the information.
14. The complainant has also raised concerns about the time taken to provide him with an initial response to his request and to then carry out an internal review. These matters have been addressed under 'Other Matters'.

## **Reasons for decision**

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### **Section 37(1)(a) – communications with the sovereign**

15. Section 37(1)(a) states that information is exempt information if it relates to communications with the Sovereign.
16. Correspondence with the Sovereign includes correspondence with members of the Royal Household acting on her behalf.
17. For the exemption to be engaged the information must constitute, or relate to, a "communication". So, for example, an internal note held by a government department that simply references the Sovereign will not fall within this definition unless it specifically relates to a relevant communication.
18. There is no need for the information to be sensitive in any way for the exemption to apply. It is sufficient that the information falls within the class of information described by the exemption.
19. Section 37(1)(a) is now an absolute exemption and therefore there is no need to consider the public interest test.
20. The Commissioner has studied the withheld information. It is not appropriate to go into any great detail as to the contents of the file. However, in broad terms, it includes correspondence from the third party named in the description of the file, alleging that the Duke of Windsor's papers were stolen. Also included is correspondence between the Prime Minister's office and other parties seeking clarification of various issues concerning those allegations. Importantly it also contains correspondence with members of the Royal Household acting on behalf of the Queen. Clearly there was a need for the Prime Minister's office to keep the Queen informed about the allegations and any actions the government were taking in light of those allegations.
21. There is correspondence directly between the Royal Household and the Prime Minister's office, correspondence from other parties which either

the Prime Minister's office or the Royal Household has copied to the other, correspondence from other parties which the sender copied to the Royal Household, correspondence between government officials which refer to communications with the Royal Household and correspondence which refer to discussions which had taken place between the Queen and others. Such information is either a communication with the Royal Household itself, or directly relates to such communications.

22. The Commissioner is satisfied that the information contained in these documents, which make up the majority of the file, fall squarely within the exemption provided by section 37(1)(a).
23. However the file also contains other information which does not consist of communications directly between the Prime Minister's office and the Royal Household, has not been copied to the Royal Household, or does not directly refer to such communications. There are however grounds for applying section 37(1)(a) to the information contained in these documents too.
24. It is important to note that section 37(1)(a) only has to 'relate to' communications with the Sovereign. It has been established at Tribunal that the term 'relates to' should be interpreted broadly. All the information held on the file and the discussions recorded were necessary in order for the Prime Minister's office to communicate well informed views to the Royal Household. Therefore the Commissioner considers that much of the information relate directly or indirectly to the communications which the Prime Minister's office had with the Royal Household over this matter and could therefore be withheld under section 37(1)(a).
25. Nevertheless the Commissioner has gone on to consider the application of section 40(2) to any information that either is not itself a communication with Royal Household on behalf of the Queen or does not directly relate to such communications, as described at paragraph 21 above.

#### **Section 40 – personal information**

26. TNA has applied the exemption provided by section 40(2) to all the information contained in the file. However having found that much of the information is exempt under section 37 the Commissioner has only considered section 40 in respect of the residual information. This is not to say that section 40(2) is not applicable to all the information contained in the file.

27. So far as is relevant, section 40(2) states that information is exempt if it constitutes the personal data of someone other than the requestor and its disclosure to a member of the public would breach the Data Protection Act 1998 (DPA). In this case TNA has argued that disclosing the information would breach the first data protection principle. The first principle states that personal data shall be processed fairly and lawfully and in particular shall not be processed unless one of the conditions in Schedule 2 of that Act can be met.
28. The first matter to be determined is whether the withheld information constitutes personal data. Personal data is defined in the DPA as being information which both relates to, and identifies a living individual. TNA has argued that the information constitutes the personal data of the Queen.
29. Having studied the withheld information the Commissioner finds that the information does relate to the Queen. Furthermore she can very clearly be identified from the contents of the file. It is therefore the Queen's personal data.
30. The Commissioner's approach to the first data protection principle is to start by looking at whether disclosing the information would be fair. Fairness is a difficult concept to define but it involves consideration of the potential consequences for the data subject should the information be disclosed and the reasonable expectations of that individual. Finally it is necessary to weigh any legitimate interests in disclosing the information to the public against the rights and freedoms of the data subject. These considerations are often interrelated.
31. It is not appropriate in this notice to detail the allegations or explain exactly how they relate to the Queen. However the Commissioner is satisfied on an objective reading of the withheld information that the Queen would not reasonably expect such information to be disclosed. The Queen is unable to prevent unsubstantiated allegations being made and is entitled to expect that when such issues arise they can be handled appropriately in private, without being subject to public scrutiny.
32. The Commissioner is satisfied that if the information was disclosed it would generate a degree of media interest. Given the subject of the information this would be intrusive.
33. When considering the legitimate interest in disclosing the information to the public the Commissioner recognises that there is an interest in the public understanding more about the relationship between the Crown and the government, how the government deals with matters of this nature and the probity of the Crown. The Commissioner therefore

accepts that there is some legitimate public interest in making the information available. However, it should be noted that simple curiosity about the events in question does not equate to a legitimate interest. There is a classic distinction between what might interest the public and what is in the public interest.

34. The interests identified above have to be balanced against the rights and freedoms of the data subject, in this case the Queen. Although the Queen, as Sovereign, has a unique public profile she is nevertheless entitled to the same data protection rights as any other individual. The Commissioner is satisfied that disclosing the information would be intrusive and contrary to the Queen's reasonable expectations. The weight that should be given to these considerations is greater than the weight attributable in this case to the legitimate interest in disclosure.
35. In light of the above the Commissioner is satisfied that disclosing the information which constitutes the personal data of the Queen would be unfair and so breach the first data protection principle. It follows that the information is exempt under section 40(2).
36. The Commissioner is satisfied that the entire contents of the file can be withheld under either section 40 or section 37, and much of it can be withheld under both. Therefore he has not gone onto consider the application of section 41 (information provided in confidence).
37. The Commissioner has produced a confidential annexe which identifies the information which he has specifically considered under section 40. This annex will only be provided to TNA.

## **Other matters**

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38. When he first contacted the Commissioner the complainant raised concerns over both the length of time taken to deal his request initially and the time taken to carry out an internal review. Although not forming part of the formal decision notice, the Commissioner considers it appropriate to comment on these issues.
39. Normally a public authority is required to respond to a request by either providing the information, or issuing a refusal notice, citing the relevant exemption, within 20 working days. However much of the information held by the TNA has been transferred to it by other public authorities and it is that public authority which best understands the sensitivity of the information. In this case the requested information was transferred to TNA by the Cabinet Office.

40. There are a number of special provisions in respect of public records offices such as TNA. Under section 66 of FOIA TNA is obliged to consult with the body which transferred the record to their keeping. The body which transferred the record is known as the 'responsible authority'. Furthermore where a qualified exemption has been applied to the information it is the responsible authority which must carry out the public interest test.
41. To accommodate this, the Freedom of Information (Time for Compliance with Request) Regulations 2004 extends the time in which TNA has to respond to 30 working days. By the end of those 30 days the TNA is obliged to either disclose the information or at least cite any exemption it is relying on to withhold it.
42. The request was received on 15 April 2014 and on 2 June 2014, 30 working days later, TNA advised the complainant that it was withholding at least some of the information under section 42 – legal professional privilege. It therefore met its obligation to issue, what was in effect, an initial refusal notice within the prescribed deadline.
43. Section 42 is subject to the public interest test. The Act recognises that full consideration of the public interest test can take time. That is why a public authority is only required to cite an exemption within the statutory time limit set, in this case, at 30 working days. If necessary a public authority, or in this case the responsible authority, may take additional time to carry out the public interest test. Section 15 of FOIA simply requires that the responsible authority informs TNA of the outcome of the test within such time as is reasonable in all the circumstances.
44. Although there is no statutory deadline for carrying out the public interest test the Commissioner has published guidance on this issue. Normally a public authority should take no more than an additional 20 working days to consider the public interest. Therefore as a general rule, where a qualified exemption is being considered, the Commissioner would expect TNA to be in a position to provide a final response within a total of 50 working days (the initial 30 days to allow consultation over the application of exemptions plus an additional 20 working days to consider a particularly difficult public interest test).
45. In this case the TNA and responsible authority took an additional 62 working days to consider the public interest. This means the complainant was not provided with a final response until 92 working days after he made his original request.
46. Although in this case the Commissioner is not in a position to say with certainty that the time taken is unreasonable, and therefore that TNA

breached section 15, he is concerned about the amount of time taken. TNA are advised to make every effort when dealing with future requests to adhere to the Commissioner's guidance and limit any extension to the time for compliance, required for consideration of the public interest, to 20 working days.

47. The complainant has also raised concerns over the length of time taken to carry out the internal review. He requested an internal review on the same day his request was finally refused, 28 August 2014. TNA provided him with the outcome of that review on 31 October 2014. Again there is no statutory time limit on the length of time a public authority may take to carry out an internal review. However the Commissioner has issued guidance that public authorities should aim to complete a review within 20 working days and, in any event, take no longer than 40 working days. On this occasion TNA took 46 working days to carry out the review.
48. When carrying future reviews TNA should make every effort to comply with the Commissioner's guidance.



## Right of appeal

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49. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

50. 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.
51. 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 .....**

**Graham Smith**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**