

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 May 2018

Public Authority: Attorney General's Office
Address: 5 - 8 The Sanctuary
London
SW1P 3JS

Decision (including any steps ordered)

1. The complainant submitted a request to the Attorney General's Office (AGO) for copies of correspondence between it and The Duke of Edinburgh about Stephen Ward or the Criminal Cases Review Commission's recent review of the Ward case. The AGO refused to confirm or deny whether it held any information falling within the scope of the request on the basis of the exemption contained at section 37(2) of FOIA, by virtue of section 37(1)(ac) which provides that information is exempt from disclosure if it relates to communications with, or on behalf, a member of the Royal Family. The Commissioner has concluded that section 37(2) is engaged and that in all the circumstances of the case the public interest favours maintaining the exemption.
2. No steps are required.

Request and response

3. The complainant submitted the following request to the AGO on 28 November 2017:

'Please note that I am only interested in information generated between 1 January 2013 and the present day.

Please note that the reference to His Royal Highness Prince Philip should include the Prince himself and his private office and any legal representative.

Please note that the reference to the Lord Chancellor should include The Attorney General and his/her private office.

My request relates to the late Stephen Ward, the osteopath at the centre of the Profumo Affair.

During the aforementioned period did HRH Prince Philip exchange correspondence and communication including emails with The Attorney General which in any way relates to Stephen Ward. This information will include but not be limited to exchanges about Mr Ward's arrest and or trial and or conviction and or subsequent death in 1963. If the answer is yes can you please provide copies of this correspondence and communication and emails. Please note that I would like to receive both sides of the correspondence and communications.

During the aforementioned period did HRH Prince Philip exchange correspondence and communications including emails with The Attorney General which in any way related to the Criminal Cases Review Commission's recent review of the Ward case and or the published outcome of that review. If the answer is yes can you please provide copies of this correspondence and communication. Please note that I would like to receive both sides of the correspondence and communications.

If relevant documentation has been subsequently destroyed can you please provide the relevant details. In the case of each destroyed document can you please provide a brief outline of its contents and the date on which it was destroyed. Can you please provide copies of all destroyed documents which continue to be held in another form.'

4. The AGO responded on 27 December 2017. It refused to confirm or deny whether it held any information falling within the scope of the request on the basis of section 37(2) of FOIA by virtue of section 37(1)(ac) which provides that information is exempt from disclosure if it relates to communications with, or on behalf, a member of the Royal Family. The AGO explained that it had concluded that the public interest favoured maintaining the exclusion to confirm or deny.
5. The complainant contacted the AGO on the same day and asked it to conduct an internal review of this decision.
6. The AGO informed him of the outcome of the internal review on 25 January 2018. The review upheld the application of the exemption contained at section 37(2) and therefore refused to confirm or deny whether it held any information falling within the scope of the request.

Scope of the case

7. The complainant contacted the Commissioner on 30 January 2018 to complain about the AGO's refusal to provide him with the information he had requested.
8. In relation to this complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: Section 1(1)(a) gives an applicant with the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant with the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.
9. As explained above, the AGO is seeking to rely on section 37(2) to refuse to confirm or deny whether it holds information falling within the scope of the request. Therefore this notice only considers whether the AGO is entitled, on the basis of these exemptions, to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.

Reasons for decision

Section 37 - Communications with the sovereign, other members of the Royal Family and the Royal Household

10. Section 37(2) of FOIA states that:

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. In the circumstances of this case the subsection within section 37(1) which has been cited by the AGO is 37(1)(ac). This section states that information is exempt if it relates to:

'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)'
12. To engage section 37(2) the requested information (if held) would therefore have to fall within the scope of one of the exemptions contained within section 37(1).

13. As the complainant has requested correspondence the Duke of Edinburgh may have exchanged with the AGO the Commissioner is satisfied that if the AGO held such information it would be clearly be exempt from disclosure on the basis of section 37(1)(ac) of FOIA. Section 37(2) is therefore engaged.

Public interest test

14. However, section 37(2) is a qualified exemption. Therefore, the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in confirming whether or not the requested information is held.

Public interest arguments in favour of confirming whether or not the requested information is held

15. The AGO acknowledged that there is a public interest in confirming whether or not it holds any correspondence from the Duke of Edinburgh and that there is also a public interest in the Stephen Ward case and the Profumo affair.
16. The complainant argued that there is a strong public interest in the disclosure of any material which may be held given the ongoing concern about Stephen Ward's conviction. He noted that the Criminal Cases Review Committee (CCRC) had recently ruled that his conviction would have probably been referred to the Court of Appeal if he was still alive.¹ The complainant also noted that the Duke of Edinburgh and Stephen Ward were associates in the early 1960s and that disclosure of any information falling within the scope of his request could clarify the nature of the relationship between the two.

Public interest arguments in maintaining the exclusion to confirm or deny whether the requested information is held

17. The AGO argued that complying with section 1(1)(a) of FOIA in respect of this request risked creating a chilling effect on full and frank correspondence between members of the Royal Family and the Attorney General. In addition, it emphasised the importance of avoiding the politicisation of the Royal Family. The AGO noted that the period of time covered by the complainant's request was recent. Furthermore, the AGO

¹ <https://ccrc.gov.uk/commission-statement-on-its-review-of-the-1963-conviction-of-dr-stephen-ward-deceased/>

noted that the CCRC investigation referred to by the complainant had also concluded the following:

'The CCRC has conducted a thorough investigation of these two submissions, along with a number of other matters raised by Dr Ward's representatives, and has followed a number of other lines of enquiry of its own design.

The CCRC has wide-ranging statutory powers to obtain whatever material we think we need to review a case. During the investigations of this case the CCRC has had unimpeded access to material at all levels of the government and the criminal justice system. We have considered a wide range of sources including restricted case files retained by The National Archive, the Metropolitan Police, the Director of Public Prosecutions and the Cabinet Office and Lord Denning's Report on the Profumo Affair and files relating to it.

In relation to the submissions that the trial was politically motivated and therefore an abuse of process, and that the Court of Appeal concealed relevant information, the CCRC has concluded that, in spite of having gone to considerable lengths to access all surviving relevant material, the available records provide no evidence to support those claims.'

Balance of the public interest arguments

18. The Commissioner agrees that that if the AGO confirmed whether or not it held information falling within the scope of this request this would contribute towards the transparency and accountability of public bodies. She also accepts that there is continued public interest in the case of Stephen Ward, and indeed given some of the findings of the CCRC investigation - namely that the subsequent conviction for perjury of the prosecution witness Christine Keeler, and the possibility that contemporaneous media coverage of the case could have prejudiced Dr Ward's trial may have provided grounds to refer his case for appeal - arguably adds further to this interest.
19. However, the Commissioner also agrees with the AGO that there is strong public interest in ensuring that the Royal Family can exchange free and frank correspondence with the Attorney General. Confirmation as to whether or not the AGO holds the requested information would reveal whether the Duke of Edinburgh had discussed a specific issue with the Attorney General over a particular time period. In the Commissioner's view such a confirmation would represent a significant risk of a chilling effect on any future correspondence. Furthermore, the Commissioner considers that this argument attracts notable further weight in light of the fact that the correspondence the complainant

requested is recent in nature, albeit concerning as it does the events of the early 1960s. The Commissioner also agrees that there is a significant public interest in ensuring that the Royal Family is not politicised and in her view revealing the topics and subjects on which they exchanged (or may have exchanged) correspondence with the Attorney General presents a real risk of this occurring. The Commissioner agrees with the AGO that it is relevant to note that the CCRC investigation concluded that there was no evidence to support the two principal claims of Dr Ward's representatives, ie that a) Dr Ward's trial was an abuse of process because it was instigated by the government and politically motivated, and b) the Court of Appeal deliberately failed to disclose information that could have assisted Dr Ward at trial. In the Commissioner's view this arguably reduces the public interest in the AGO confirming whether or not it holds information falling within the scope of the request.

20. For these reasons, the Commissioner is satisfied that the public interest in maintaining the exemption contained at section 37(2) outweighs the public interest in the AGO confirming whether or not the requested information is held.

Right of appeal

21. 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

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

22. 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.
23. 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
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