Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 February 2023

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

Decision (including any steps ordered)

1. The complainant has requested access to death duty records relating to four members of the Royal Family. The above public authority ("the public authority") relied on section 31 of FOIA to withhold the information.

2. The Commissioner's decision is section 31 of FOIA is engaged and that the balance of the public interest favours maintaining this exemption. However, the public authority breached section 17 of FOIA in responding to the request as it failed to complete its public interest considerations within a reasonable period of time.

3. The Commissioner does not require further steps.

Background

4. In England and Wales, the Senior Courts Act 1981 requires that wills should, in normal circumstances, be open to inspection and obtainable on request. However, the Non-Contentious Probate Rules (1987) allow for a district judge or registrar to prevent a will from being published if it would be "undesirable or inappropriate."

5. The practice of sealing royal wills began in 1910 when the then President of the Probate, Admiralty and Divorce Division of the High Court determined that the will of the recently-deceased Prince Francis of Teck (younger brother of the then-Queen Consort, Mary) should be sealed indefinitely – allegedly in order to avoid a scandal.

6. Since then it has become custom and practice for the executors of the estate of a recently-deceased royal to make an application for the will to be sealed. At present, applications are usually only made in respect of consorts or children of either current or former Sovereigns, or in respect of those who were, at the time of their death, first or second in line to the throne (and their children) – although the practice has previously been used by more minor members of the royal family.

7. As of January 2021, the President of the Family Division of the High Court was the custodian of a safe containing some 33 royal wills, all of which had been ordered to be sealed indefinitely.

8. In 2021, the Rt Hon Sir Andrew MacFarlane, President of the Family Division considered an application from the executors of the will of the late Prince Philip to have that will (and the value of the estate) sealed indefinitely. Sir Andrew granted a sealing order, but went on to discuss the issue of royal wills more generally. Whilst conscious of the need to protect the "dignity of the Sovereign", he went on to note that:

> "As each year passes, the importance of the factors justifying withholding publication will diminish. Any historical or biographical interest in such wills will, however, remain. At present Royal wills that have been the subject of orders made by my predecessors are sealed without any time limit. Where the default position for all other wills is that they are to be open, it must be questionable whether sealing for an indefinite period is either necessary or proportionate."

9. Sir Andrew's judgement states that:

> "I therefore propose to order that, where the initial period during which a Royal will has been sealed expires, there is then to be a process by which it is opened and considered in private by the individual office holders that I have referred to before the court is then invited to determine whether the will should either be made public at that time or re-sealed for a further set period. I also agree with the suggestion made by the Attorney General that the physical process of un-sealing should be conducted by a professional archivist from the Royal Archives (or such other professional as the Keeper of the Royal Archives appoints) to ensure that the document and its seals are properly preserved.
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> "It follows that I will direct that the orders that have previously been made for the sealing of Royal wills are to be taken to be varied by the order of this court so that on the expiration of the period of 90 years following the date upon which probate for any such will was granted, the will is to be opened in private, at the direction of the then President of the Family Division, so that its content may be inspected

by the Sovereign's Private Solicitor, the Keeper of the Royal Archives, the Attorney General, and by the any of the deceased's personal representatives who may be available. The physical process of un-sealing is to be conducted by a professional archivist from the Royal Archives (or such other professional as the Keeper of the Royal Archives appoints) to ensure that the document and its seals are properly preserved."[1]

Request and response

10. On 26 November and 29 November 2021 respectively, the complainant wrote to the public authority to request access to files transferred from the then-Inland Revenue (now HMRC) concerning the death duties of the following individuals:

    - HRH Princess Helen of Waldeck and Pyrmont (also Duchess of Albany)
    - Alastair Arthur Windsor, 2nd Duke of Connaught and Strathearn and Earl of Macduff
    - HRH Princess Victoria Alexandra Olga Mary of Great Britain.
    - HRH Alexandra Victoria Alberta Edwina Louise, Princess Arthur of Connaught and Duchess of Fife.

11. The public authority responded several months later. It relied upon section 31 of FOIA to withhold the information – a position it upheld at internal review.

Reasons for decision

12. A public authority can rely on section 31(1)(c) of FOIA in order to withhold information whose disclosure would prejudice the administration of justice. This might be because disclosure would affect ongoing proceedings or because it would affect the system of justice more generally.

[1] https://www.judiciary.uk/wp-content/uploads/2021/11/The-Will-of-His-late-Royal-Highness-The-Prince-Philip-Duke-of-Edinburgh.pdf

13. The withheld information in question consists of files transferred from the then-Inland Revenue, regarding the estates of the individuals in question. Three of the files contain copies of wills that have been sealed, as well as further information which relates to the contents of those wills. The final file does not contain a copy of a sealed will itself, but does contain what appears to be a note of the contents of that will.

14. The public authority argued that there were three reasons why disclosure would prejudice the administration of justice:

- "First, disclosure would undermine the process for the private un-sealing and review of each of the sealed Royal wills ordered by the President of the Family Division in September 2021. Such a release would prevent the Sovereign's Private Solicitor and the Attorney General from being able to make submissions as to whether the relevant will should or should not be made public. This undermines the entire purpose of these aspects of the judgment, which recognise that there may be some circumstances where even historic sealed Royal wills may not be appropriate for unsealing. This would – to use the wording in the ICO's guidance – interfere with the execution of the President of the Family Division's order.

- "Second, disclosure would undermine the original sealing orders by putting in the public domain information which was ordered to not be available for public inspection. Disclosure would undermine the purpose of the sealing of any will, which is to prevent it from being accessed by members of the public. TNA's copy would otherwise become the 'weak link' which completely undermines the effect of a court order and the process leading up to it. The President of the Family Division's judgment describes the reasons why it is appropriate for Royals wills to be kept outside of the public domain.

- "Finally, at the time of the requests, matters were live in two ways. First and most importantly, the President of the Family Division's judgment was the subject of an appeal by The Guardian in the Court of Appeal and was sub judice. It would be inappropriate for TNA to have disclosed information which is the subject of litigation and an order being challenged in the appellate courts as disclosure would undermine the fair process of those appeals and, in turn, the administration of justice. Second and by way of additional context, the detailed process for the private un-sealing and review of each of the Royal wills which are over 90 years old was (and is at the time of this note in January 2023) still being finalised and agreed, with the oversight and input of the President of the Family Division, the Attorney General and the Sovereign's Private Solicitor."

15. Having considered the matter, the Commissioner is satisfied that disclosure would prejudice the administration of justice as it would create a "back door" by which to access material that the courts have reserved for their own consideration.

16. Because the order issued by Sir Andrew referred to the wills as documents, rather than the information contained within them, the Commissioner is not satisfied that disclosing the information that has been withheld would be obviously contemptuous of Sir Andrew's order – but it would clearly circumvent that order.

17. Firstly, disclosure would undermine the process of sealing royal wills in the first place. Both Sir Andrew's judgement and the judgement of the Court of Appeal recognised that there is a strong public interest in preserving the dignity of the sovereign – and previous orders were granted on that basis.

18. It is not clear whether Sir Andrew's predecessors would have been aware that further copies of the wills were in existence[2], but a person's tax records are usually regarded as confidential and, in three out of the four cases, probate would have been granted prior to passage of the 1958 Public Records Act – which created a general right to inspect public records. Therefore at the time each will was sealed, it could be said that sealing the copy of the will provided to the courts was sufficient to prevent the contents of that will from entering the public domain – therefore there was no need to extend any sealing order to cover any other records. However, those records are now with the public authority and are no longer subject to an enduring expectation of confidentiality.

19. Of the three individuals whose records have been requested, only the Duke of Connaught and Strathearn is not listed as having had his will sealed and deposited in the safe of the President of the Family Division. However the Duke died only five years after his father (Prince Arthur of Connaught) – whose will has been sealed.[3] The Commissioner is therefore of the view that the contents of the file relating to the Duke are highly likely to reflect the contents of a will which has been sealed.

[2] Sir Andrew has now been made aware of this issue.

[3] The complete list of sealed wills can be found at: https://www.judiciary.uk/wp-content/uploads/2021/11/Annex-1-to-judgment-NOV-2021.pdf

20. The Commissioner is thus satisfied that the contents of the files cannot be disclosed without revealing at least some of the contents of wills that the court has said must be sealed.

21. If a person can simply circumvent a court's order, sealing a will, by requesting tax records which contain the will, either in full or in part, that undermines the ability of the court to make and enforce decisions. That could potentially lead to unjust and unfair outcomes in which a court is unable to grant a party meaningful relief.

22. Secondly (and, perhaps, more importantly), disclosure would undermine Sir Andrew's order to the extent that it established (or, at least, outlined – the public authority has indicated that the final details are still being determined) a process by which royal wills can be unsealed.

23. In his judgement, Sir Andrew recognised that protecting the Sovereign's dignity was important, but to expect every royal will to be sealed indefinitely was no longer a proportionate means of achieving this end. He set out a process by which a will would be unsealed 90 years after the grant of probate. The will would then be inspected by representatives of the Royal household and by the Attorney General, who would then recommend to the court whether the will should or should not be re-sealed.

24. However, the key part of this process is that the final decision on re-sealing rests with the court – which can balance the relevant factors and determine whether a particular will should be made available to the public or whether there are particular circumstances that would justify a re-sealing order. Disclosing the withheld information would render this process redundant and, it would in effect remove, from the courts' jurisdiction, matters which they had reserved to themselves. That is prejudicial to the administration of justice as it prevents the courts from giving effect to an order they might have made.

25. Finally, on the proceedings in relation to Prince Phillip's will, the Commissioner notes that Guardian News Media (GNM) was granted permission to appeal on the basis that it should not have been excluded from proceedings relating to Prince Phillip's will. Whilst disclosure does not directly affect Prince Phillip's will, the Commissioner notes that the relief GNM expressly sought from the Court of Appeal was that:

> "the orders in their Notice of Appeal that the PFD's order should be set aside, and that the matter should be remitted for fresh determination with GNM present as an intervenor. GNM wanted to make submissions on four substantive issues: (i) whether the Will should be sealed, (ii) the order that no copy of the value of Prince Philip's estate should be made or kept on the court file, (iii) the process to be followed in the

case of an application to unseal the Will, **(iv) the overall process to be followed in respect of the wills of members of the Royal Family**." [emphasis added]

26. The Commissioner is therefore of the view that disclosure would have undermined the administration of justice in a third way: because it would have granted part of the relief GNM was, at the point the request was made, currently seeking from the Court of Appeal – and which that Court subsequently decided GNM was not entitled to receive. Disclosure would therefore have further undermined matters before the courts.

27. The Commissioner is therefore satisfied that the exemption is engaged.

Public interest test

28. The Commissioner recognises, as did the courts, that whilst public curiosity in the withheld information is considerable, the actual public interest is much more modest.

29. In the Commissioner's view, the public interest clearly favours maintaining the exemption because doing so allows the courts to consider matters appropriately and issue judgements based on evidence.

30. As a result of Sir Andrew's judgement, there is now a possibility that royal wills eventually become public. However, Sir Andrew recognised that there is a balance to be struck between transparency and protecting the dignity of the Sovereign. Where that balance should be struck in each case is a matter for a court decide, having had the opportunity to consider evidence and submissions.

31. There is a strong public interest in allowing the courts to decide such matters and, once they reach a decision, allowing for that decision to be enforced.

32. Disclosure in this case would undermine the courts' ability to make and enforce decisions and that is not in the public interest.

Procedural Matters

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33. The Commissioner considers that the public authority breached section 17 of FOIA as it took an unreasonable amount of time to consider where the balance of the public interest lay in this case.

Right of appeal

34. 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

35. 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.

36. 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 .....

Roger Cawthorne
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