

**Section 37(1)(a) was amended on 19 January 2011.**

**The amended exemption states: 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)**

**Communications with the Monarch, the Heir to the Throne or second in line to the Throne or those acting on their behalf is now subject to an absolute exemption. All the rest remain qualified.**

**Departments should be aware that any requests for information which fall to be considered under section 37(1) (a), received on or after 19 January 2011 by English and Welsh public authorities should be considered under the amended exemption. The changes do not apply to Northern Irish public authorities.**

**Requests received before this date must continue to be considered under the previous exemption in line with the previous guidance which is attached below. Revised guidance on the amended exemption will be published shortly.**

## **Section 37 - Communications with Her Majesty, with other Members of the Royal Household, and the Conferring by the Crown of any Honour or Dignity**

Section 37 applies to two categories of information:

1. Information relating to communications with Her Majesty, other members of the Royal Family or the Royal Household; and
2. Information relating to the conferring by the Crown of any honour or dignity.

Key points:

- It is a fundamental constitutional principle that communications between the Queen and her Ministers are essentially confidential in nature: in most situations, the public interest in disclosure is likely only exceptionally to outweigh the public interest in maintaining this aspect of the exemption;
- In respect of both parts of this exemption, public authorities should be alive to the need to consult relevant departments or private offices;
- Section 37 is subject to a public interest balance.

### **Introduction to the exemption**

Stating the exemption

Section 37 of the Freedom of Information Act provides that:

3. Information is exempt information if it relates to -
  - (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household, or
  - (b) the conferring by the Crown of any honour or dignity.
4. 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).

Section 37 falls into two quite distinct parts:

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| <ol style="list-style-type: none"><li>1. information relating to communications with Her Majesty with other members of the Royal Family or with the Royal Household, and</li><li>2. information relating to the conferring by the Crown of any honour or dignity</li></ol> |
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For convenience these are discussed in two separate parts of this section

### **Part 1**

#### **Chapter 01: The exemption under section 37 - General Points**

**1.1** The FOI Act does not apply directly to the Royal Household, as the Royal Household is not included in the Act's definition of a public authority (Section 3 and Schedule 1). The exemption is about information which is in the hands of public authorities who have been in communication with Her Majesty, other members of the Royal Family or the Royal Household.

**1.2** A list of current and recent members of the Royal Family appears as Annex A to this chapter and includes those individuals who hold or are entitled to hold the title of Majesty or Royal Highness, along with their spouses. The list will change over time, especially through marriage or birth. If an authority is in doubt as to whether someone should be included in the list (for example, not all those entitled to the title of Royal Highness may choose to use it) the Private Secretary to The Queen should be consulted.

**1.2** The Royal Household is not defined in the Act. It should generally be taken to include those individuals who are authorised to act on behalf of a member of the Royal Family (eg their employees, servants or agents) in fulfilling of public, official and constitutional roles. It will clearly include members of the Private Offices of members of the Royal Family. Contractors who supply goods and services to the Royal Household (such as holders of royal warrants) do not form part of the Royal Household. In cases of doubt, Departments should consult the private office of the member of the Royal Family to determine the precise role performed by the individual concerned when he or she was in communication with the Department.

**1.4** Certain members of the government Whips' offices in both Houses of Parliament are formally members of the Royal Household. (Senior government Whips in the Commons are designated the Treasurer and Comptroller of the Household; the Vice Chamberlain also serves as a Senior government Whip; Junior government Whips in the Lords are Lords and Baronesses in Waiting) Their activities as government Whips are not covered by this exemption.

## **Chapter 02: What constitutes information of the type covered by this exemption?**

**2.1** Section 37(1)(a) is not concerned with all information relating to Her Majesty, other Members of the Royal Family, or the Royal Household. Rather it is concerned more narrowly with information relating to communications with Her Majesty, other Members of the Royal Family, or the Royal Household. The sort of information which may be found on departmental files which will needed to be considered under this exemption will include:

- direct communication between the Sovereign or other members of the Royal Family and government Ministers;
- correspondence between the Royal Households and either Ministers or officials;
- copies of correspondence between the Sovereign, other members of the Royal Family or their Households and third parties;
- notes, records or agendas of Ministerial audiences (that is private meetings between a member of the Royal Family and one or more Ministers, although the term audience may not appear in the record itself);
- material detailing possible contents of correspondence or discussion with the Sovereign, other Members of the Royal Family or their Households;
- material which has been, or will be, shown to Her Majesty for approval;
- material concerning the drafting of broadcast statements, speeches and messages sent by or on behalf of the Sovereign or other Members of the Royal Family.

**2.2** Information held by public authorities relating to Her Majesty, other Members of the Royal Family or the Royal Household, but not relating narrowly to communications with Her Majesty, other Members of the Royal Family or the Royal Household, may cover a wide range of subjects. Such information is not exempt information under section 37(1)(a), but it may be exempt under other sections of the Act. For instance:

- Information relating to communications with, and between, public authorities concerning Royal visits may be exempt under section 31 (law enforcement) or section 38 (health and safety).
- Personal information relating to the Sovereign and members of the Royal Family, including their private finances and property and future funeral arrangements, and in particular functions carried out in a private capacity, may be exempt under section 40 (personal information).

**2.3** Other exemptions which may be relevant to information relating to Her Majesty, other Members of the Royal Family or the Royal Household are discussed in chapter 4 at paragraph 4.1 - 4.3.

### **Chapter 03: When to use the exemption under section 37**

**3.1** Section 37 is not an absolute exemption. In considering whether or not to use this exemption Departments should consider whether or not the public interest in withholding the information outweighs the public interest in disclosing it. Only if the public interest in withholding is the greater should disclosure be refused. However, for the reasons set out below, it may be in only the most exceptional circumstances that the balance of the public interest comes down in favour of disclosing information falling within the terms of section 37(1).

**3.2** Where subsection (2) applies, there is no obligation to confirm or deny whether or not the information requested is held.

#### **Public Interest Test**

**3.3** Having reached a judgement as to whether or not particular information falls under this exemption Departments will need a clear view of the public interest considerations that must be weighed in considering whether or not the information requested should be released. The balance of the public interest must be based on a proper examination of all the circumstances of the case. A number of relevant considerations are set out below. They deal first with communications with the Sovereign, then with those with the heir to the throne, and then with those with other members of the Royal Family.

It is a fundamental constitutional principle that communications between the Queen and her Ministers and other public bodies are essentially confidential in nature and there is therefore a fundamental public interest in withholding information relating to such communications. That is so because the Sovereign has the right and the duty to counsel, encourage and warn her government. She is thus entitled to have opinions on government policy and to express them to her ministers. She is, however, constitutionally bound to accept and act on the advice of her ministers. Any communications which have preceded the giving of that advice remain confidential, because of the need to maintain the political neutrality of the Queen in public affairs (its

reality and appearance); this itself is fundamental to the UK system of constitutional monarchy;

**3.4** There is also a fundamental need to avoid prejudicing the Queen's diplomatic activities, for example in:

- visits as Head of State abroad
- receiving visiting Heads of State
- Her Majesty's role as Head of the Commonwealth
- communications regarding the government of other countries
- where the Queen is Head of State

And the need to maintain and protect the Queen's personal safety in the planning and carrying out of her public duties is also of paramount importance.

**3.5** Unlike with some other exemptions, it is unlikely that the sensitivity of much of the information covered by this exemption will diminish with time. The Sovereign remains in office for life. It will remain a matter of constitutional sensitivity that the Queen expressed particular views on a policy or a personality long after the policy has been implemented (and may even have been superseded), or the personality has ceased to hold the relevant office. Consequently, as a general rule, communications between the Sovereign and Government Ministers, including those between their respective Private Secretaries, which refer to such matters, and where such views are not already in the public domain, are likely to remain sensitive during the lifetime of the Sovereign and possibly even after the death of the Sovereign.

**3.6** The Queen is in a unique position in that it is particularly difficult to disentangle her public and private personas. Unlike any other figure in public life, except the heir to the throne, she was born to her position in public life and has no choice but to accept the resulting media interest. It is important to remember that 'what the public is interested in' is not the same as 'the public interest' as used in the Act. As noted above personal information relating to the Queen, particularly in relation to her private affairs, may fall to be considered under section 40, in accordance with the Data Protection Act.

**3.7** Communications between the heir to the throne and Government Ministers, including those between their respective private secretaries, where such views are not already in the public domain are, like those of the Sovereign, likely to remain sensitive because they could, at a later date, be taken to show a lack of political neutrality. It is therefore likely that the public interest test in respect of such communications will continue to be determined in favour of withholding the information. This is all the more the case because there are two 'end dates' which may determine the sensitivity of the information; both the date at which it was created and the proximity of any disclosure to the eventual accession to the throne.

**3.8** Other members of the Royal Family are not in the same constitutional position as the Sovereign and the heir to the throne, but the factors set out above in relation to the need to maintain the neutrality of the Sovereign, the need not to undermine diplomatic and goodwill work and the need to preserve personal safety are still relevant to a decision on whether disclosure would be in the public interest. The other members of the Royal Family may also perform public roles whose performance is dependent upon the maintenance of the confidentiality of their communications with public authorities.

(Provisions on the protection of personal information, under section 40 will apply to all members of the Royal Family as they do to all citizens.)

Openness in government can increase public trust and engagement. The FOI Act requires the public interest to be balanced before a final decision can be taken about whether or not to disclose. But for the reasons indicated above, it is likely to be in exceptional circumstances only that the public interest will come down in favour of disclosure of this information to the extent that it is to any degree confidential or private.

## **Consultation**

**3.9** When in receipt of a request for disclosure of information which has been contained in a communication with the Royal Family or Royal Household, Departments should always consult with the relevant private office before making a decision on disclosure. The Royal Household will be nominating a senior individual as the point of contact.

## **Duration of the exemption**

**3.10** Under the provisions of section 62, a record becomes a historical record 30 years after it was created. Under the provisions of section 63(1), the exemption in section 37(1)(a) ceases to apply to historical records.

**3.11** However, as noted above, the sensitivity of information about the Sovereign's personal views on policy issues or personalities may last for the lifetime of the Sovereign and even beyond. There are some exemptions which do not expire when the records in which the information is contained is more than 30 years old. In these circumstances the following exemptions may be relevant:

- **Section 23:** Information supplied by or relating to bodies dealing with security matters,
- **Section 24:** national security,
- **Section 26:** defence,
- **Section 27:** international relations,
- **Section 31:** law enforcement,
- **Section 37 (1)(b):** honours,
- **Section 38:** health and safety;
- **Section 39:** environmental information;
- **Section 40:** personal information; and
- **Section 41:** information provided in confidence.

It should be particularly noted in this context that both section 35 (formulation of government policy) and section 36 (effective conduct of public affairs) also expire 30 years after the date of the record in which it is held.

## **Chapter 04: Interrelationship with other exemptions**

**4.1** Section 37(1)(a) refers to information which is exempt if it relates to communications with certain individuals. Any exemption which works by reference to the content of the information may also apply to information contained in a communication with the Royal Family and Royal Household. For example, the record of a conversation between the Prime Minister and the Sovereign may be covered by the 'formulation and development

of government policy' provisions of section 35(1)(a). (It should be noted, however, that it will not be covered by the provisions of section 35(1)(b) on Ministerial communications, since this refers only to communications between ministers). Section 28 (relations within the United Kingdom), and section 36 (prejudice to the effective conduct of public affairs) may also be relevant.

**4.2** The exemption at Section 41(1) exempts information if its disclosure would constitute a breach of confidence actionable in the courts. The Sovereign is in a unique constitutional position and it is in recognition of the fact that the confidentiality of such communications is of constitutional, rather than merely personal, significance that section 37 makes special provision for it. Whilst section 41(1) might apply to information given in confidence by members of the Royal Household it may not apply to information supplied in confidence by the Sovereign to government departments, due to the Sovereign's constitutional position.

**4.3** Personal information relating to Her Majesty and other members of the Royal Family is likely to be exempt under section 40. That means that questions about its disclosure will be governed by the Data Protection Act. However, that Act relates only to personal information relating to living individuals. In some circumstances the public interest in preserving the dignity and standing of the Monarchy might be endangered by the release of personal information relating to recently deceased members of the Royal Family. In these circumstances providing the information related to communications with Her Majesty, other members of the Royal Family, or with the Royal Household, and providing it was contained in records less than 30 years old the information might be exempt under section 37(1)(a). Information relating to the recently deceased the release of which would breach the rights to family life of the relatives of the deceased may be exempt under section 44.

## **Part 2**

### **Chapter 01: General points**

**1.1** This exemption relates only to the conferring by the Crown of an honour or dignity. Neither 'honour' nor 'dignity' is defined in the legislation, but examples are considered below. Conferring of an honour or dignity by another body (eg the decision by a local government body to confer the freedom of a borough on a distinguished citizen or of an academic body to confer an honorary degree) will not be covered by this section, even though both types of award would loosely be described as honours.

### **Chapter 02: What constitutes information of the type covered by this exemption?**

**2.1** The exemption at section 37(1)(b) covers all information relating to:

- the award of honours in the various Orders of Knighthood (the Order of the Garter, the Order of the Thistle, the Order of Merit, the Royal Victorian Order, the Order of the Bath, the Order of St Michael and St George, the Companions of Honour, the Order of the British Empire and the Imperial Service Order);
- the appointment of Knights Bachelor;
- military medals and decorations (eg the Victoria Cross, the Distinguished Service Order, the General Service Medal, the Operational Service Medal, etc);
- awards made for gallantry (eg the George Cross, the George Medal, The Queen's Gallantry Medal, etc);

- other medals and decorations conferred by The Queen (eg The Queen's Police Medal, The Queen's Fire Service Medal)
- other awards granted by The Queen (eg The Queen's Award for Enterprise, The Queen's Anniversary Prizes for Higher and Further Education, The Queen's Award for Voluntary Service);
- foreign or international awards where The Queen's permission is required or sought to accept and wear them;
- creation of life peers;
- creation of hereditary titles;
- appointments as Lords Lieutenant and Vice Lords Lieutenant;
- appointments as Governor-Generals, Governors and Lieutenant-Governors;
- appointments to the Privy Council.

**2.2** Most appointments to offices are not covered by this exemption. However some Crown appointments (both secular and ecclesiastical) will come within the category of "honour or dignity" and so will come within this section. For example, some senior Church appointments (the appointment of archbishops, diocesan bishops, suffragan bishops, deans of cathedrals, deans and canons of the two Royal Peculiars and the First and Second Church Estates Commissioners) are dignities and so will fall within this section.

**2.3** Judicial appointments are not covered by section 37(1)(b) but information relating to them might be covered by section 31(1)(c) (or section 40). Thus whereas appointments to the Privy Council are covered by section 37(1)(b) appointments to the Judicial Committee of the Privy Council is not covered by section 37(1)(b), but might be covered by section 31(1)(c).

**2.4** Appointment to Queen's Counsel is not covered by section 37(1)(b).

**2.5** The information to which this exemption relates may take the form of:

- information about individual candidates for or recipients of awards, which may be in the form of citations, interdepartmental correspondence, committee papers and notes of meetings, nomination forms, references and associated correspondence etc (this information is very likely to be personal information within the terms of section 40);
- information about the honours or dignities process, for example the structure of the honours assessment committees, the working of the House of Lords Appointment Commission, the procedures under which honours may be forfeited etc; and
- information about honours or dignities policy, for example the discussion leading up to and the decisions taken about the qualifying conditions for the award of military medals, papers dealing with the honours reviews which take place every five years, proposals for possible new awards etc.

### **Chapter 03: When to use the exemption under section 37**

**3.1** Section 37 is not an absolute exemption. Only if the public interest in withholding is the greater should you refuse to disclose it.

## **The duty to confirm or deny**

Where subsection (2) applies, there is no obligation to confirm or deny whether or not the public body holds the information requested. This part of the exemption may be particularly relevant in the case of requests for information as to whether particular individuals are being or have been considered for particular honours and dignities.

## **The Public Interest Test**

**3.2** In reaching a decision on the public interest, the factors which may need to be weighed might include:

- the need to protect the personal details of candidates, most of whom will not know that they are under consideration (section 40 will need to be considered in such circumstances of course);
- the need to ensure that those asked for information about particular candidates can give it honestly. This information will be given in confidence, and those supplying it need to be satisfied that confidence is respected, so that decisions about honours and dignities are taken on the basis of full information about the person concerned and their achievements (section 41 may well be relevant in these circumstances);
- the need to ensure that those who sit on honours or dignities assessment committees can carry out their work free from pressure from or on behalf of potential or actual candidates;
- the need for public confidence in the integrity of the honours and dignities system. If honours and dignities are to be treated with respect, the public need to be confident that the process for awarding them is properly objective and comprehensive;
- the public interest in ensuring that the award of honours and dignities is accountable and transparent.

**3.3** The public interest in withholding information may be unlikely to outweigh the public interest in disclosure when the request is for information about the honours or dignities process, provided that disclosure would not involve the inappropriate disclosure of information about individual honours candidates or recipients, or about those directly involved in the honours or dignities process, for example as members of assessment committees

**3.4** Members of the House of Lords Appointments Commission were appointed on the understanding that that their names would be available publicly because of the need to reinforce the transparent nature of the appointment of working peers.

**3.5** The most finely balanced issues are likely to arise on requests for information about honours or dignities policy. In this particular case, however, the exemptions under sections 35 and 36 may need to be considered.

**3.6** Senior Church of England appointments are unique due to the nature of the Church of England as the established church. The appointments all involve correspondence between the Crown appointments office in No.10, the Prime Minister and the Queen and information regarding preferred and other candidates will often be extremely sensitive, as will material used in the appointment process and the nature of the discussions regarding the appointments. Disclosure of this sensitive information about

the appointments would subject those involved in the process to considerable pressure from or on behalf of individuals or from pressure groups within and outside the Church. Archbishops and three senior diocesan bishops have an automatic place to sit in the House of Lords on their appointment and 21 of the remaining diocesan bishops have a seat in the House of Lords at any one time, according to their seniority in terms of length of service. The pressures which would arise in relation to these appointments are therefore likely to be particularly great. The effect might be to constrain the appointment process which would not be in the public interest. It could be detrimental to the relationship between the Church and the state as a whole in that it could undermine the balance that has been struck between them. The public interest against disclosure of such information is therefore particularly strong. Several exemptions in addition to that under s.37(1)(b) may well therefore apply, including those under sections 35, 37(1)(a) and 40.

## Consultation

**3.7** In the first instance Departments should consult, where appropriate via the official responsible for honours and dignities policy internally. This will ensure consistency of responses. In most cases this will be the Ceremonial Secretariat in the Cabinet Office, or The Central Chancery. However, a number of other departments take the lead in relation to particular classes of honour or dignity:

- where the request relates to awards made (or not made) in the Foreign Secretary's or the Defence Secretary's Honours List, the Foreign and Commonwealth Office or the Ministry of Defence respectively should be consulted;
- the Ministry of Defence should be consulted about requests relating to military medals and decorations;
- the Department for Trade and Industry should be consulted about The Queen's Awards for Enterprise;
- the Department for Education and Skills should be consulted about The Queen's Anniversary Prizes;
- the Home Office for the Queen's Awards for Voluntary Service and the Queen's Police Medal
- the Foreign and Commonwealth Office should be consulted about foreign or international awards;
- the House of Lords Appointments Commission should be consulted about appointments as working peers recommended by the Commission;
- No 10 should be consulted about anything relating to appointments to the Privy Council (and will consult the Privy Council Office as required); and
- No 10 should be consulted about anything relating to appointment of Baronets, Lords Lieutenant, Vice Lords Lieutenant, and those Peers who are appointed otherwise than by recommendation of the House of Lords Appointments Commission.
- No 10 should be consulted about anything relating to senior Church appointments.

## **Duration of the exemption**

**3.8** Under section 63(3), information relating to honours or dignities remains exempt for 60 years after it was created, subject to the public interest. The public interest in withholding information relating to the conferring of individual honours and dignities is likely to diminish with the passage of time, and in considering each case regard should be had to the age of the information requested. Personal information is however subject to the Data Protection Act regime, and not to the FOI Act regime.

## **Chapter 04: Interrelationship with other exemptions**

**4.1** The most obvious exemption which may be relevant is section 40 (personal information). Section 41 (information provided in confidence) may also be relevant. There may be some information relating to the conferring of honours and dignities by the Crown to which sections 23 and 24 (security), section 27 (international relations), section 35 (formulation of government policy), and section 36 (effective conduct of public affairs) are relevant. The exemptions under sections 35 and 36 expire when the records in which the information in question is held are over 30 years old.

## **Annex A: Members of the Royal Family since 1 January 1975 (as at November 2006)**

### **Those entitled to use the title Majesty or Royal Highness and their spouses (since 1st January 1975)**

- THE QUEEN
- The Prince Philip, Duke of Edinburgh
- Queen Elizabeth The Queen Mother
- The Prince of Wales
- The Princess of Wales
- The Duchess of Cornwall
- Prince William of Wales
- Prince Henry of Wales
- The Prince Andrew
  - later The Duke of York
- The Duchess of York
- Princess Beatrice of York
- Princess Eugenie of York
- The Prince Edward
  - later The Earl of Wessex
- The Countess of Wessex
- Lady Louise Windsor
- The Princess Anne, Mrs Mark Phillips
  - later The Princess Royal
- Captain Mark Phillips
- Rear-Admiral Timothy Laurence
- Princess Margaret, Countess of Snowdon
- The Earl of Snowdon
- Princess Alice, Duchess of Gloucester
- The Duke of Gloucester
- The Duchess of Gloucester

- The Duke of Kent
- The Duchess of Kent
- Prince Michael of Kent
- Princess Michael of Kent
- Princess Alexandra, the Hon. Lady Ogilvy
- The Rt. Hon. Sir Angus Ogilvy
- Princess Alice, Countess of Athlone