

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 September 2017

Public Authority: Ministry of Justice

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information held by the Ministry of Justice (MoJ) relating to the decision to give Justices of the Supreme Court the courtesy title of Lord/Lady. The MoJ confirmed it held some relevant information but withheld it on the basis of section 37(1) of the FOIA (Communications with Her Majesty, etc. and honours).
2. The Commissioner's decision is that the section 37(1)(a) exemption (communications with the Sovereign) is engaged in respect of the withheld information. She requires no steps to be taken as a result of this decision.

Request and response

3. On 22 January 2017, the complainant wrote to the MoJ and requested information in the following terms:

"Please provide me with any correspondence, memorandums, or other materials documenting the decision to give Justices of the Supreme Court the courtesy title of 'Lord/Lady' in December 2010. I would be particularly interested in any relevant correspondence between the Ministry of Justice and:

1. *the Supreme Court? or*
2. *the College of Arms".*

4. The MoJ responded on 15 February 2017. It refused to provide the requested information, citing section 37(b) [sic] of the FOIA.

5. Following an internal review the MoJ wrote to the complainant on 16 March 2017 maintaining its original position that section 37(b) [sic] applied.

Scope of the case

6. The complainant contacted the Commissioner on 17 March 2017 to complain about the way his request for information had been handled.
7. He argued that the issue under consideration – the decision to give justices courtesy titles - was controversial. He disputed the MoJ's application of section 37(1)(b) on the basis that the MoJ misapplied the public interest test when it concluded that the public interest favoured withholding the requested information.
8. During the course of the Commissioner's investigation, the MoJ revisited its handling of the request. Having done so, it clarified the subsections of section 37 of the FOIA that it considers apply in this case. In correspondence with the complainant, the MoJ told him that, on review, it had concluded that while the exemptions applied were correct, section 37(1)(a) (communications with the Sovereign) should also have been applied.
9. Similarly, the MoJ told the Commissioner that subsections (1)(a), (1)(b) (the conferring by the Crown of any honour or dignity) and/or (1)(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) of section 37 variously apply.
10. The complainant confirmed that he was not satisfied with the MoJ's revised response.
11. During the course of her investigation, the MoJ provided the Commissioner with a copy of the withheld information. With respect to her consideration of the withheld information, the Commissioner's investigation has been assisted by the summary provided by the MoJ setting out the information held in scope of the request, annotated to show which subsection of the section 37 exemption the MoJ considers applies.
12. The analysis below considers the MoJ's application of section 37(1)(a) of the FOIA to the requested information.

Reasons for decision

Section 37 Communications with Her Majesty, etc. and honours

13. Section 37 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”.

14. With respect to the scope of the exemptions, the Commissioner states in her published guidance¹ on section 37 that the exemptions in sections 37(1)(a) – (ad):

*“...will also cover communications made or received by a person (or organisation) who was acting **on behalf** of the sovereign, heir, second in line to the throne and other members of the Royal Family”.*

15. In this case, the MoJ considers that subsections 1(a), (1)(b) and/or (1)(ad) apply.

¹ https://ico.org.uk/media/for-organisations/documents/1194/communications_with_her_majesty_and_the_awarding_of_honours.pdf

16. Where a public authority seeks to rely on several exemptions, the Commissioner considers that in many cases it will be appropriate to consider absolute exemptions first.
17. Accordingly, the Commissioner has first considered the MoJ's application of section 37(1)(a) to the requested information.

The information withheld by virtue of section 37(1)(a)

18. Section 37(1)(a) provides an exemption from disclosure for information relating to communications with the Sovereign.
19. Section 37(1)(a) is a class based and absolute exemption. This means that if the information in question falls within the class of information described in the exemption in question, it is exempt from disclosure under the FOIA. It is not subject to a public interest test.
20. In correspondence with the complainant, the MoJ referred to protecting the confidentiality of "*sensitive communications*" and "*the confidentiality of correspondence with the Royal Household*".
21. In support of its application of section 37(1)(a), in its submission to the Commissioner the MoJ stated that, in line with ICO guidance:

"... the phrase 'relates to' is interpreted broadly, referring additionally to information deriving from or appertaining to the actual communications with the Monarch."
22. The Commissioner's published guidance on section 37 states:

"The term 'relates to' should be interpreted broadly. In practice this means that the scope of the exemption will cover more than just the actual communications themselves; it will also apply to information that refers to, or is derived from those communications".
23. This broad interpretation was affirmed by the Information Tribunal in the case of *Brown vs ICO and the Attorney General* (EA/2011/0002, 26 August 2011).
24. The Commissioner has reviewed the information withheld on the basis of this exemption and is satisfied that it comprises information relating to communications with Her Majesty the Queen, either expressly or by derivation.
25. She is therefore satisfied that it falls within the scope of this exemption.
26. The Commissioner acknowledges that the complainant made submissions in relation to his interest in this information being disclosed.

For example, he considered that the issue of courtesy titles for justices was controversial. The Commissioner accepts that in his submission he put forward arguments as to why he considered that it was in the public interest that the disputed information should be disclosed.

27. However, since section 37(1)(a) is an absolute exemption no public interest test applies. The Commissioner has therefore concluded that it was appropriate for the MoJ not to disclose the information withheld by virtue of that exemption.
28. As the Commissioner has concluded that the MoJ correctly applied section 37(1)(a), she has not gone on to consider the other limbs of the section 37 exemption cited in this case.

Right of appeal

29. 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

30. 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.
31. 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

Gerrard Tracey
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