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Freedom of information and the Royal Family

By Lucinda Maer

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Summary

The *Freedom of Information Act 2000* does not apply directly to the Royal Household. However it does apply to communications with members of the Royal Family held by public authorities. Under the Act, as amended in 2010, certain information relating to communications with the Sovereign and to the heir and second in line to the Throne is absolutely exempt from the Act, whereas information relating to other members of the Royal Family and the Royal Household is subject to the public interest test.

Before the 2000 Act was amended in 2010 by the *Constitutional Reform and Governance Act 2010*, all of the information covered by the exemption for communications with members of the Royal Family had been subject to the public interest test. In addition, the 2010 Act also amended the *Freedom of Information Act 2000* so that the exemption is valid for 20 years from the creation of the record containing the information or five years from the "relevant death", whatever is later.

The *Constitutional Reform and Government Act* received Royal Assent just before the 2010 General Election and changes in relation to the Royal Family were implemented in January 2011.

The changes followed a review of the 30 year rule by Paul Dacre, editor of the *Daily Mail*, which had recommended that the 30 year rule be replaced by a 15 year rule. In responding to Dacre's report, the Government stated that it would be reducing the 30 year rule to a 20 year rule, but the review had also prompted consideration of whether the safeguards for some categories of information covered by the Act were strong enough.

On 26 March 2015 the Supreme Court ruled in favour of publishing a series of letters (known as the 'black spider memos'). These are letters from the Prince of Wales to various Government departments. The case arose from a Freedom of Information request originally submitted by the *Guardian* in 2005. The request had been rejected but the *Guardian* successfully appealed this decision to the Upper Tribunal. The Government used the ministerial veto under the 2000 Act to prevent publication. The *Guardian* then challenged the use of the veto with a final ruling by the Supreme Court in favour of publication. The letters were published with some redactions on 13 May 2015.

1. The scope of the *Freedom of Information Act 2000*

The *Freedom of Information Act 2000* does not apply directly to the Royal Household, as the Royal Household is not included in the Act's definition of a public authority. Communications with the Royal Family are exempt under Section 37 of the Act which provides that information is exempt:

- (1)... 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.
- (2) 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).

Until 19 January 2011 the exemption for communications with the Royal family and Royal household had been subject to a public interest test. However, the exemptions for communications with the Sovereign, communications with the heir or second in line to the Throne, and communications with a person who has subsequently become heir or second in line to the throne, have, since 19 January 2011, become absolute exemptions. The changes were made by the *Constitutional Reform Act 2010*, with the relevant clauses brought into force by the Government in January 2011 (see section 3 below). Sections 37(1)(ac) – (ad) remain subject to the public interest test.

The Constitutional Reform and Governance Act 2010 also amended section 63 of the *Freedom of Information Act* so that information covered by sections 37(1)(a) to (ad) cannot be exempt after 20 years from the creation of the record containing the information or five years from the "relevant death", whatever is later.

The Information Commissioner has produced Awareness Guidance on the section 37 exemptions which summarises the overall position as follows:

- Certain information relating to the Sovereign and to the heir and second in line to the throne is absolutely exempt under section 37.

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- Information relating to other members of the Royal Family and to the Royal Household is subject to a qualified exemption under section 37. The public interest test applies.
- Section 37 is broad in its definition, encompassing information **relating to** communications with Her Majesty, other members of the Royal Family or the Royal Household.
- The exemption also covers information **relating to** the conferring by the Crown of any honour or dignity.
- Information may be withheld if it relates to information which is central to the Queen's constitutional position.
- The public interest test, where appropriate, should be interpreted narrowly in relation to requests for information concerning the honours process, procedure and policy, and on a case by case basis.¹

¹ Information Commissioner's Office, [Freedom of Information Act Awareness Guidance No 26 Communications with Her Majesty and the Awarding of Honours](#), V2, 18 August 2011

2. Prince of Wales correspondence with Government

On 26 March 2015 the Supreme Court ruled in favour of publishing a series of letters (known as the 'black spider memos'). These are letters from the Prince of Wales to various Government departments. The letters were published with some redactions on 13 May 2015.² Their publication follows a ruling on 12 May by the Upper Tribunal of Britain's Administrative Appeals Chamber.

The case arose from a Freedom of Information request originally submitted by the *Guardian* in 2005, to see 27 of these pieces of correspondence sent by the Prince between September 2004 and April 2005.³ The request was rejected by the relevant Government departments.

The *Guardian* pursued the request in the courts. Publication of the letters was originally ordered by the Upper Tribunal on 18 September 2012, but this was halted by [a veto under section 53 \(2\) of the Freedom of Information Act 2000](#), issued by the then Attorney General, Dominic Grieve QC, on 16 October 2012. The *Guardian* challenged this decision in the High Court, but the court ruled in favour of the Government on 9 July 2013.⁴ The *Guardian* appealed to the Court of Appeal, which found in the *Guardian's* favour on 12 March 2014.⁵ The Government then appealed to the Supreme Court, which confirmed the Court of Appeal's judgment.

The Supreme Court ruled that Mr Grieve had been wrong to issue a certificate under s53(2) of the *Freedom of Information Act 2000*. Section 53(2) allows 'the accountable person' to issue such a certificate if s/he decides on 'reasonable grounds' that no requirement existed to release a particular piece of information. [The judgment](#) stated that the reasons given by Mr Grieve for issuing the certificate did not constitute 'reasonable grounds' for issuing a certificate under s53(2). It was not sufficient for the Government simply to state that it took a different view of the law from that of the court.

² See Cabinet Office, [latest documents](#)

³ "[Prince Charles's letters: single email set off tussle involving 16 judges' rulings](#)", *Guardian*, 26 March 2015

⁴ [R \(ex parte Evans\) v Attorney General](#), 2013 EWHC 1960 (Admin), 9 July 2013

⁵ [R \(Evans\) v Attorney General](#), 2014 EWCA Civ 254, 12 March 2014

3. Changes made to the exemption on communications with the Royal Family

3.1 Review of the 30 year rule (the Dacre Review)

On 25 October 2007 the Prime Minister announced that he had asked Paul Dacre, editor of the *Daily Mail*, working with Professor David Cannadine and Sir Joseph Pilling, to chair an independent review of the 30 year rule. The report was published on 29 January 2009.⁶ It recommended that the 30 year rule should be replaced with a 15 year rule. On 10 June 2009 the Prime Minister made a statement on Constitutional Renewal, in which he said that:

...as part of extending the availability of official information, and as our response to the Dacre review, we will progressively reduce the time taken to release official documents. As the report recommended, we have considered the need to strengthen protection for particularly sensitive material, and there will be protection of royal family and Cabinet papers as part of strictly limited exemptions. But we will reduce the time for release of all other official documents below the current 30 years, to 20 years.⁷

The Ministry of Justice released a statement in June 2009 that indicated that alongside considering reducing the 30 year rule, the review had prompted the Government to look at “important safeguards” in the 2000 Act:

In relation to Cabinet information, and information relating to the Royal Household, it has become clear that those safeguards are insufficiently robust to protect our current constitutional arrangements, and need changing...

We will be making two amendments to the exemptions in the Freedom of Information Act to ensure that our information access arrangements allow essential constitutional relationships and conventions to be preserved.

Cabinet papers will be released much earlier than under the current rule, but will be subject to an absolute exemption under the Act until they are 20 years old.

To ensure the constitutional position and political impartiality of the Monarchy is not undermined, the relevant exemption in the Freedom of Information Act will be made absolute for information relating to communications with the Royal Household that is less than 20 years' old. After that point - if the relevant Member of the Royal Family is still alive - then the exemption will continue to apply until five years after their death - on an absolute basis for the Sovereign and the Heir to the Throne, and on a qualified basis for other members of the Royal Family.⁸

⁶ [Review of the 30 Year Rule](#)

⁷ HC Deb 10 June 2009 c797

⁸ See the BBC's Martin Rosenbaum's "[Open Secrets](#)" blog

The Campaign for Freedom of Information responded by welcoming the reduction of the 30 year rule to a 20 year rule as a “substantial step” even if it did not go as far as the 15 year period recommended by the Dacre Review. However, the Campaign expressed “serious concern” at the announcement that new exemptions would be introduced for Cabinet Papers and for information relating to the Royal Family.⁹

On 25 February 2010 the Government published its final response to the Dacre Review.¹⁰ It concluded that the target should be a reduction for 20 years for specified exemptions:

13. After 20 years, exemptions relating to investigations conducted by public authorities, court records, audit functions, the formulation of government policy and legal professional privilege will cease to have any application to official information. The Government has looked again carefully at the information falling within the scope of these exemptions and has decided that, although there are occasions when information could properly remain exempt from disclosure under these provisions, it is nevertheless appropriate, under a new rule, to make available all such information at the end of the period in the interests of promoting public understanding about the machinery of government.

14. In certain circumstances, however, the particular sensitivities surrounding certain categories of information mean that it is right for a limited set of the relevant exemptions to continue to remain applicable for 30 years. When the new rule is introduced, files may still remain closed after transfer to archive facilities when they engage exemptions relating to prejudice to relations within the United Kingdom (FOIA section 28), the section 36 exemption insofar as is necessary to protect the devolved governance and internal relations of the United Kingdom and prejudice to commercial interests (FOIA section 43) if the public interest is against disclosure. These exemptions relate to information whose release before the 30-year point may be harmful. For example, in relation to the section 43 exemption a number of contracts, particularly those relating to large scale infrastructure projects and procurement, can run for periods in excess of 20 years and may therefore contain information which remains commercially sensitive after that point.¹¹

Proposals were put forward “to ensure that the constitutional position of the Monarchy is not undermined”:

...information relating to communications with the Sovereign, the Heir to the Throne and the second in line to the Throne, and those acting on their behalf, will be covered by an absolute exemption for a period of 20 years. If the Member of the Royal Family to whom the information relates is not deceased after the end of this 20-year period the absolute exemption will continue to apply until five years after their death.

52. However, in recognition of the fact that the position of other Members of the Royal Family will vary in a constitutional sense, information relating to communications with Members of the

⁹ Campaign for Freedom of Information, Press Notice, [Concern over new Freedom of Information Exemptions](#), 10 June 2009

¹⁰ Ministry of Justice, [Government response to the 30 year rule review, February 2010](#), Cm 7822

¹¹ *Ibid*

Royal Family other than the Sovereign, the Heir to the Throne, or the second in line to the Throne and those acting on their behalf, will be covered by a qualified exemption for a period of 20 years. If the Member of the Royal Family to whom the information relates is not deceased after the end of this 20-year period the qualified exemption will continue to apply until five years after their death.

The response also noted that the Government had decided against tightening the exemption for Cabinet documents.¹²

3.2 *The Constitutional Reform and Governance Act 2010*

The Government added new clauses to the *Constitutional Reform and Governance Bill 2009-10* at report stage on 2 March 2010 to reduce the 30 year rule for the release of official records to 20 years for some records, and to create a new Fol exemption for communications between members of the Royal Family and public authorities. In introducing the clauses, Mr Straw noted that there would be a transitional period until the target of 20 years was reached:

...until we reach the target time of 20 years, in the intervening period two years' records should be released every year to get down from the 30-year limit to the 20-year limit. The new clause makes provision for the transitional period to be brought in by order, because exactly when that new time limit is introduced will need to be considered by Government in the next Parliament.¹³

He also noted that the new 20 year limit would not apply to a number of exemptions within Fol. The exemptions which will be subject to a reduction are:

- investigations and proceedings [s 30]
- court records [s 32]
- audit functions [s 33]
- policy formulation [s 35]
- effective conduct of public affairs [s 36] - except in relation to Northern Ireland authorities, where the exemption would continue to apply for up to 30 years
- legal professional privilege [s 42]

All other exemptions would continue for their present length of time. Those that would still operate for up to 30 years would be the exemptions for commercial interests [s 43] and devolved administrations [s 28]. The honours exemption would continue for up to 60 years, the law enforcement exemption for up to 100 years, but disclosure could still occur if the balance of public interest favoured disclosure, or the 'harm' test did not apply.

The New Clauses and the New Schedule were added to the Bill without a division. Due to the imminence of the general election, the Bill did not

¹² *Ibid*

¹³ HC Deb 2 March 2010 c830

receive full scrutiny in the Lords but the clauses were retained, as they were not considered controversial.¹⁴

3.3 Commencement

On 18 January 2011 Kenneth Clarke, the Lord Chancellor, noted in a Written Ministerial Statement that a number of measures to expand FOI would be brought forward. He also noted that the provisions relating to the Royal Household would be commenced as from 19 January 2011:

...we must also ensure that information which it is not in the public interest to release is properly protected, and that we have proper regard to this country's long-standing constitutional conventions. It is for this reason that on 16 January 2011, I made a commencement order to bring into effect changes made in the Constitutional Reform and Governance Act 2010 to enhance the protection for information relating to communications with the royal family and royal household. The changes provide an absolute instead of a qualified exemption for information relating to communications with the sovereign, heir to the throne or second in line to the throne or those acting on their behalf. The exemption for other members of the royal family and members of the royal household remains qualified. The lifespan of the exemption changes from 30 to 20 years or the lifetime of the relevant member of the royal family plus five years, whichever is longer.

This amendment to the FOI Act is necessary to protect the long-standing conventions surrounding the monarchy and its records, for example the sovereign's right and duty to counsel, encourage and warn her Government, as well as the heir to the throne's right to be instructed in the business of Government in preparation for their future role as monarch. The changes will come into force tomorrow.¹⁵

There was no opportunity in Parliament to vote on or debate this order.¹⁶

In July 2012 Lord McNally, Minister of State in the Ministry of Justice, announced further details and commencement of the changes to introduce the new 20 year rule.¹⁷ The point at which records are transferred to the National Archives would be reduced from 2013 over a 10-year transitional period with two years' worth of records being transferred to the National Archives until the transition is complete. The maximum lifespan on the relevant exemptions provided by the Freedom of Information Act would be reduced for all public authorities in parallel with the transitional period:

From 1 January 2014 the maximum duration of the following exemptions will reduce by one year per annum over a 10-year period: sections 30 (investigations and proceedings conducted by public authorities); 32 (court records); 33 (audit functions); 35 (formulation and development of government policy); 36 (prejudice to effective conduct of public affairs), except in relation

¹⁴ For further information see Library Standard Note [Dissolution of Parliament](#)

¹⁵ [HC Deb 18 January 2011](#) c35WS

¹⁶ *Constitutional Reform and Governance Act 2010 (Commencement No. 4 and Saving Provision) Order 2011*

¹⁷ *Constitutional Reform and Governance Act 2010 (Commencement No. 7) Order 2012*, SI 2012/3001

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to Northern Ireland and the work of Executive Committee of Northern Ireland Assembly; and 42 (legal professional privilege).¹⁸

¹⁸ HL Deb 13 July 2012 c153WS

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