

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 March 2010

Public Authority: Cabinet Office
Address: 70 Whitehall
London
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Summary

The complainant asked the Cabinet Office for information relating to the award of a working peerage to Michael, now Lord Ashcroft, in March 2000. The information sought by the complainant relates to the undertaking given by Lord Ashcroft to take up residence in the UK prior to the award of his peerage. The complainant stressed that he did not want information relating to the suitability of Lord Ashcroft for the award; merely information which relates to his "domicility" and tax status.

The Cabinet Office confirmed that it held information relevant to the complainant's request but determined that it should be withheld in reliance on the exemptions contained in sections 37(1)(b), 40(2) and 41 of the Freedom of Information Act 2000 ("the Act").

The Commissioner has decided that the Cabinet Office was wrong to rely on the exemptions provided by sections 37(1)(b), 40(2), 40(4) and 41 in order to withhold all of the information relevant to this request. The Commissioner finds that the disclosure of some limited information is warranted to serve the public interest in relation to section 37(1)(b) of the Act. He has also found that sections 40(2), 40(4) and 41 were not appropriately applied in respect of the limited information the Commissioner has identified for disclosure.

In consequence of this finding the Commissioner has determined that the Cabinet Office breached section 1(1)(b) of the Act and he requires it to disclose information which is described in the confidential annex which is sent only to the Cabinet Office. The Commissioner has also found that the Cabinet Office breached sections 10(1) of the Act and 17(1) of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. A press release was issued on 31 March 2000 announcing the award of a life peerage to Michael Ashcroft (now Lord Ashcroft). A 'note for editors' was also issued with the press release and was subsequently read out in the House of Commons on 25 January 2008. This editor's note stated:

"In order to meet the requirements for a Working Peer, Mr Michael Ashcroft has given his clear and unequivocal assurance that he will take up permanent residence in the United Kingdom again before the end of the calendar year. He would be introduced into the House of Lords only after taking up that residence. These undertakings have been endorsed by the Leader of the Conservative Party and conveyed to the Prime Minister – and to the Political Honours Scrutiny Committee."

The Request

3. On 10 October 2007 the complainant wrote to the Cabinet Office to make the following request for information in respect of the award of Lord Ashcroft's peerage:

'I would like to see all documents that you possess which would help me to understand whether any such agreement was made, how it was made, and upon whose suggestion it was made.'

4. The complainant stated that he was not seeking information about any assessments of Lord Ashcroft's suitability for a peerage '...other than those that address his domicile [sic] and tax status, and any undertakings that were given that he would rise [sic] in the UK and pay tax in the UK'.
5. The Cabinet Office responded to the complainant's request on 6 December 2007 and confirmed that it held relevant information falling

within its scope. The Cabinet Office informed the complainant that the information was being withheld under section 37(1)(b) (confering by the Crown of any honour or dignity) and some of the information was additionally exempt under sections 40(2) and 41. It advised the complainant that he could request an internal review, and complain to the Commissioner.

6. On 12 December 2007 the complainant asked the Cabinet Office to conduct an internal review of its decision to withhold the information he had requested.
7. The Cabinet Office completed its internal review and wrote to the complainant on 27 March 2008. The Cabinet Office confirmed its original decision to apply sections 37(1)(b), 40(2) and 41 to the requested information and responded to the assertions made by the complainant in his request for internal review.

The Investigation

Scope of the case

8. On 20 March 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant emphasised that he was not seeking information about the nominee's suitability for an honour. Rather, he is seeking:

'... information about any assurances that the candidate gave, or that were given on his behalf, concerning his domicile [sic] for tax purposes; that a public statement about this matter has already been made by Downing Street in March 2000; that the candidate's press spokesman has sought to suggest that the candidate had not given an assurance in line with Downing Street's statement (*Guardian*, August 27 2002); that the lack of clarity has resulted in members of both Houses repeatedly questioning whether all those who sit in the UK's legislature are paying income tax; and the clear possibility that this lack of clarity, may undermine public confidence in the integrity of the honours system, or the Parliamentary system, or both.'

9. The Cabinet Office sent the Commissioner a bundle of information relating to Lord Ashcroft's nomination. This information concerns all aspects of Lord Ashcroft's nomination, going beyond the issues which the complainant had expressly stated are the focus of his request.

10. The Commissioner has examined all of this information. He has determined that only the information relating to Lord Ashcroft's residency and tax status falls within the scope of the complainant's request. It is this information which is the sole focus of this Notice and to which the Commissioner's considerations relate.

Chronology

11. The Commissioner wrote to the Cabinet Office on 26 April 2008 asking to be sent copies of the withheld information.
12. On 28 May 2008 the Commissioner asked the Cabinet Office a number of questions concerning the exemptions it claimed in support of withholding the requested information.
13. The Cabinet Office responded to the Commissioner's enquiries on 28 July 2008 and also provided information which the Cabinet Office determined fell within the scope of the complainant's request.
14. The Commissioner reviewed the information the Cabinet Office had sent him. On 22 December 2008 he wrote to the Cabinet Office seeking documents which were referred to in those already supplied.
15. The Cabinet Office responded to the Commissioner's request on 24 February 2009.
16. During the investigation of this complaint the Commissioner issued the Cabinet Office with a Decision Notice in another case concerning Lord Ashcroft's undertaking to take permanent residency in the UK (FS50197952). Additionally there were changes in the way the courts approach the law of confidence. Since this case involved the application of section 41 (Information provided in confidence) and related, in part, to the Commissioner's findings in the related case he decided to invite the Cabinet Office to make further representations. He therefore wrote to the Cabinet Office on 3 February 2010.
17. The Cabinet Office responded to the Commissioner's enquiries on 1 March 2010.

Analysis

18. During the Commissioner's investigation of this complaint, information relevant to the request was put into the public domain (although not by the Cabinet Office). This information included some documents which were withheld from the complainant.

19. The following analysis outlines public interest considerations which the Commissioner believes should have been considered by the Cabinet Office when it responded to the complainant's request.
20. The Commissioner has identified information contained within a number of documents which he considers the Cabinet Office should have disclosed to the complainant at the time he made his request. Some of the documents contain information which the Commissioner has determined may be redacted before disclosure. The identified redactions are those which reflect the public interest considerations at the time of the complainant's request. Some of the redacted information may now have appeared in the public domain.

Exemptions

Section 37(1)(b) – the conferring by the Crown of any honour or dignity

21. The Cabinet Office refused to disclose the requested information in reliance on section 37(1)(b) of the Act. It confirmed that the information engaged this exemption when it concluded its internal review and again in its response to the Commissioner's enquiries.
22. Section 37(1)(b) provides an exemption which is class based. This means that any information falling within its ambit is automatically exempt and there is no requirement for the public authority to demonstrate any level of prejudice that might occur if the information were disclosed. In this case the Cabinet Office asserts that the requested information falls within the class of information described by the exemption; that is, information relating to the conferring by the Crown of any honour or dignity.
23. The Commissioner has examined the requested information and considers that it engages the exemption provided by section 37(1)(b): The information does relate to the conferring of an honour or dignity by the Crown.

Public Interest Test

24. Information which engages this exemption may be withheld only where, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
25. In the Commissioner's view section 37(1)(b) is designed to protect from disclosure information which is subjective and potentially highly

sensitive and which relates to information which is necessarily required by the honours system to determine the suitability of candidates. The Commissioner considers such information to include appraisals of the merits of a candidate and information about that person and their suitability. It includes any views expressed about a candidate that are necessarily required for free and frank discussion by those appointed for that task. The Commissioner believes that information used and generated during these discussions also merits protection from disclosure.

26. The Commissioner believes that a distinction can, and should, be made between the subjective and person-related sensitive information required by the honours system, and information relating to any criteria identified as being necessary for consideration for an award. Such requirements are likely to have been identified, and to have been considered by the relevant parties, before the necessary scrutiny of any particular candidate took place. It is information of a generic nature and is not specific to any particular nominee. The criteria against which nominees are considered are likely to have constitutional significance and be less sensitive and their disclosure is therefore more likely to serve the public interest.

Public interest arguments in favour of disclosing the requested information

27. The Commissioner considers that an important factor in favour of disclosing the requested information is that it would provide a degree of transparency and accountability in the honours system in general and more importantly in this particular case. Greater transparency and accountability would increase public confidence in the honours system. He believes that significant weight should be given to these factors on the basis that working peers have a public role, enjoy privileged positions and cannot be removed by virtue of the process of election.
28. He also considers that disclosure of some information, relevant to this request, would allow the public to have greater understanding of the award of Lord Ashcroft's peerage in particular and of the honours system operating at the time of that award.
29. The lack of transparency in the honours system at the time of Lord Ashcroft's ennoblement, together with the subsequent debate and speculation about the residency of peers and of prospective MPs, leads the Commissioner to conclude that there is a particular public interest in knowing whether or not residency in the UK for tax purposes was a necessary requirement for the conferment of a working peerage.

30. The undertaking made by Lord Ashcroft resulted in speculation in respect of whether he satisfied what may have been a condition associated with the award of his peerage. This speculation has fuelled a debate concerning the domiciliary and tax status of peers and prospective MPs. The Commissioner believes that disclosure of some limited and relevant information would assist this debate.
31. Lord Ashcroft's domiciliary arrangements and liability for UK tax are not simply matters of interest to the public; they are matters which concern the public interest. The Commissioner considers that the disclosure of some information would enable the public to have greater understanding of what may or may not have been a necessary requirement for the award of Lord Ashcroft's peerage. This in turn would allow the public to participate in the wider debate concerning the honours system in an informed way.
32. The Cabinet Office argues that if there are differing degrees of confidentiality depending on the degree of controversy about the recipient, especially if the controversial nature of the nomination is identified retrospectively, contributors to the honours process may not be willing to as full or frank in their comments as the honours system requires. The Cabinet Office outlined a number of scenarios which it asserts would result in a reticence to be wholly candid. It identifies a conflict between the public interest in the need of the honours system to have information conveyed in confidence and the uncertainty that would arise if that information was subsequently made public. The Commissioner does not accept this position. In his view the potential for disclosure, albeit reliant on a balance of public interest considerations, may have a positive effect on the honours system. The chance of later public scrutiny of information is, in the Commissioner's view, likely to raise the standards of scrutiny by those charged with this role and to provide a positive pressure on those who provide information to ensure that it is truthful, accurate and comprehensive as far as this may be achieved.
33. The Cabinet Office referred to the Commissioner's decision in case FS50223685 (Home Office) where he had considered that the benign nature of the information in that request weighed in favour of disclosure. It also referenced the more recent and related case (FS50197952) and the Commissioner's reliance on the controversial nature of Lord Ashcroft's nomination for a working peerage. The Cabinet Office informed the Commissioner that it considered 'this imposes far too subjective an element which in turn would remove vital certainty from the Honours process...'
34. The Commissioner does not accept that disclosure of information under the Act would remove the 'vital certainty' of the honours process. He

would emphasise that Parliament determined that information relating to the conferment of any honour or dignity should be subject to a qualified exemption in this Act. It did not provide an 'absolute expectation of confidentiality' by making section 37(1)(b) an absolute exemption from disclosure.

35. In this case the information sought would genuinely cast light on an issue of public interest. The Commissioner believes that it is fair to characterise Lord Ashcroft as being a controversial nominee, particularly given that the Political Honours Scrutiny Committee determined that Lord Ashcroft should give an assurance regarding his residency and that this should be placed into the public domain. He rejects the Cabinet Office's assertion that deciding whether a particular nomination is controversial is an impossible task. A determination of whether a nomination is controversial depends on the circumstances of the case and the particular characteristics or circumstances of that individual. The Commissioner believes that public authorities must take into account all of the relevant aspects of a case in determining the balance of the public interest. This may include, in appropriate circumstances, whether the person who is the subject of a request for information is in any way a controversial figure.

Public interest arguments favouring the maintenance of the exemption

36. The Cabinet Office asserts that all those who contribute to the honours process, do so in the expectation that the content of their communications were, and would remain, confidential. It is a long-standing expectation that those communications and the discussions of the respective committees would not be revealed. The Commissioner accepts this argument insofar as it relates to the honours system in general. The point made by the Cabinet Office fails to take into account the specific circumstances of each case. Furthermore, the Commissioner believes that a 'long-standing expectation' is qualitatively different to an explicit assurance.

Balance of the public interest arguments

37. The Cabinet Office also asserts that Parliament considered it important to identify section 37(1)(b) as a specific exemption; therefore it should be seen as an exemption where there is an assumption of a good reason against disclosure and why the public interest favours confidentiality under this section of the Act. The Commissioner rejects this assertion. In doing so he is minded of the Information Tribunal's decision in *DfES v the Commissioner & the Evening Standard* [EA/2006/0006], where the Information Tribunal found that there was no inherent damage caused by disclosing information covered by such

a class-based exemption, that is to say, there is no inherent public interest in withholding information of the specified class.

38. Moreover, the Cabinet Office points out that the honours system is dependent on the sharing of data. This data may be highly personal and is provided with the expectation of confidentiality in respect of its form and content.
39. Nominations for honours and dignities require enquiries to be made on a confidential basis. It is necessary to determine the suitability of individuals to receive an honour and it was equally necessary for the Political Honours Scrutiny Committee (now the House of Lords Appointments Commission) to be able to exchange views and information openly and freely. The Cabinet Office asserts that disclosing information in respect of the honours system may erode trust in that system and therefore protecting the confidential nature of the honours system has an inherent public interest.
40. The Commissioner accepts that the honours system relies to a large extent on the provision of confidential information about nominees. As a result of the reliance on the provision of confidential information about nominees very little information about those nominees enters the public domain. The Commissioner considers that the maintenance of confidentiality and the trust in the honours system which flows from it, underpins the exemption provided by section 37(1)(b). It is for this reason that he believes there is a strong public interest in withholding information which is subjective, person-centred and which was imparted with some expectation of confidentiality.
41. Parliament determined that section 37(1)(b) should be a qualified exemption and subject to a weighing of the public interest; it chose not to make this exemption absolute. In most cases, awards of honours or dignities are not controversial and there will be a greater likelihood that where this exemption is applied the public interest would be more likely to favour the exemption. This is because the arguments set out above would be weaker when applied to most candidates. However, this case is clearly distinguishable from the majority of awards or working peerages. Here, the initial nomination was rejected. Moreover, there was a requirement by the Political Honours Scrutiny Committee for the nominee not only to give an undertaking concerning his residency in the United Kingdom, but also to have the fact of that undertaking placed into the public domain.
42. In this case the circumstances of the nomination and of the nominee were seen as being of a controversial nature. In the Commissioner's opinion Parliament is likely to have considered instances such as this one when it determined that this exemption should be qualified so that

all relevant public interest factors could be taken into account in each particular case.

43. The Cabinet Office asserts that the public interest in the issue of Lord Ashcroft's appointment to the peerage was satisfied by the publication of the press notice and its accompanying note to editors in March 2000. It further asserts that this note weakens the public interest for disclosing information relating to the negotiations and discussions that preceded that announcement.
44. The Commissioner accepts that the publication of the note to editors goes some way in satisfying the public interest. Nevertheless it does not satisfy the public interest in full. The note does not place into the public domain any information which informs the public of the reasons why Lord Ashcroft's undertaking was given and whether or not his undertaking was to meet a requirement for residency alone or included residency for tax purposes.
45. The Commissioner is mindful of the many statements made by prominent members of the major UK political parties concerning Lord Ashcroft's residency and tax status. In the Commissioner's opinion these statements reveal the extent of the uncertainty and controversy that was already in existence at the time of the complainant's request. Such statements failed to bring clarity to these issues. He is also mindful that Prime Minister's Office chose to make public the fact that Lord Ashcroft had given an undertaking to the effect that he would take up permanent residence in the United Kingdom. The Commissioner considers that a limited disclosure of relevant information would place into the public domain information which would provide some important, though limited, information which would illustrate how his undertaking came about.
46. The arguments advanced by the Cabinet Office in support of its application of section 37(1)(b) are to a large extent general in nature. They are not focussed on the information requested by the complainant.
47. In this case the complainant requires 'all documents... which would help... to understand whether any such agreement was made, how it was made, and upon whose suggestion it was made'. The complainant emphasised that he required only that information which addresses his "domicility" and tax status. He made clear that his request does not include unrelated information relating to Lord Ashcroft's suitability for his peerage. The Commissioner considers that the disclosure of some limited information to fulfil this request would not be unduly prejudicial to Lord Ashcroft or be unduly detrimental to the honours system to the extent that it would outweigh the strong public interest in disclosure.

The Commissioner would point out that the Prime Minister's Office has already placed into the public domain information about the undertaking. This disclosure has had the effect of limiting the prejudice which would occur through the disclosure of the requested information in this case. The Commissioner is not convinced that any prejudice of substance would be caused by disclosing some further, limited information relating to Lord Ashcroft's undertaking.

48. The Commissioner has already stated that he considers the maintenance of confidentiality, and the trust which flows from it, is an important feature, though not necessarily the most significant feature, of the honours system. He must therefore give this factor the necessary weight it merits.
49. The Commissioner has carefully examined the information supplied by the Cabinet Office and has identified four documents containing information which he considers should be disclosed to the complainant. These documents are listed in the confidential annex at the end of this Notice which is sent only to the public authority. They contain information which engages section 37(1)(b) and which the Commissioner believes would satisfy both the complainant's request and the public interest in disclosure which the Commissioner has identified. Some of the information contained in these documents is outside the scope of the complainant's request. Some engages the exemption but would not add anything to further the public understanding of the issue concerned with here, therefore limiting the public interest in disclosure such that the Commissioner finds that the public interest in maintaining the exemption outweighs that in disclosure. Other information in these documents engages the exemption provided by section 40(2) of the Act, which is an absolute exemption. The Commissioner has identified those pieces of information which he considers the Cabinet Office may legitimately redact from each of the documents.
50. The Commissioner has concluded that the public interest in maintaining the exemption provided by section 37(1)(b) does not outweigh the public interest favouring the disclosure of some of the information in the four documents he has identified. That information would not result in undue harm to the honours system, nor would it result in undue prejudice to Lord Ashcroft. The Commissioner has determined that the considerations of transparency, accountability and greater understanding overwhelmingly support the public interest in disclosure of this information to meet the terms of the complainant's request.

Section 41 – information provided in confidence

51. This section states that:

'41-(1) Information is exempt information if -

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'

52. Therefore for this exemption to be engaged two criteria have to be met. The public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.

53. The Cabinet Office asserts that the withheld information is exempt from disclosure by virtue of section 41 of the Act on the basis that it is information provided by the nominee and by a number of other third parties. It considers that section 41 applies to the information contained in documents emanating from the third parties and to information produced by civil servants for internal purposes which record and comment upon information provided by these parties.

54. The Commissioner is satisfied that the first limb of section 41 is met.

The position of the Cabinet Office on an actionable breach of confidence

55. The Cabinet Office provided the Commissioner with submissions in relation to this case and referenced to FS50197952, to support its position that the disclosure of the withheld information would constitute an actionable breach and thus meet the requirements of section 41(1)(b). The Commissioner has summarised these submissions below and then proceeded to explain his view as to whether they apply to the information which has been withheld in this case.

56. In most cases involving the application of section 41 which the Commissioner has previously considered, the requested information has been of a commercial nature rather than the more personal information which is the focus of this case. The approach usually adopted by the Commissioner in assessing whether disclosure of commercial information would constitute an actionable breach is to follow the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415 (the *Coco* test).

57. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:

- Whether the information had the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and
 - Whether an unauthorised use of the information would result in detriment to the confider.
58. In its submissions to the Commissioner in relation to another case [FS50197952], the Cabinet Office explained that it considered the test in *Coco v A N Clark* no longer represented the law in respect of information of the type requested by the complainant. In particular, it referenced the only High Court case to date which deals with the application of section 41 of the Act. This case involved a request submitted to the Home Office by the British Union for Abolition of Vivisection (BUAV) for applications for licenses to conduct animal experimentation. The Cabinet Office stated that it principally relied on the comments made by Eady J at [27] – [36], under the heading, “The Tribunal’s flawed interpretation of the law of confidence”¹.
59. The Cabinet Office noted that the *Coco* test involved a claim in relation to commercially confidential information whereas the information which was the focus of this case, the form of Lord Ashcroft’s undertaking, was essentially personal information. The Cabinet Office explained that more recent cases than *Coco v Clark* had considered the law of confidence and/or misuse of personal or private information in the context of Article 8 of the European Convention of Human Rights (ECHR). Such cases included *Campbell v MGN* and *HRH The Prince of Wales v Associated Newspapers Ltd.*² The Cabinet Office argued that it was the approach to the law of confidence set out in these cases, rather than in *Coco v Clark* that should be considered in the circumstances of this case.
60. The Cabinet Office highlighted the fact that in his judgment Eady J confirmed that the *Coco* test was not the only test of confidence that existed; recognition had to be given to how misuse of private information may give rise to an actionable breach of confidence; and furthermore any assessment of confidence had to take into account the impact of the Human Rights Act.³
61. The Cabinet Office asserted that the test of confidence described in *Coco v Clark* is still relevant and that all the elements of the test are met in this case. Nevertheless it also provided the Commissioner with

¹ Secretary of State for the Home Office v British Union for the Abolition of Vivisection and the ICO [2008] EWCH 892

² Full citation: *HRH The Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 (Ch), [2006] EWCA Civ 1776 [2008] Ch 57.

³ *The Home Office v British Union for the Abolition of Vivisection and Information Commissioner* [2008] EWCH 892 (QB) 25 April 2008.

what it considers to be the current test that should be applied. The Cabinet Office began by citing Lord Nicholls' comments in *Douglas v Hello*:⁴

'As the law has developed breach of confidence, or misuse of confidential information, now covers two distinct causes of action, protecting two different interests: privacy, and secret ("confidential") information. It is important to keep these two distinct. In some instances information may qualify for protection both on grounds of privacy and confidentiality. In other instances information may be in the public domain, and not qualify for protection as confidential, and yet qualify for protection on the grounds of privacy.'

62. The Cabinet Office explained that the tort of confidence has developed to include not only "traditional" breach of confidence claims, as in *Coco v Clark*, but also claims to prevent misuse of information entitled to protection under Article 8 ECHR. English courts have been required to extend the tort of breach of confidence to cover private information within the ambit of Article 8, in order so far as possible to develop the common law in a way which gives effect to Convention rights. Lord Woolf CJ expressed this matter in *A v B plc* [2003] QB 195 at paragraph [4]:

'Under section 6 of the [Human Rights Act 1998] the court, as a public authority, is required not to act "in any way which is incompatible with a Convention right". The court is able to achieve this by absorbing the rights which articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving new strength and breadth to the action so that it accommodates the requirements of those articles.'

63. Article 8 provides that -

'1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society for the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

64. The Cabinet Office highlighted the fact that the concept of 'private life' within Article 8(1) is a broad one, based upon the need to protect a

10 *Douglas v Hello* (No 3) [2008] 1 AC 1

person's autonomy and relationships with others from outside interference. The Cabinet Office argued that the right is not confined to activities which are personal in the sense of being intimate or domestic but can be extended to business or professional activities. To support this broad interpretation the Cabinet Office quoted the European Court of Human Rights case of *Niemietz v Germany* and also noted that this judgment confirmed that Article 8(1) was intended to protect correspondence, (i.e. the type of information which is the focus of this case):

'[29] The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which an individual may choose to live his personal life as he chooses at to exclude entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.

There appears, furthermore, to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world...'

And:

'[32] In this connection, it is sufficient to note that the provision does not use, as it does for the word "life", any adjective to qualify the word "correspondence". And, indeed, the Court has already held that, in the context of correspondence in the form of telephone calls, no such qualification is to be made...in a number of cases relating to correspondence with a lawyer...the Court did not even advert to the possibility that Article 8 might be inapplicable on the ground that the correspondence was of a professional nature.'⁵

65. Consequently, the Cabinet Office suggested that a number of different circumstances may arise in which a breach of confidence could exist:
- Some claims for the misuse of private information will cover information which has the quality of confidence, and which was imparted in circumstances inconsistent with a pre-existing relationship of confidence, but which is not entitled to protection under Article 8,

⁵ *Niemietz v Germany* (1993) 16 EHRR 97

- e.g. trade secrets. Such claims would fall within the ambit of the traditional test set out in *Coco v Clark*.
- Some claims will cover private information which is disclosed in breach of Article 8 ECHR, but which was not imparted in circumstances importing an obligation of confidence.
 - Further claims will concern information which was both confidential information in the sense that it was imparted in circumstances importing an obligation of confidence, and information entitled to protection under Article 8 ECHR, for example, many claims in respect private information of the type which is the focus of this present case.
66. In consideration of each of these circumstances the Cabinet Office noted that it was not necessary for any particular detriment to be demonstrated in order for a duty of confidence to be actionable. The Cabinet Office explained that this position was supported by the judge in *Coco v Clark* who questioned whether in fact detriment would always be a necessary ingredient of an actionable breach (para 421) and furthermore by the fact that in order for Article 8(1) to be engaged it was not necessary to demonstrate any detriment.
67. However, although section 41 of the Act is an absolute exemption and thus not subject to the public interest test contained at section 2 of the Act, the common law concept of confidence suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on public interest defence.

The Cabinet Office's position on public interest defence

68. The Cabinet Office argues that in the circumstances of this case there is no effective public interest defence. In considering the public interest defence to a claim of breach of confidence the Cabinet Office maintains its view that the importance of maintaining confidentiality in the honours system is the most significant factor and, as per Eady J in *McKennitt v Ash* ((2006) EMLR 10), that for a public interest defence to be triggered "a very high degree of misbehaviour must be demonstrated".

The Commissioner's position on an actionable breach of confidence

69. The Commissioner agrees with the Cabinet Office that a strict and rigid following of the *Coco* test is not an appropriate approach to the test of confidence in this case. The Commissioner's reasoning for this mirrors the arguments advanced by the Cabinet Office above, not least by the recent developments in case law which it referenced, most notably *BUAV*, but also the impact of the ECHR. Therefore when considering whether personal and private information is confidential, the

Commissioner agrees that consideration of Article 8 ECHR should be given.

70. However, the Commissioner does not believe that some of the concepts raised in *Coco v Clark* should be abandoned completely as they can still be useful in determining whether information of a personal and private nature is confidential. Indeed as Eady J noted in his conclusion at [35] whether information was imparted in circumstances where there was an expectation of confidence can be relevant to determining whether there would be an actionable breach if information of a private and personal nature was disclosed.
71. Therefore for personal information, such as the information being sought in this case, rather than use the three limbed test employed by *Coco v Clark*, the Commissioner, in this case, will consider:
- Whether information was imparted with an expectation that it would be kept confidential (be that an explicit or implicit expectation); and
 - Whether disclosure of the information would infringe the confider's right of privacy as protected by Article 8(1) ECHR.
72. The Commissioner has not been provided with any evidence to the effect that any explicit assurance of confidentiality was given to anyone contributing to the honours system operating at the time of Lord Ashcroft's ennoblement. He does however accept that the closed nature of the honours system would have provided *some* expectation that information would be kept confidential. He accepts that information relevant to the complainant's request was given for a particular and restricted purpose and that there was an expectation that it would be circulated among a limited (though undefined) number of persons. Nevertheless, the Commissioner must stress that the information requested by the complainant is not 'private' data; rather it is personal data which has been created out of necessity and necessarily imparted for public purposes (the purposes of the Political Honours Scrutiny Committee) and ultimately for the acquisition of the public role of a working peer. For the reasons stated at paragraphs 97 to 107 below, the Commissioner considers that those involved in the honours system would have had some expectation that the requested information would be kept confidential. However he considers that in the circumstances of this case this would not be a reasonable expectation in respect of all the relevant information. In the context of this case and generally, the Commissioner considers a reasonable expectation of confidentiality rests on the objective examination of all the circumstances of the case rather than a subjective assessment of the confiders' expectations.

73. In relation to the second criterion, the Commissioner agrees with the Cabinet Office that in respect of Article 8(1) the term 'private' should be interpreted broadly to ensure that a person's relationships with others are free from interference. The Commissioner also accepts that matters relating to identifiable individuals and of a business and professional nature can be covered by the protection afforded by Article 8(1).
74. In light of this broad reading of Article 8(1) the Commissioner accepts that disclosure of information which is the focus of this case would place in the public domain further information relating to Lord Ashcroft's ennoblement and such an action would lead to a limited invasion of his privacy. Thus the Commissioner accepts that disclosure of the information would constitute an infringement of Article 8(1), but would only constitute an actionable breach of confidence where, on the balance of probabilities an action would not succeed due to the public interest favouring disclosure. The Commissioner must however emphasise that the requested information was created solely in connection with this particular nomination for a working peerage, not in connection with Lord Ashcroft's or third parties private and personal interests.

Can disclosure of the information be justified on public interest grounds?

75. Before turning to the balance of the public interest in respect of this case, the Commissioner wishes to highlight that the public interest test inherent within section 41 differs from the public interest test contained in the qualified exemptions contained within the Act; the default position for the public interest test in the qualified exemption is that the information should be disclosed unless the public interest in withholding the information outweighs the public interest in disclosing the information. With regard to the public interest test inherent within section 41, this position is reversed; the default position being that information should not be disclosed because of the duty of confidence unless the public interest in disclosure outweighs the interest in maintaining the confidence.
76. In the Commissioner's opinion the introduction of the concept of privacy and the impact of ECHR into the law of confidence has not affected this balancing exercise; Sedley L J expressed such a view in *LRT v Mayor of London*: 'the human rights highway leads to exactly the same outcome as the older road of equity and common law'.⁶

⁶ Quote by the Information Tribunal in *Derry City Council v Information Commissioner*, (EA/2006/0014).

77. Therefore in conducting this balancing exercise as well as taking into account the protection afforded by Article 8(1), consideration must also be given to Article 10 ECHR which provides that:

‘1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’

78. The Commissioner notes that recent European Court of Human Rights judgments have highlighted the relationship between Article 10 and access to public information. In particular, the Court has recognised that individuals involved in the legitimate process of gathering information on a matter of public importance can rely on Article 10(1) as a basis upon which to argue that public authorities interfered with this process by restricting access to information.⁷

79. Turning to the various factors identified by the Cabinet Office, the Commissioner does not entirely accept the argument that for there to be a successful public interest defence against a breach of confidence there would always have to be an exceptional public interest in disclosure. The Commissioner’s reasoning is as follows: The Information Tribunal in *Derry City Council v Information Commissioner* in discussing the case of *LRT v The Mayor of London* noted that in the first instance the judge said that an exceptional case had to be shown to justify a disclosure which would otherwise breach a contractual obligation of confidence. When hearing the case, the Court of Appeal although not expressly overturning this view did leave this question open and its final decision was that the information should be disclosed. The Tribunal in *Derry* interpreted this to mean that:

- No exceptional case has to be made to override the duty of confidence that would otherwise exist;
- All that was required is balancing of the public interest in putting the information into the public domain and the public interest in maintaining the confidence.

⁷ See *Kenedi v Hungary* 37374/05.

80. Consequently in cases where the information is of a commercial nature, the Commissioner's approach is to follow the lead of the Tribunal in that no exceptional case has to be made for disclosure, albeit the balancing exercise will still be of an inverse nature.
81. However, in cases where the information is of a private and personal nature, the Commissioner accepts that in light of the case law referenced by the Cabinet Office, disclosure of such information requires a very strong set of public interest arguments. The difference in the Commissioner's approach to such cases can be explained by the weighty protection that Article 8 offers to private information; in other words the Commissioner accepts that there will always be an inherent and strong public interest in protecting an individual's privacy. The Commissioner believes that a potential deviation to this approach may be appropriate where the personal information relates to the individual's public and professional life, as opposed to their intimate personal or family life, and in such a scenario such a strong set of public interest arguments may not be needed because the interests of the individual may not be paramount.
82. The Commissioner has determined that the requested information relates to Lord Ashcroft's public and professional life and to any considerations by the Political Honours Scrutiny Committee concerning his UK tax liability in the context of their deliberations on his suitability for a life peerage. Therefore for the purposes of this case, and the consideration of Article 8, the Commissioner believes that the information, within the scope of the request, taking into account the reason for which it was created and imparted, can be said to have a public quality, albeit being of a private nature. The 'public life' context of the information reduces the weight of public interest arguments needed for there to be a valid public interest defence.
83. The Commissioner accepts that the honours system operates on the provision of confidential information concerning nominees. It would clearly not be in the public interest for those persons making nominations to do so without a reasonable expectation that the information they provided in candour would be treated with a significant degree of confidence. Similarly it is in the public interest that nominees are subject to the necessary degree of scrutiny to ensure their suitability for the important role they will play. Nevertheless, the Commissioner believes that, in the specific circumstances of this case, the public interest would be better served by knowing whether the Political Honours Scrutiny Committee had carried out its functions vigorously and had been satisfied that the nominee had given an assurance regarding his residency in the United Kingdom and whether this related also to his UK tax liability. In this respect the Commissioner considers that disclosure of the limited

information he has identified would not result in the undermining of this important process. The Commissioner would also stress that disclosure of the requested information would not result in the greater disclosure of the committee's frank and free discussions and opinions about this particular nominee.

84. The Commissioner of course agrees with the Cabinet Office that there is a clear and important distinction between disclosure of information which the public would be interested in and disclosure of information which is genuinely in the public interest.
85. However, given the number of public interest arguments in favour of disclosure that the Commissioner has identified in this Decision Notice, his opinion is that the benefit of disclosing some information relevant to the complainant's request should not be summarily dismissed as implied by the Cabinet Office. Rather the arguments identified by the Commissioner touch directly on many, if not all, of the central public interest arguments underpinning the Act, namely ensuring that public authorities are accountable for and transparent in their decision-making; furthering public debate; improving confidence in decisions taken by public authorities. Furthermore, the specific arguments put forward in relation to Lord Ashcroft and the specific circumstances of this case deserve to be given particular weight.
86. Nevertheless, the Commissioner has to remember that disclosure of such information would require sufficient public interest arguments and disclosure would have to be justified by the content of the withheld information itself not simply on the basis of generic or abstract public interest arguments.
87. The Commissioner has carefully considered the nature of the withheld information and he has reached the conclusion that despite the weight of the public interest arguments in favour of maintaining the confidentiality of the four documents the Commissioner has identified, the nature of the information and the circumstances surrounding it are sufficiently important and significant that information in those documents should be disclosed. Consequently, the Commissioner has concluded that there would, on the balance of probabilities, be a public interest defence if the information he has identified was disclosed.

Section 40 – Personal information

88. Section 40(2) provides an exemption for information which is the personal data of any third party. Where disclosure would breach any of the data protection principles contained in the Data Protection Act 1998 (DPA) subsection 3(a)(i) of section 40 is relevant.

89. In order to rely on the exemption provided by section 40, the information being requested must therefore constitute personal data as defined by the DPA. The DPA at section 1(1) defines personal data as:

'... data which relate to a living individual who can be identified
a) from those data, or
b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect to the individual.'

90. The Cabinet Office maintains that the information sought by the complainant in connection to the ennoblement of Lord Ashcroft is exempt from disclosure under the provisions of section 40(2) based on the condition in section 40(3) being engaged. This is because the information constitutes Lord Ashcroft's personal data.
91. The Commissioner has examined the withheld information and is satisfied that it constitutes the personal data of Lord Ashcroft. He agrees with the Cabinet Office that the requested information is not Lord Ashcroft's sensitive personal data as defined by section 2 DPA.

The first data protection principle

92. The Cabinet Office asserts that the disclosure of the requested information would contravene the first data protection principle as stated in Schedule 1 of the DPA.
93. The first data protection principle has two components:
- i. The personal data must be processed fairly and lawfully, and*
 - ii. personal data shall not be processed unless one of the conditions in the Data Protection Act 1998 Schedule 2 is met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.*
94. The Cabinet Office informed the Commissioner that it would not be fair to Lord Ashcroft to disclose the information requested by the complainant. The recorded information contains detailed considerations about Lord Ashcroft's nomination, including opinions expressed about him. Discussions about Lord Ashcroft's nomination were part of a confidential process, relating in some respects to his personal affairs.

95. In determining whether disclosure of the requested information would be fair, the Commissioner's approach is to consider what would be, or would have been, Lord Ashcroft's reasonable expectation of privacy at the times when his nomination was considered and at the time of the complainant's request. In the absence of any explicit assurance given to Lord Ashcroft to this effect, the Commissioner must examine the circumstances which existed during the period leading up to and including the times when the nomination was being scrutinised as well as those circumstances at the time of the complainant's request.
96. The press release and note for editors placed into the public domain information relating to the contents of Lord Ashcroft's undertaking in an attempt to assuage any concern the public might have had regarding the reasons why Lord Ashcroft's first nomination had been rejected. The press release rehearsed, to a large extent, the contents of Lord Ashcroft's undertaking but did not place into the public domain the form in which the undertaking was given and the identity of its recipient. Significantly, it did not comment on whether the undertaking met a condition which had been placed on Lord Ashcroft.
97. The question to be asked here is whether Lord Ashcroft, or any third party associated with the Political Honours Scrutiny Committee, had a reasonable expectation that information about Lord Ashcroft's nomination would be made public, particularly given the controversial nature of Lord Ashcroft's nomination and in light of his undertaking being made the subject of a note to editors.
98. Lord Ashcroft was first nominated for a working peerage in 1999 by the then Leader of the Conservative Party, William Hague. The nomination was considered by the small, all-party Political Honours Scrutiny Committee⁸ and was rejected.
99. According to an answer to a parliamentary question raised by Lord Shinwell in 1976, Lord Peart, the then Lord Privy Seal, stated that:
- 'My Lords the function of the Political Honours Scrutiny Committee is to report to the Prime Minister whether the persons whose names he submits to them are fit and proper persons to be recommended for appointment to any dignity or honour on account of political services. Their function is one of scrutiny and scrutiny only - to report if the past history or general character of a person render him unsuitable to be recommended. The Committee have no duties of initiation or recommendation, nor are they asked to adjudicate on the nature of the honour submitted, whether it be for Life Peerage or for any other

⁸ Superseded by the House of Lords Appointments Commission (HOLAC).

appointment, The criteria for the selection of Life Peers are not, therefore, a matter for the Committee.’⁹

100. In circumstances where the Committee had no objections to the nomination, the Prime Minister would then approve it and recommend the appointment to the Sovereign. Where a nomination was rejected there was no right to appeal the Political Honours Scrutiny Committee’s decision. It was the Committee’s practice that no reasons were given for the rejection of the nomination.
101. Nevertheless, in Lord Ashcroft’s book, ‘Dirty Politics Dirty Times’, Lord Ashcroft states that he learned that his nomination had been turned down for the following reasons¹⁰:
- A report into the sinking of the MV *Rema* in April 1998 was due to be published in 2000. There was a possibility that Lord Ashcroft would be criticised by this report.
 - Lord Ashcroft was a tax exile.
 - Lord Ashcroft was the Belizean Ambassador to the United Nations.
 - Lord Ashcroft was rumoured to have underwritten the finances of the Conservative Party.
102. In 2000 William Hague re-nominated Lord Ashcroft for a working peerage. This followed a period of significant interest in Lord Ashcroft by the media and in particular by the press. It was at this juncture that Lord Ashcroft made his undertaking and this in turn resulted in the publication of the press release and note for editors.
103. The Commissioner makes no comment about the circumstances which resulted in the rejection of Lord Ashcroft’s nomination for a peerage. Similarly he makes no comment on the nature of, or validity of, the media interest which occurred during this period. Notwithstanding this however, the Commissioner would make the point that Lord Ashcroft had a high public profile at the time of his nomination. The subsequent award of his peerage was seen by many as being particularly controversial.
104. The Commissioner believes that it must have been clear to Lord Ashcroft that his nomination for a peerage was controversial, at least to the extent that he gave an undertaking concerning his residency. Indeed the controversial nature of his nomination is referred to by his solicitors in a letter to the Cabinet Office dated 12 October 2009.

⁹ <http://hansard.millbanksystems.com/lords/1976/nov/16/political-honours-scrutiny-committee>

¹⁰ Ashcroft M, *Dirty Politics Dirty times – My fight with Wapping and New Labour* (Biteback, 2009 Edition) page 80

105. The Commissioner understands that it is normal practice for a press release to be issued when a list of working peers is announced and that on occasion such press releases contain 'Notes for Editors'. In this case it was determined by the Prime Minister's Office that the content of the note to editors was entirely appropriate. The Commissioner believes that the note to editors demonstrates that Lord Ashcroft's nomination was somewhat exceptional and warranted further contextual remarks.
106. The Commissioner has considered the nature of the requested information, particularly in relation to the degree to which it is strictly personal information concerning Lord Ashcroft's private life, as opposed to personal information concerning Lord Ashcroft's public life.
107. He is mindful of the Information Tribunal's decision in *House of Commons v ICO & Norman Baker MP (EA/2006/0015 and 0016)*. In that case the Tribunal considered whether further details of the travel allowances claimed by MPs should be disclosed, with particular reference to the fairness requirement of the first data protection principle. The Tribunal considered that there were three matters which needed to be considered in order to determine whether the processing was fair (para 74);
1. Whether MPs were provided with the necessary information as to how the information they had supplied about their travel arrangements would be processed.
 2. Whether the first and paramount consideration is the interests of the data subject i.e. the MPs.
 3. Whether there is any distinction between the personal data relating to an individual's public and his private life.
108. The Commissioner is unable to determine what information Lord Ashcroft was given regarding the future processing of his undertaking or other information relating to his nominations. He does however acknowledge that Lord Ashcroft would have *some* expectation of confidentiality based on his knowledge of the way in which the Political Honours Scrutiny Committee worked. Nevertheless, given the controversial nature of *his* nomination, the Commissioner believes that this expectation would not necessarily be as great as that of a person with a less prominent public profile or a non-controversial nominee would have been.
109. The Commissioner believes it is fair to assume that Lord Ashcroft's domiciliary arrangements were a significant concern of the Political Honours Scrutiny Committee and this provided the motivation or need for Lord Ashcroft to give his undertaking. It is also reasonable to conclude that without giving his undertaking it would have been less

likely that Lord Ashcroft's second nomination would have been recommended to The Queen.

110. The conferring of a working peerage enables the holder to sit in the House of Lords and be an active member of the United Kingdom's legislature. Such membership of the House of Lords is by appointment, not by election. Membership cannot be removed by electoral defeat; it is for life. The Commissioner believes that membership of the House of Lords carries with it important rights, privileges and responsibilities. He therefore considers that the requested information is information processed for the purpose of assessing Lord Ashcroft's suitability for a public role.
111. The distinction between personal data relating to a person's private life and person's public life, leads the Commissioner to conclude that Lord Ashcroft's interests should not be considered as the first and paramount consideration. The Commissioner considers that the information requested by the complainant is inextricably linked to Lord Ashcroft's nomination for a public role and cannot be considered as being 'private' in this context.
112. For the reasons outlined above, the Commissioner considers that it would not be unfair to Lord Ashcroft for the Cabinet Office to disclose some limited information relevant to the complainant's request.

Schedule 2 of Data Protection Act 1998 - Condition 6

113. The Cabinet Office asserts that disclosing the information requested by the complainant would be unwarranted and prejudicial to the rights and legitimate interests of Lord Ashcroft.
114. The Cabinet Office also asserts that none of the conditions relevant for the purposes of the first data protection principle in Schedule 2 of the DPA are satisfied.
115. The Commissioner accepts that conditions 1 to 5 of Schedule 2 are not relevant for processing the requested information in this case. Rather, he considers that its processing might fall within condition 6 and he must therefore determine whether or not this condition is relevant.
116. Condition 6(1) states:

'(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by third party or parties to who the data are disclosed, except where the process is unwarranted in any particular case by reason of prejudice to

the rights and freedoms or legitimate interests of the data subject.'

117. In *House of Commons v ICO & Leapman, Brooke Thomas (EA/2007/0060)*, the Information Tribunal determined that for condition 6 to be satisfied consideration should be given to:
- a) Whether the disclosure of the requested information was necessary for the legitimate interests of the recipient (the general public), and,
 - b) Whether, even if the disclosure was necessary, it would nevertheless cause unwarranted prejudice to the rights and freedoms of the data subject.
118. The Commissioner would point out that a person entering the House of Lords via the political nomination route has done so outside of the election process. The electoral process is to a large extent well understood, is reasonably transparent and allows for the scrutiny of candidates by electors. None of this was the case for the system for nominating working peers operating at the time of Lord Ashcroft's ennoblement.
119. At the time of Lord Ashcroft's ennoblement the honours system lacked transparency and afforded the public little information about the process itself or those persons recommended for ennoblement. Nevertheless, the majority of political nominations were considered to be uncontroversial and few, if any, questions were raised about them.
120. This was not the case concerning Lord Ashcroft's nomination. Lord Ashcroft's domiciliary arrangements were clearly seen as important, not least by the Political Honours Scrutiny Committee. This fact, coupled with the rejection of Lord Ashcroft's initial nomination has generated and fuelled continuing controversy surrounding it.
121. Since Lord Ashcroft's ennoblement, the question of where he lives has continued to be raised. This has led to on-going speculation about whether Lord Ashcroft has satisfied the undertaking he gave and whether his undertaking was made in respect of an expressed or implied requirement for him to pay UK tax.
122. Statements by senior politicians concerning Lord Ashcroft's "domicility" and tax status failed to cast light on this issue. More recently their statements have been contradictory and have failed to address whether UK tax liability was a condition for the award of Lord Ashcroft's peerage. Moreover the same politicians have voiced their support for changes in the rules which will make UK tax liability an explicit requirement for those sitting in Parliament.

123. Lord Ashcroft could have ended the speculation about his residency and tax status by making a public statement to that effect. Indeed, he furthered the speculation by stating that it is a private matter and, as stated on his website, *'If home is where the heart is Belize is my home'*¹¹.
124. It was not until 1 March 2010 that he chose to end this speculation. On this date he issued a statement confirming his tax status as being that of a 'non-dom'.
125. In the Commissioner's view there was at the time of the request a legitimate interest for the public to know more about the Lord Ashcroft's ennoblement. There is a legitimate public interest in understanding the process by which Lord Ashcroft's peerage was awarded, knowing the details of any criteria against which consideration for the award was measured, discovering the details of any conditions placed upon that award and finding out whether Lord Ashcroft has met what appears to have been a condition to his award. The Commissioner has taken this view because of the combined effect of the following considerations:
- The conferring of a working peerage carries with it significant rights, responsibilities and privileges.
 - Very little official information was placed into the public domain about the award of Lord Ashcroft's peerage or the honours system in general.
 - The conferring of a working peerage to Lord Ashcroft was and continues to be controversial. This is not the case in the majority cases involving the conferring of working peerages.
 - There has been very little official information made available to the public concerning Lord Ashcroft's peerage.
 - No attempt has been made by senior politicians or by officials in government or Parliament to bring an end to the speculation about Lord Ashcroft's domiciliary arrangements.
 - The information sought by the complainant is not sufficiently available to the public so as to satisfy its legitimate interests otherwise than by disclosure under this Act.
126. The Commissioner believes that legitimate interests of the public identified above cannot be met without the disclosure of some information relevant to the complainant's request. He believes that disclosure is necessary because there are no other means of scrutiny available to the public. The Parliamentary Ombudsman has stated that she cannot investigate this matter and similarly, the House of Lords

¹¹ <http://www.lordashcroft.com/belize/index.html>

Awards Commission has stated that it has no jurisdiction regarding this particular award.

127. Having concluded that disclosure would be fair to Lord Ashcroft, and determined that disclosure of some relevant information would be necessary for the purpose of those legitimate interests pursued by the public, the Commissioner has considered whether disclosure would cause unwarranted prejudice to Lord Ashcroft.
128. Some information about Lord Ashcroft's ennoblement has already been placed into the public domain by the Prime Minister's Office. This was considered to be fair to Lord Ashcroft and necessary for the public's understanding of his ennoblement. The disclosure of additional information relating to Lord Ashcroft's ennoblement would place into the public domain details of what may or may not have been necessary criteria for an award or working peerages at that time. The Commissioner believes that this information is not subjective or person-centred information; it is information about the honours system itself and as such would not result in unwarranted prejudice Lord Ashcroft's rights, freedoms and legitimate interests. The Commissioner therefore concludes that condition 6 would be satisfied by the disclosure of the documents identified in the confidential annex of this Notice.
129. Since the requested information does not constitute Lord Ashcroft's sensitive personal data, there is no need for the Commissioner to consider any of the conditions of Schedule 3 of the Data Protection Act.
130. The Commissioner has considered whether disclosure of relevant information would be lawful in relation to the first data protection principle. He has considered this in respect of whether disclosure would breach any statutory provision preventing disclosure and whether there is a duty of confidence owed to Lord Ashcroft. He has concluded that there is no statutory provision which prevents disclosure and there would be no breach of confidence. The Commissioner's considerations are detailed in this Notice in his analysis of section 41 above.

Section 40(4)

131. The Commissioner notes that the Cabinet Office did not apply this exemption when it initially refused the complainant's request or at the conclusion of its internal review. It was only in its letter dated 1 March 2010 that the Cabinet Office confirmed to the Commissioner that section 40(4) also applied to the requested information.
132. Section 40(4) provides that information that is the personal information of an individual other than the requestor is exempt under

the Freedom of Information Act, if it is also exempt from the requirement of section 7(1)(c) of the Data Protection Act 1998, which provides a right for individuals to access their own personal data. The effect of this exemption is that any information that constitutes personal data, but is not available to the data subject via section 7(1)(c) of the DPA, is also not available to any other person via the Freedom of Information Act.

133. Consideration of this exemption is a three stage process.

- Firstly, the Commissioner must determine whether the information in question constitutes personal data.
- Secondly, this information must be subject to an exemption from 7(1)(c) of the DPA.
- Thirdly, because section 40(4) is not an absolute exemption, the information must be subject to an analysis of whether the public interest favours its disclosure or withholding.

134. The analysis of the public interest requires the Commissioner to consider the specific interest which the exemption in the DPA is designed to protect, the conferring by the Crown of any honour or dignity, and the consequences of allowing access to personal information, which the data subject may not be able to obtain through his right of subject access, and balancing this against the public interest in disclosure. In this case it is necessary to consider whether disclosure of the requested information would be an intrusion into Lord Ashcroft's privacy and whether such an intrusion would result in Lord Ashcroft being disadvantaged as a consequence of that disclosure.

135. The Commissioner has already determined (at paragraph 93 above) that the requested information constitutes the personal data of Lord Ashcroft. His attention is now turned to whether this personal data is exempt from the provisions of section 7(1)(c) of the DPA – Lord Ashcroft's right to have his personal data communicated to him.

136. Paragraph 3(b) of Schedule 7 of the DPA provides that -

3. 'Personal data processed for the purpose of –

(b) the conferring by the Crown of any honour, are exempt from the subject information provisions.¹²

137. Lord Ashcroft's solicitors wrote to the Cabinet Office on his behalf on 23 July 2009 asking for information concerning correspondence between the Cabinet Office and the Information Commissioner's Office, sent in relation to this case and one of a related and similar nature; and for

¹² Amended by paragraph 6 of Schedule 6 of this Act to include "or dignity" after "honour".

information relating to Lord Ashcroft's undertaking. The letter pointed out that some of the questions should be treated as subject access requests under the Data Protection Act.

138. The Commissioner is aware that the requests made by Lord Ashcroft's solicitors were much broader in scope than the request under consideration by this Notice. He is also aware that parts of the request were refused in reliance of the exemption provided by Schedule 7(3)(b) DPA above.
139. The Cabinet Office informed the Commissioner that it had supplied Lord Ashcroft with the information requested by the complainant in this case on 2 July 2009 and provided the Commissioner with the following clarification concerning its citation of section 40(4):

'... in principle, were Lord Ashcroft to make a subject access request, the scope of which included the undertaking, that request could be refused under section 7(1)(c) of the Data Protection Act 1998 ('DPA') (i.e. the right of the subject to access their personal data) because of the exemption for honours and dignities. To do this we can see that section 40(4) could be relevant as Lord Ashcroft's solicitors suggested.'

140. The Commissioner accepts that the requested information does concern the conferring by the Crown of a dignity in March 2000 and therefore it is exempt from the provisions of section 7(1)(c) of the DPA by virtue of the exemption provided by Schedule 7(3)(b). The attraction of the Schedule 7(3)(b) exemption is not dependant on whether the Cabinet Office chose to exercise its discretion to provide Lord Ashcroft with information within the scope of this case. The Commissioner therefore concludes that the second stage of the test for section 40(4) is met.
141. Information is exempt from the provisions of section 1(1)(b) of the Act if, or to the extent that, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.

Public interest arguments in favour of disclosing the requested information

142. Section 40(4) is considered here by virtue of the Cabinet Office's application of Schedule 7(3)(b) of the DPA to information requested by Lord Ashcroft in his subject access request. Schedule 7(3)(b) is designed to provide appropriate protection to information relating to the conferring by the Crown of any honour. The Commissioner considers that in the specific circumstances of this case there is a

significant public interest in publicly disclosing the limited information identified by the Commissioner. This is because there is a clear public interest in greater transparency regarding the circumstances of Lord Ashcroft's ennoblement the interest which the honours and dignities exemption in the DPA is designed to protect is primarily personal information given in third party assessments of the suitability of a candidate for an award, but that is not at issue here. The Commissioner has set out his considerations and conclusions relating to the public interest in disclosure in his analysis of section 37(1)(b) above.

Public interest arguments in favour of maintaining the exemption

143. The Commissioner considers that there is an inherent public interest consideration in maintaining the section 40(4) exemption; that personal data that cannot be accessed by the data subject should not be accessible to a wider audience through the provisions of the Freedom of Information Act. This applies, for example, where the information requested is a personal assessment by a third party of a candidate's suitability for the award of an honour or dignity. The Commissioner notes that that is not the position in the present case. He has gone on to consider further public interest arguments which also favour the maintenance of this exemption in his analysis of section 37(1)(b) above.

Balance of the public interest arguments

144. The Commissioner finds that, in the particular circumstances of this case, disclosure of some of the requested information would serve the public interest in providing a necessary degree of openness and transparency of the honours system operating at the time of Lord Ashcroft's ennoblement, but more importantly in relation to this case in particular. The controversial nature of Lord Ashcroft's nomination and subsequent award of his peerage provide sufficient weight to favour disclosure when balanced against any detriment or harm to Lord Ashcroft or to the honours system that would flow from such disclosure.
145. Since 2001 responsibility for recommending non-party political peers has lain with the House of Lords Appointments Commission (HOLAC). HOLAC is tasked with finding people of distinction and to recommend them on their merit and ability. The Prime Minister has undertaken to pass all the Commission's recommendations to The Queen unless there are exceptional circumstances.
146. HOLAC is also asked to vet for propriety recommendations for peerages which are made when Party leaders are invited to nominate individuals

for peerages to serve as members of the House taking the party whip, or where the Prime Minister recommends distinguished public servants on their retirement.

147. In this case the complainant seeks information relating to the honours system which predates the current system operated by HOLAC. The Commissioner accepts that the information sought by the complainant would not provide any insight into the operation of the current honours system. The requested information does not relate to the current honours system; it is information which would allow the public to understand the system in place at the time of Lord Ashcroft's ennoblement in 2000 when his nominations were considered by the Parliamentary Honours Scrutiny Committee. This leads the Commissioner to conclude that a limited disclosure of relevant information concerning Lord Ashcroft's ennoblement would not be prejudicial to the current honours system.
148. The Commissioner considers that disclosure, under this Act, of information in the four documents he has identified and which are relevant to the complainant's request, cannot be seen to disadvantage Lord Ashcroft. He would again emphasise his belief that its disclosure is in the public interest.

Procedural Requirements

149. Section 17 of the Act provides that -

(1) A public authority, which in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

150. The Commissioner finds that the Cabinet Office breached the requirements of section 17(1) of the Act by exceeding the time for complying with the complainant's request. This is because it failed to provide him with a notice within the time for complying which specified the exemptions on which it later relied.

The Decision

151. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act, in respect of all of the information it holds relevant to the complainant's request.
152. The Commissioner has determined that the Cabinet Office was wrong to rely on the provisions of sections 37(1)(b), 40(2), 40(4) and 41 of the Act to withhold in their entirety the four documents he has identified in the confidential annex of this Notice. The Commissioner considers that sections 37(1)(b), 40(2), 40(4) and 41 of the Act cannot be relied on for the reasons outlined in this Notice and therefore the Cabinet Office breached these sections. In consequence of these breaches, the Cabinet also breached section 1(1)(b) of the Act.
153. The Cabinet Office breached section 10(1) in failing to provide the identified information to the complainant within twenty working days. It also breached section 17(1) of the Act by its failure to give the complainant a refusal notice in line with the provisions of this section within the time for complying with a request for information.

Steps Required

154. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

The Cabinet Office is required to provide the complainant with copies of the four documents identified in the confidential annex to this Notice. The Cabinet Office is permitted to make those redactions detailed in the confidential annex.

155. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

156. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

157. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
158. There is no timescale laid down in the Act for a public authority to complete an internal review. However, as he has made clear in his *'Good Practice Guidance No 5'*¹³, the Commissioner considers that these internal reviews should be completed as promptly as possible. In the absence of exceptional circumstances, a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer, but the total time taken should not exceed 40 working days, and as a matter of good practice the public authority should explain to the requester why more time is needed.
159. In this case the complainant's internal review request was made on 15 January 2008 and the Cabinet Office issued its decision on 27 March 2008. The Cabinet Office therefore took 50 working days to complete the review. The Commissioner does not believe that any exceptional circumstances existed in this case to justify that delay, and he therefore wishes to register his view that the Cabinet Office fell short of the standards of good practice in failing to complete its internal review within a reasonable timescale.

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http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_5.pdf

Right of Appeal

160. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 16th day of March 2010

Signed

**Christopher Graham
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Section 10(2) provides that –

"Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt."

Section 10(3) provides that –

"If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given."

Refusal of Request

Section 17(1) provides that -

"A public authority which ... is to any extent relying:

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or
- on a claim that information is exempt information

must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

Communications with Her Majesty.

Section 37(1) provides that –

"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."

Personal information.

Section 40(1) provides that –

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

Section 40(2) provides that –

"Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied."

Section 40(3) provides that –

"The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

Section 40(4) provides that –

"The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)."

Information provided in confidence.

Section 41(1) provides that –

"Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

Section 41(2) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence."

Data Protection Act 1998

Sensitive personal data

(2) In this Act "sensitive personal data" means personal data consisting of information as to—

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,

- (d) whether he is a member of a trade union (within the meaning of the [1992 c. 52.] Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

7 Right of access to personal data

(1) Subject to the following provisions of this section and to sections 8 and 9, an individual is entitled—

- (a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller,
- (b) if that is the case, to be given by the data controller a description of—
 - (i) the personal data of which that individual is the data subject,
 - (ii) the purposes for which they are being or are to be processed,and
 - (iii) the recipients or classes of recipients to whom they are or may be disclosed,
- (c) to have communicated to him in an intelligible form—
 - (i) the information constituting any personal data of which that individual is the data subject, and
 - (ii) any information available to the data controller as to the source of those data, and
- (d) where the processing by automatic means of personal data of which that individual is the data subject for the purpose of evaluating matters relating to him such as, for example, his performance at work, his creditworthiness, his reliability or his conduct, has constituted or is likely to constitute the sole basis for any decision significantly affecting him, to be informed by the data controller of the logic involved in that decision-taking.

SCHEDULE 1

The data protection principles

1 Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

2 Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

3 Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

4 Personal data shall be accurate and, where necessary, kept up to date.

5 Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

6 Personal data shall be processed in accordance with the rights of data subjects under this Act.

7 Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

8 Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

SCHEDULE 2

Conditions relevant for purposes of the first principle: processing of any personal data

1 The data subject has given his consent to the processing.

2 The processing is necessary—

(a) for the performance of a contract to which the data subject is a party, or

(b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3 The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4 The processing is necessary in order to protect the vital interests of the data subject.

5 The processing is necessary—

- (a) for the administration of justice,
- (b) for the exercise of any functions conferred on any person by or under any enactment,
- (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
- (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

6 (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

SCHEDULE 7

Miscellaneous exemptions Judicial appointments and honours

3 Personal data processed for the purposes of—

- (a) assessing any person's suitability for judicial office or the office of Queen's Counsel, or
 - (b) the conferring by the Crown of any honour,
- are exempt from the subject information provisions.