

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 10 March 2011

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Summary

The complainant requested information concerning the decision to award a CBE to a named individual. The public authority refused the request and cited the following exemptions from the Freedom of Information Act (the "Act"): sections 37(1)(b) (information relating to the conferring by the Crown of any honour or dignity) and 40(2) / (4) (personal information exempt from the right of access provided by the Data Protection Act). The Commissioner finds that the public authority was correct to withhold some of the information, but that the exemptions were applied incorrectly in relation to the remainder of the information. The public authority is now required to disclose the information that the Commissioner has concluded was not exempt. The Commissioner also found that the public authority had breached its procedural obligations under 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.

The Request

2. The complainant made the following information request on 25 March 2010:

"I write to formally serve notice on you under the Freedom of Information Act for sight of the file reviewed by the Independent Committee Honours Committee and of their conclusions in [name redacted] case."

3. The response to this request was dated 26 April 2010. The request was refused with the exemptions provided by the following sections of the Act cited: 37(1)(b) (information relating to the conferring by the Crown of any honour or dignity), 40(2) / (3) (personal information the disclosure of which would be in breach of any of the data protection principles) and 40(2) / (4) (personal information exempt from the right of access provided by section 7(1)(c) of the Data Protection Act 1998).
4. The complainant responded to this on 3 May 2010 and requested an internal review. The public authority responded with the outcome of the internal review on 26 May 2010. The conclusion of this was that the citing of sections 37(1)(b) and 40(2) / (4) were upheld, but the citing of section 40(2) / (3) was withdrawn on the basis that the individual named in the request had given their consent to the disclosure of this information.

The Investigation

Scope of the case

5. The complainant contacted the Commissioner's office in connection with this information request on 15 June 2010. The complainant made the case that the public authority has previously disclosed information relating to the awarding of the honour in question by commenting on this honour in correspondence. The complainant believed that this negated the arguments advanced by the public authority in favour of the exemption. The complainant also noted at this stage that the request would be satisfied through viewing the requested information on site at the public authority.

Chronology

6. The Commissioner contacted the public authority in connection with this case on 11 October 2010. At that stage the public authority was asked to respond with a copy of the information withheld from the complainant and with any further explanations it wished to advance for the refusal of the request. In particular, the public authority was invited to comment on the argument advanced by the complainant that information relating to the awarding of the honour referred to in the

request had been disclosed by the public authority through correspondence.

7. The public authority responded by letter dated 4 November 2010. The public authority emphasised that it remained of the view that the information in question should remain confidential. On the issue of the correspondence referred to by the complainant, the public authority stated that it did not accept that confidentiality had been breached through this correspondence and that the intention of this correspondence had been to comment on the honours system in general, not in connection with any specific case.

Analysis

Exemptions

Section 37

8. Section 37(1)(b), which is set out in full in the attached legal annex, as are all other legislative provisions referred to in this Notice, provides an exemption for information that relates to the conferring by the Crown of any honour or dignity. Consideration of this exemption is a two-stage process; first, the exemption must be engaged as a result of the information conforming to the description given in the wording of section 37(1)(b). Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
9. Covering first whether the exemption is engaged, the information identified by the public authority as falling within the scope of the request consists of a document titled 'Honours Citation Form' and extracts from briefing notes and notes recording committee meetings that relate to the honour award mentioned in the request. The individual named in the request was awarded a CBE. The Commissioner considers it clear that this information does relate to the conferring by the Crown of an honour and so the exemption provided by section 37(1)(b) is engaged in relation to this information.

The public interest

10. Having concluded that the exemption is engaged, it is necessary to go on to consider the balance of the public interest. In reaching a conclusion on the balance of the public interest here, the Commissioner

has taken into account factors relevant to the honours system in general in considering what harm may result to the honours system through disclosure and what benefits may be said to result through an improvement in the transparency and openness of the honours system. The Commissioner has also considered what relevance the specific decision to award an honour to the named third party and the stated reasons for it may have to the balance of the public interest.

11. Importantly, this exemption does not carry any inherent weight in the balance of the public interest. This means that it is not the case that the starting point for the public interest, having concluded that the exemption is engaged, is that the balance favours maintenance of the exemption. Instead, the starting point for the public interest test is that the balance between maintenance of the exemption and disclosure of the information is equal, even in a case where, as here, there is no doubt that the information falls into the class specified in the exemption.
12. Covering first the significance to the balance of the public interest of the specific honour award that was the subject of the request, brief research reveals that the departure from previous practice on the awarding of an honour to previous holders of the same public office as the subject of the request was the subject of some comment in the media. This media coverage records that the reasoning behind this departure from previous practice was also the subject of some public speculation and debate. Given the questioning of the reasoning for this departure from tradition, with some of the suggestions made in the media having been denied by the then Government, the Commissioner believes that there is public interest in disclosure of the information in question on the grounds that this would improve transparency surrounding the specific decision to award a CBE to the individual named in the request. The Commissioner considers this a public interest factor in favour of disclosure of some weight.
13. As referred to above, the complainant has argued that the public authority has previously breached confidentiality in relation to the awarding of this honour by discussing this in correspondence. The response from the public authority to this point is that this correspondence covered the honours system in general and that no breach of confidentiality occurred. If it were the case that the public authority had disclosed information about the awarding of this honour through comments made in correspondence, the potential impact of this on the balance of the public interest would be that the weight of the arguments advanced by the public authority about the importance of preserving the confidentiality of the honours system would be undermined.

14. The Commissioner has not viewed the content of the correspondence referred to by the complainant, but has been provided with a copy of a letter sent by the individual named in the request to the public authority in which the relevant parts of this correspondence are quoted. Whilst these quotes show that the issuing of this particular honour was commented on in this correspondence, this appears to have been in the context of confirming that the awarding of this honour followed the usual procedure, which had also been set out in this correspondence. On the basis of the information available to him about the content of this correspondence, the Commissioner does not consider this to be a factor that reduces the weight of the arguments advanced by the public authority about the importance of preserving the confidentiality of the honours system.
15. Turning to those factors related to the honours system in general, the Commissioner's published guidance on this exemption states the following:

"Two recent independent reviews of the honours system have acknowledged a general concern regarding transparency and accountability of the system itself."

"The Information Commissioner encourages public authorities when applying the public interest test to recognise the considerable need for public confidence in the integrity of the honours system. Specifically, if the system and the individual honours and dignities themselves are to be valued and respected, the public will wish to know that the process for awarding them is objective, accountable and transparent. In particular where the requests for information concern the process of and policy behind the awards of honours and dignities, authorities are encouraged to take a positive approach in their application of the public interest test and disclose the maximum information possible."

16. Disclosure of the information in question here, recorded as part of the process of awarding an honour, would further the transparency and accountability of the honours system. The Commissioner considers this to be a valid public interest factor in favour of disclosure of considerable weight.
17. The arguments of the public authority related to the effective operation of the honours system, which it believed may be prejudiced as a result of inhibition to participants in the honours system resulting from knowledge that the record of contributions may later be disclosed. The

Commissioner believes that these arguments from the public authority are similar to two concepts used in relation to the application of the public interest test under section 35(1)(a).

18. The first concept is that of civil servants and ministers needing a 'safe space' in which to formulate policy and debate live issues away from public scrutiny and particularly away from lobbying and media involvement. This safe space therefore allows policy makers to hammer out policy by exploring both safe and radical options, without the fear of headlines suggesting that ideas that have merely been touched upon during the formulation / development process have in fact been accepted or are being seriously considered as policy options. Whilst the awarding of honours involves the implementation of existing policy rather than the creation of new policy, safe space is still a relevant factor here in the sense of preserving a space within which to make decisions about the awarding of honours.
19. The second concept is that of a chilling effect. This is directly concerned with the potential loss of frankness and candour in debate and advice which may lead to poorer quality of advice and less well formulated policy and decision making if information were to be disclosed under the Act.
20. The Commissioner accepts the logic of the safe space argument. It would clearly not be in the public interest if media or public pressure interfered with the established system of awarding honours.
21. However, he also notes that in considering safe space arguments under section 35(1)(a) of the Act, the need for such a safe space diminishes once the policy decision in question has been taken. It is clear that by the time of the complainant's request the decision making process in relation to the awarding of the named third party's honour had been completed. This reduces the force of the argument in this case concerning the need for officials to have a safe space for deliberation.
22. This does not altogether negate the strength of the chilling effect argument generally, however. The Commissioner takes into account how those involved in the awarding of honours will act in the future if this information were to be disclosed. In particular, would they be inhibited from freely and frankly discussing the merits of the candidates who have been nominated? Clearly, such a line of argument is relevant to the concept of the chilling effect described above.
23. The Commissioner has reached differing conclusions here in relation to the different information falling within the scope of the request; first,

the citation form, and secondly, the excerpts from briefing and meeting notes.

24. Covering first the citation form, whilst the Commissioner has accepted, in concluding that the exemption is engaged, that the information in question does relate to the conferring of an honour, the content of this information includes nothing that can be characterised as requiring a free or frank exchange, or is in any way contentious. Instead the information consists of a recitation of the achievements of the named third party. In the absence of any content within this information that could conceivably have eroded the safe space within which to discuss honours nominations, or given rise to a chilling effect, the Commissioner does not accept that disclosure of this information would cause prejudice to the operation of the honours system. Prejudice to the operation of the honours system is not, therefore, a factor in favour of maintenance of the exemption to which the Commissioner affords any significant weight in this particular case in relation to the citation form.
25. In relation to the excerpts from briefing and meeting notes, the Commissioner considers that the content of these do include comments on the merits of the honours nomination and views expressed by individuals about this. The Commissioner accepts that some of these views could be characterised as free and frank. For this reason, the Commissioner also accepts that the chilling effect argument advanced by the public authority should be afforded some weight in relation to this information.
26. The conclusion of the Commissioner in relation to the long citation is that the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure. He considers that the objective and non-contentious nature of the content of the information in this case means that the argument of the public authority that disclosure would result in prejudice to the operation of the honours system does not carry any significant weight. On the other hand, he has decided that disclosure would further the transparency both of the honours system in general and in relation to the specific decision to award a CBE to the individual named in the request, being a departure from tradition in relation to holders of the relevant public office. These factors have tipped the balance of the public interest in favour of disclosure.
27. In relation to the citation form, this analysis and conclusion relates to the substantive content of this, which is that part under the heading "Long Citation". The Commissioner does not consider it necessary for the form itself to be disclosed, the remaining content of which is

administrative and includes exempt personal information, in order to satisfy the public interest.

28. In relation to the excerpts from briefings and meeting notes, the Commissioner has reached the opposite conclusion; that the public interest in the maintenance of section 37(1)(b) does outweigh the public interest in disclosure in relation to this information. The key factor in favour of maintenance of this exemption, that did not apply in relation to the long citation, is that it is conceivable that a chilling effect that could harm the honours system in future could result through disclosure of this information. In the Commissioner's view this factor tips the balance in favour of maintenance of the exemption in relation to this information.

Section 40

29. The public authority cited section 40(2) in conjunction with section 40(4). Having concluded that section 37(1)(b) is not upheld in relation to the 'Honours Citation Form', the Commissioner has gone on to consider whether section 40(2)/(4) applies to this information. As section 37(1)(b) was upheld in relation to the other information within the scope of the request, it has not been necessary to consider this exemption in relation to that information.
30. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester, subject to certain conditions. Section 40(4) provides that information that is the personal data of an individual other than the requester 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 ("DPA"), which provides to individuals a right of access to 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 a subject access request under the DPA, is also not available to any other person via the Freedom of Information Act.
31. Consideration of this exemption is a three-stage process. First, the information in question must constitute the personal data of an individual other than the complainant. Secondly, this information must be subject to an exemption from section 7(1)(c) of the DPA. Thirdly, as made clear by section 2(3)(f)(ii), this part of section 40 is subject to the public interest, meaning that this information should be disclosed if the public interest favours this even though the exemption is engaged.

32. Covering first whether the information in question constitutes personal data, section 1(1) of the DPA gives the following definition of personal data:

“personal data’ means 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.”*

33. The position of the public authority is that the information in question constitutes the personal data of the individual named in the request. The Commissioner considers it clear that this individual can be identified from this information and that this information relates to this individual. This information does, therefore, constitute the personal data of the individual named in the request.

34. Turning to whether this personal data is exempt from section 7(1)(c) of the DPA, the argument of the public authority is that the exemption provided by DPA Schedule 7(3)(b) applies. This states the following:

“Personal data processed for the purposes of-

- (b) the conferring by the Crown of any honour are exempt from the subject information provisions.”*

35. The task for the Commissioner here is to reach a conclusion as to whether this DPA exemption does apply in relation to the personal data in question. The Commissioner notes first that section 27(2)(b) of the DPA provides that section 7 of the DPA is part of the *“subject information provisions”*.

36. Secondly, on the issue of whether this personal data was processed for the purposes of the conferring by the Crown of any honour, the Commissioner would refer to his conclusion above at paragraph 9 that the exemption provided by section 37(1)(b) is engaged. In forming that conclusion the Commissioner has found that the information in question relates to the conferring by the Crown of an honour. For the same reasons as outlined in that paragraph, the Commissioner concludes that the personal data in question was processed for the purposes of the conferring by the Crown of an honour. The exemption from section 7(1)(c) of the DPA provided by DPA Schedule 7(3)(b) does, therefore, apply to this personal data.

37. The Commissioner has found that the information in question does constitute personal data and that this personal data is exempt from the requirement of section 7(1)(c) of the DPA. The exemption provided by section 40(2) in conjunction with section 40(4) is, therefore, engaged.

The public interest

38. The Commissioner considers the basis for the public interest test here to be twofold; first, similarly as in relation to section 37(1)(b), the public interest in openness and transparency in the honours system versus the public interest in the maintenance of the exemption provided by DPA Schedule 7(3)(b). The second basis is the public interest in maintenance of the principle that personal data that cannot be accessed by the data subject should not be accessible to a wider audience via the Freedom of Information Act.
39. The Commissioner's considerations and conclusion in relation to the public interest in the openness of the honours system versus the interest in maintaining the confidentiality of this system are as set out above when considering the balance of the public interest in connection with section 37(1)(b). The Commissioner finds that the content of the information in question means that disclosure would not result in harm to the honours system and so the public interest in furthering the transparency of this system tips the balance in favour of disclosure.
40. Turning to the second factor, the Commissioner recognises that there is a public interest in maintaining the principle that personal data that cannot be accessed by the data subject should not be made available via the Act. However, the weight that the Commissioner affords to this factor will vary from case to case and will depend primarily on the content of the information. At paragraph 24 above the Commissioner notes that the content of the information in question consists of a recitation of the achievements of the named third party. The nature of this information also means that the Commissioner gives this public interest factor less weight in relation to this exemption than he might have had it been the case that, for example, the content of this information included subjective critical or contentious comments about the named third party's nomination for an honour or comments which impinged upon the private life of the individual concerned. Given this reduced weight, the Commissioner concludes that this factor is outweighed in this case by the public interest in furthering the transparency of the honours system.
41. The conclusion of the Commissioner in respect of the relevant information in this particular case is that the public interest in the maintenance of the exemption does not outweigh the public interest in

disclosure. The primary reason for this conclusion is that the objective and non-contentious nature of the content of the information in question means that disclosure would not result in harm to the honours system or to the data subject.

Procedural Requirements

Sections 1 and 10

42. In failing to disclose within twenty working days of receipt of the request the long citation, in relation to which the Commissioner concludes that neither of the exemptions cited by the public authority are engaged, the public authority did not comply with the requirements of sections 1(1)(b) or 10(1).

The Decision

43. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that it applied the exemption provided by section 37(1)(b) correctly in relation to some of the information falling within the scope of the request. However, the Commissioner has also found that the public authority was incorrect to withhold the remainder of the information under the exemptions provided by sections 37(1)(b) and 40(2)/(4) and, in so doing, breached the requirements of sections 1(1)(b) and 10(1).

Steps Required

44. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - disclose to the complainant the long citation from the document titled 'Honours Citation Form' relating to the particular named individual.
45. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

46. 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.

Right of Appeal

47. 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.

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

Dated the 10th day of March 2011

Signed

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

Legal Annex

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."

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 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."

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(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)."