

## Freedom of Information Act 2000 (FOIA)

**Date:** 11 August 2014

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

### Decision (including any steps ordered)

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1. The complainant requested information from the Cabinet Office about why Jimmy Saville was 'turned down' for honours and a knighthood between 1970 and 1990. The Cabinet Office disclosed some information to the complainant regarding these discussions. However, it sought to withhold eight further documents on the basis of sections 37(1)(b) (honours exemption) and 40(2) (personal data exemption) of FOIA. The Commissioner has concluded that although section 37 is engaged, the public interest favours disclosing the information. He has also concluded that the information is not exempt from disclosure on the basis of section 40(2).
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Provide the complainant with the information contained in the eight withheld documents which relates to Jimmy Saville.<sup>1</sup>
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

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<sup>1</sup> The Commissioner is conscious that it may be difficult for the Cabinet Office to make legible copies of the relevant parts of the eight documents given the quality of the originals. Therefore, in complying with this step the Cabinet Office may wish to consider whether it is more pragmatic to transcribe the relevant information and provide this to the complainant rather than provide copies of the originals.

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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4. The complainant submitted the following request to the Cabinet Office on 5 December 2013:

*'Under the terms of the freedom of information act, I'd like to request all documents and minutes discussing why Jimmy Savile was repeatedly turned down for honours and knighthood from 1970 to 1990.'*
5. The Cabinet Office responded on 8 January 2014 and confirmed that it held the requested information but considered it to be exempt from disclosure on the basis of section 37(1)(b) of FOIA but needed a further 20 working days to consider the balance of the public interest test.
6. The Cabinet Office issued a similar letter to the complainant on 5 February 2014.
7. The Cabinet Office contacted the complainant again on 11 February 2014 and explained that it had concluded that *'it is in the public interest to disclose the information, subject to redactions. This information, which has been previously released to members of the public, is enclosed with this letter.'* The Cabinet Office explained that these redactions had been made on the basis of the exemptions contained at sections 37(1)(b) and 40(2) of FOIA.
8. The complainant contacted the Cabinet Office on 12 February 2014 in order to ask for an internal review of this decision. He asked the Cabinet Office to clarify why it had needed to extend its consideration of the public interest test twice only to then disclose information that had previously been released to the public.
9. The Cabinet Office informed the complainant of the outcome of the internal review on 7 March 2014. It apologised for the length of time it took to complete the public interest test considerations and explained that this was partly because the official dealing with the request did not initially realise that this information had been previously released into the public domain. However, the internal review concluded that the redactions which had been made to the disclosed documents had been correctly applied. Furthermore, the review explained that additional information falling within the scope of the request had been located

albeit that this was also considered to be exempt from disclosure on the basis of sections 37(1)(b) and 40(2).

## **Scope of the case**

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10. The complainant contacted the Commissioner on 17 March 2014 to complain about the Cabinet Office's decision to withhold information falling within the scope of his request.
11. The Commissioner has established that the redactions applied by the Cabinet Office to the 24 documents disclosed to the complainant on 11 February 2014 do not relate to discussions about Jimmy Savile but concern other individuals being considered for honours. The complainant did not seek to challenge the decision to withhold this information.
12. However, the additional information which the Cabinet Office located at the internal review stage consisted of eight further documents. The information contained in these documents does focus on Jimmy Savile and therefore the complainant sought to challenge these redactions.
13. The Cabinet Office sought to withhold the information contained in all 8 documents on the basis of section 37(1)(b). It also sought to withhold some of the information contained in the documents 2, 3, 4 and 5 on the basis of section 40(2).

## **Reasons for decision**

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

14. Section 37(1)(b) of FOIA states that information is exempt if it relates to the conferring by the Crown of any honour or dignity.
15. Given that the request specifically seeks information which discusses the awarding of an OBE and knighthood to Jimmy Saville, the Commissioner is satisfied that the withheld information clearly falls within the scope of the exemption contained at section 37(1)(b). It is therefore exempt from disclosure on the basis of section 37(1)(b).
16. However, section 37(1)(b) is a qualified exemption and therefore the Commissioner must consider the public interest test at section 2 of the FOIA and whether in all the circumstances of the case the public interest

in maintaining the exemption outweighs the public interest in disclosing the information.

### **Public interest arguments in favour of disclosing the withheld information**

17. The Cabinet Office recognised that it was in the public interest for the honours system to be open and transparent in terms of the process involved and it actively promoted the transparency of the process so that the public has confidence in the integrity of the system.

### **Public interest arguments in favour of maintaining the exemption**

18. However, the Cabinet Office explained that it differentiated between the honours process and the content of individual honours cases. Whilst it understood the special circumstances of this case, it remained of the view that the public interest favoured maintaining the exemption given that the information related to an individual honours case. In reaching this conclusion the Cabinet Office emphasised that it had taken into account the age of the material, the fact that the individual under discussion was deceased as well as the fact that there was related information already in the public domain. Furthermore, the Cabinet Office highlighted the following two reasons for reaching its conclusion:
19. Firstly, the Cabinet Office explained that the withheld documents did not contain any information which would add to what is already in the public domain and that which has already been disclosed to the complainant. Consequently, disclosure of this information would add nothing to the public debate on this subject.
20. Secondly, and more importantly, the Cabinet Office explained that it was essential to the good functioning of the honours system to protect the confidentiality of discussions. This is in order to protect those participating in the system and helps to ensure that those invited to comment about a given candidate can do so freely and honestly on the understanding that their confidence will be respected. The Cabinet Office argued that it would not be in the public interest if it became apparent that records of discussions concerning individual honours might occasionally be made public. The Cabinet Office emphasised that the honours system relies on those participating to contribute frankly and on a voluntary basis; the system would become impaired if contributors became reluctant to participate on the basis that their comments might become public knowledge.

## **Balance of the public interest arguments**

21. In the Commissioner's opinion, when balancing the public interest under section 37(1)(b), consideration should only be given to protecting what is inherent in the actual exemption, namely protecting the integrity and robustness of the process of recognising and rewarding individuals for exceptional merit, bravery, achievement or service to the country. On a practical level, this means that the Commissioner will consider whether the confidentiality of the process should be maintained taking into account safe space and chilling effect arguments.
22. With regard to the weight that should be attributed to maintaining the section 37(1)(b) exemption, as a general principle the Commissioner accepts the Cabinet Office's fundamental argument that for the honours system to operate efficiently and effectively there needs to be a level of confidentiality which allows those involved in the system to freely and frankly discuss nominations. Furthermore, the Commissioner accepts the premise of the Cabinet Office's argument that if views and opinions, provided in confidence, were subsequently disclosed then it is likely that those asked to make similar contributions in the future may be reluctant to do so or would make a less candid contribution. Moreover, the Commissioner also accepts that disclosure of information that would erode this confidentiality, and thus damage the effectiveness of the system, would not be in the public interest.
23. However, in the particular circumstances of this case given the content of the withheld information, in the Commissioner's view the degree to which disclosure of this information would undermine this confidentiality is very limited. This is because, as the Cabinet Office acknowledges, the withheld information does not contain any information that is not already in the public domain. Therefore, in the Commissioner's opinion the likelihood of the withheld information resulting in a chilling effect on future honours discussions is minimal. The Commissioner believes that the impact of any such chilling effect is reduced further given the age of the information in question and the fact that the recipient of the awards is deceased.
24. With regard to the public interest in favour of disclosing the withheld information, the Commissioner recognises that following the revelations about Jimmy Savile there is a compelling public interest in the disclosure of information that would inform the public about the nature of the deliberations that led him to receive his honours. However, given that the withheld information does not contain any further information beyond that already disclosed into the public domain, the Commissioner accepts that the degree to which disclosing the information would

actually serve this particular interest is also very limited. That said, in the Commissioner's opinion there is always some public interest in disclosing the 'full picture' behind a particular decision in order to serve the purposes of general transparency and accountability and therefore the public interest in disclosure of this information cannot be completely discounted. Furthermore, withholding information which is said not to add anything to that which is already in the public domain is arguably contradictory and gives the impression that there is something to hide. It is difficult to argue that maintaining this stance is in the public interest.

25. In the Commissioner's opinion the public interest is finely balanced given that the public interest in maintaining the exemption and the public interest in disclosing the information are both limited. If the public interest on both sides is equal, under section 2 of FOIA information must be disclosed. In this case the Commissioner considers the balance of the public interest tips positively in favour of disclosure, albeit only marginally. Therefore, the information about Savile contained in documents 1 to 8 should be disclosed.

#### **Section 40 – personal data**

26. Section 40(2) of FOIA states that personal data is exempt if its disclosure would breach any of the data protection principles contained within the Data Protection Act (DPA). The Cabinet Office argued that disclosure of the information withheld under this exemption would be unfair and thus breach the first data protection principle which states that:

*'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.'*

27. Clearly then for section 40(2) to be engaged the information being withheld has to constitute 'personal data' which is defined by the DPA 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 of the individual.'*

28. In relation to the application of section 40(2), the Cabinet Office explained that this was being relied upon to withhold the following information from documents 2, 3, 4 and 5:
  - a) The personal data of any parties participating in the process by providing comments and views, i.e. their names and the attributable views they provided; and
  - b) Personal data of any candidates being considered in terms of their suitability to receive an honour.
29. The Commissioner accepts that the information described at a) comprises the personal data of identifiable individuals and thus is potentially exempt from disclosure on the basis of section 40(2).
30. With regard to the information described at b), the Commissioner notes that in the copies of documents 2 and 5 provided to him, very brief references are made to candidates other than Savile. However, in line with the approach set above under the heading the 'Scope of Case', the Commissioner would consider this information to be outside the scope of this complaint.
31. Therefore, the Commissioner has simply considered whether the information described at paragraph a) is exempt from disclosure on the basis of section 40(2).
32. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:
  - The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
    - what the public authority may have told them about what would happen to their personal data;

- their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
  - the nature or content of the information itself;
  - the circumstances in which the personal data was obtained;
  - particular circumstances of the case, e.g. established custom or practice within the public authority; and
  - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
- The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
    - whether information of the nature requested is already in the public domain;
    - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
33. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
34. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.

#### *The Cabinet Office's position*

35. The Cabinet Office argued that it would not be fair to disclose the withheld information because those involved in such discussions would have had a very reasonable expectation that discussions and views



recorded as to the suitability of various persons as recipients would have been kept confidential. The information was obtained in circumstances where there was an expectation of discretion. The Cabinet Office emphasised, as with its submissions on the application of section 37(1)(b), the award of honours was done on a confidential basis and this would have been clearly understood by those involved in the process.

*The Commissioner's position*

36. With regard to the expectations of the individuals who provided their opinions and the expectations of those involved in assessing the nominations, the Commissioner accepts the Cabinet Office's argument that given the confidential nature of the honours system the individuals would have had a reasonable – and indeed weighty – expectation that such information would not be made public. However, to some degree the Commissioner believes that it is reasonable to expect this expectation to shift with the passage of time, i.e. those who made contributions cannot necessarily expect their contributions to be withheld in perpetuity. Moreover, the Commissioner notes that the individuals whose views and opinions are recorded are senior in nature and in his opinion this means that in terms of their expectations they must, even in the days prior to the enactment of FOIA, have had some level of greater expectation that they would be publically accountable for their involvement in decision making.
37. Furthermore, in the Commissioner's view the opinions offered about Savile by the various individuals do not appear, for the large part, to be the personal views of these individuals. Rather they would appear to simply be objective views which have been expressed on behalf of a government department.
38. Therefore, despite the expectations of the individuals as to whether the personal data would be disclosed, in the Commissioner's opinion it is still fair to disclose the information withheld on the basis of section 40(2).
39. With regard to the conditions in Schedule 2 of the DPA, the Commissioner believes that the most appropriate one in this case is the sixth condition which states that:

*'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 of legitimate interests of the data subject'.*

40. As discussed above in the context of section 37(1)(b), the Commissioner accepts that given the content of the withheld information its disclosure would add little to the information already in the public domain. However, as also noted above, the Commissioner is firmly of the view that there is always a legitimate interest in disclosing information in order to disclose the 'full picture' behind a particular decision in order to serve the purposes of general transparency and accountability. In the particular circumstances of this case, i.e. given the revelations about Savile which have emerged following the broadcast of the ITV documentary in October 2012, the Commissioner is of the view that the need for such transparency and accountability cannot be underestimated. As a result the Commissioner believes that it is necessary to disclose this information despite the other information which has already been placed into the public domain. The Commissioner has therefore concluded that section 40(2) cannot be relied upon to withhold the information described at paragraph a) from documents 2, 3, 4 and 5.

## Right of appeal

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41. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

42. 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.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

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