

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 March 2020

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

Decision (including any steps ordered)

1. The complainant has requested information regarding the information shared between HMRC and the Cabinet Office with regards to the awarding of Honours.
2. The Commissioner's decision is that the Cabinet Office is entitled to withhold information under sections 36 and 37.
3. However, the Commissioner has determined that the Cabinet Office is not entitled to rely on section 21 with regards to the number of high risk ratings.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the number of high risk ratings received by year.
5. 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 3 September 2018, the complainant wrote to the Cabinet Office and requested information in the following terms:

"My request has been inspired by revelations by The Times newspaper that the HMRC is routinely consulted when individuals are nominated/recommended for an Honour.

HMRC operates a traffic light system and information relating to the tax affairs of a particular nominee are passed onto the Honours committee(s) and the Prime Minister.

Please note that I do not want to receive the name of any nominees or the name of any one who recommended them.

Please note that I am only interested in information which relates to the proposed and actual Birthday and New Year Honours Lists of 2014, 2015, 2016, 2017, 2018,

1...How many individuals being considered for inclusion in any of the proposed or actual lists had a red light flagged up by their name. Can you please provide a figure for each of the aforementioned years. For each individual year and in the case of each individual assigned a red light warning can you specify what Honour they were being considered for and the relevant list. Please do not identify the individual but please specify whether they are male or female.

2...Did the individual who was subject to a red light still get an Honour during that year or on a later occasion. Did they get the Honour they were recommended for? Alternatively did they get a lower ranking Honour as a result of the red light? Alternatively did they not get an Honour at all after the red light was flagged up. In the case of each individual can you specify what happened to their recommendation as a result of the red light warning.

3...In the case of each individual and each red light warning can you please specify why the red light warning was applied. Please do provide the names and details of any relevant tax avoidance or evasion schemes if you can do so without identifying the relevant individual. Please do specify if the red light was a result of concerns about avoidance or whether it was the result of concerns about evasion.

4...In the case of each individual and each individual red light warning can you specify which particular Honours committee was informed of the red light warning.

5... In the case of each individual were they or their representatives notified of the red light warning and informed of the implications of that warning for their particular Honours recommendation.”

7. The Cabinet Office responded on 29 October 2018. It confirmed that it held information within the scope of the request.
8. With regards to question 1, the Cabinet Office informed the complainant that the number of risk ratings provided by HMRC to the Honours and Appointments Secretariat is available online¹ and it was therefore relying on section 21 to refuse to provide this information. The Cabinet Office explained that the Memorandum of Understanding² which provides the legal basis for the exchange of tax risk ratings between HMRC and the Cabinet Office prohibits retention of the risk rating data. Therefore only partial information is held and this prohibits cross-reference of risk ratings with other data such as gender and level of award. The Cabinet Office also cited section 44(1)(a) of the Act, as the information is prohibited from disclosure under another enactment. In this instance, the relevant enactment is section 23(1) of the Commissioners for Revenue and Customs Act 2005 (CRCA). The Cabinet Office explained that the effect of section 23 of the CRCA is to prohibit disclosure of information held in connection with its functions which would specify the identity of a person or enable the identity of a person to be deduced. The Cabinet Office explained that section 44(1)(a) is an absolute exemption and therefore does not require consideration of the balance of the public interest.
9. With respect to question 2, the Cabinet Office confirmed that it held incomplete information and it was relying on section 44(1)(a) to withhold the information.
10. The Cabinet Office confirmed that the information requested in question 3 is not held as HMRC only provided the Cabinet Office with a high, medium or low risk rating and does not include details of nominees' tax behaviour.
11. With respect to questions 4 and 5, the Cabinet Office confirmed that it held information falling within the scope of the request but was withholding the information in accordance with section 37(1)(b) of the

¹ <https://www.gov.uk/government/publications/honours-nominations-probity-and-propriety-checks/honours-nominations-probity-and-propriety-checks-completed-by-hmrc>

² <https://www.gov.uk/government/publications/how-the-honours-system-works>

Act as it was information related to the conferring by the Crown of any honour or dignity. The Cabinet Office confirmed that section 37(1)(b) is not an absolute exemption and is subject to consideration of the public interest. The Cabinet Office acknowledged the general importance of transparency in government and the specific public interest in understanding how the honours system works and the way in which such decisions are taken. However, the Cabinet Office considered that there is also a public interest in preserving the confidentiality regarding individual cases which is essential to protect the integrity of the honours system and without which the system could not function. The Cabinet Office explained that non-disclosure of information in relation to individual cases ensures that those involved in the honours system can take part in the understanding that their confidence will be honoured and that decisions about honours are taken on the basis of full and honest information about the individual concerned. The Cabinet Office confirmed that it considered the public interest is better served by maintaining the exemption at section 37(1)(b).

12. The Cabinet Office explained that although the complainant did not request the names of individuals, the number of honours nominees affected by high risk ratings is so small as to carry a very strong risk that individuals may be identified. It therefore confirmed that it was withholding the information under section 40 which protects personal data and under section 41(1)(b) which exempts information from disclosure if to do so would constitute an actionable breach of confidence. The Cabinet Office also confirmed that it considered the information exempt under section 44(1)(a) as relates to the CRCA.
13. On 31 October 2018, the complainant contacted the Cabinet Office and requested an internal review of the handling of his request for information. The complainant disputed that individuals could be identified by disclosure of the requested information. The complainant also confirmed that he believed the public interest test had not been carried out correctly as its arguments did not take into account that he had specifically not requested individuals names. The complainant also explained that he considered that greater transparency could serve to protect the integrity of the system. He believed that to ensure the system is working correctly, the public have a right to know how often the warnings are being used and to what effect. He also argued that transparency may have a wider benefit as individuals who are keen to be considered for an honour may be encouraged to get their tax affairs in order.
14. The Cabinet Office provided the outcome of its internal review on 12 February 2019. It upheld its decision to withhold information under sections 37 and 41 and confirmed that it considered the balance of the public interest was fully considered. The Cabinet Office withdrew its

reliance on section 44(1)(a) as it was incorrectly applied. The Cabinet Office confirmed that it was now relying on sections 36(b)(i) and 36(2)(c) to withhold the information. The Cabinet Office explained that these sections exempt information if, in the opinion of the qualified person, disclosure would inhibit the free and frank provision of advice and would, or would be likely to, otherwise prejudice the effective conduct of public affairs. The Cabinet Office explained that it had consulted the qualified person and they have given their opinion that release of the information would be likely to cause prejudice for the purposes of section 36(2)(b)(i) as HMRC might be unwilling to share information with the Cabinet Office in the future, and that it would also be likely to cause prejudice by creating a detriment to the effective working of the honours systems, engaging the exemption at section 36(2)(c).

15. The Cabinet Office confirmed that it considered the public interest favoured maintaining the exemption.

Scope of the case

16. The complainant contacted the Commissioner on 19 February 2019 to complain about the way his request for information had been handled.
17. Following the agreement of the complainant, the scope of the investigation is to determine:
 - Whether the Cabinet Office can rely on section 21, section 36(2)(b)(i), section 36(2)(c) and section 37(1)(b) to withhold the information requested in question 1.
 - Whether the Cabinet Office can rely on section 37(1)(b) to withhold the information requested in question 2.
 - Whether the Cabinet can rely on section 37(1)(b), section 40(2), section 41(1)(b), to withhold the information requested in questions 4 and 5.
18. The complainant did not dispute that that Cabinet Office only holds partial information and the Commissioner has no reason to believe that it holds the information it has stated is not held. She will therefore not consider this as part of her investigation.

Reasons for decision

Section 21: Information reasonably accessible to the applicant

19. The Cabinet Office confirmed that it was relying on section 21 with regards to the first part of the first request, namely

"How many individuals being considered for inclusion in any of the proposed or actual lists had a red light flagged up by their name. Can you please provide a figure for each of the aforementioned years."

20. Section 21(1) of the Act states:

"Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."

21. Section 21 provides an absolute exemption, meaning it is not subject to the public interest test.
22. Although the information that is requested may be available elsewhere, a public authority will need to consider whether it is actually reasonably accessible to the applicant before it can apply section 21.
23. Unlike consideration of most of the other exemptions under the Act, section 21 allows a public authority to take the individual circumstances of the applicant into account. The inclusion of "to the applicant" creates a distinction between information that is reasonably accessible to the particular applicant and the information that is available to the general public.
24. The Cabinet Office has confirmed that it considers the information requested in the first part of the first question is exempt under the Act as it is already available via the GOV.UK website.
25. The Commissioner wrote to the Cabinet Office and explained that she was not persuaded that all of the information was reasonably accessible as it included redacted information where low numbers are represented as <5.
26. The Cabinet Office responded and stated:

"In respect of [complainant]'s question 1, the ICO has said that section 21 cannot be used since the information published by HMRC is redacted by means of their reliance on section 44. I should clarify that we intended our use of section 21 to relate specifically to the first part of [complainant]'s question 1 ("How many individuals being considered for inclusion in any of the proposed or actual lists had a red light flagged up

by their name. Can you please provide a figure for each of the aforementioned years.”). The information published by HMRC on gov.uk is listed by year and therefore provides the answer to this part of the question. We therefore maintain that this is in the public domain.”

27. The Commissioner is not persuaded by the Cabinet Office’s argument that the information is in the public domain. The information which is redacted by stating <5, not the recorded figure, cannot be accessible to the complainant by virtue of being redacted. Indeed, HMRC will have redacted the information precisely to prevent it from being available to members of the public.
28. The Commissioner therefore finds that section 21 is not engaged. The Commissioner acknowledges that HMRC has redacted the figures under section 44 of the Act, however, the Commissioner cannot accept another public authority’s citation of an exemption instead of a submission by the Cabinet Office.
29. In the absence of any further exemptions cited by the Cabinet Office, the Commissioner cannot take any other step than to require the Cabinet Office to disclose the requested information.

Section 36: Prejudice to effective conduct of public affairs

30. The Cabinet Office confirmed that it was relying on sections 36(2)(b)(i) and 36(2)(c) to withhold the information requested in the second part of the first question:

“For each individual year and in the case of each individual assigned a red light warning can you specify what Honour they were being considered for and the relevant list.”

31. Section 36(2)(b)(i) states:

“(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice”

32. Section 36(2)(c) states:

“(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

33. In determining whether sections 36(2)(b) and (c) are engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
 - The qualified person's knowledge of, or involvement in, the issue.
34. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
35. With regard to the process of seeking this opinion, the Cabinet Office provided the submission and judgement of the qualified person, in this case, Chloe Smith MP.
36. The submission provided to Ms Smith included the following arguments:
- Information has already been released about the relationship between HMRC and the Honours and Appointments Secretariat (HAS) in the Cabinet Office concerning the Honours system. This includes confirmation that a Memorandum of Understanding exists between the two parties, and overall statistics about the number of people rated low, medium and high risk in each year since 2013.

- The information provided by HMRC informs deliberation on the recommendation of individuals for Honours. The Cabinet Office confirmed that it believes disclosure would be likely to inhibit the free and frank exchange of views in the future. The Cabinet Office explained that HMRC has made its position clear, and has noted that were this information to be released, it would be unlikely to continue to provide information to the HAS in the future.
- The requested information relates to the provision of Honours and allows HAS to uphold the integrity of the Honours process. Disclosure of the information would, or would be likely to, inhibit the effective conduct of this in future. HMRC are legally obliged to withhold this information if it is requested of them, and although the Cabinet Office does not have the same legal restrictions, it is likely that HMRC would not share information with it if it released the information into the public domain.

37. On 16 January 2019, Ms Smith confirmed, via her private secretary, that she held the following opinion:

"It is my opinion that disclosure of the requested information, namely further details of the advice given to the Honours and Appointments Secretariat in the Cabinet Office by HMRC in relation to the provision of s. 36(2)(b)(i) because HMRC would be likely to withdraw their agreement to provide that information in future.

It is my opinion that disclosure of further information on the subject of the tax status of honours nominees would or would be likely to cause prejudice, for the purposes of s. 36(2)(c) because HMRC are legally obliged to withhold such information. Although there is no such legal obligation on the Cabinet Office, the release of the information by another government department would be likely to have the effect that HMRC would withdraw their agreement to provide that information in the future. Release of this information would prejudice the effective conduct of public affairs because the withdrawal of HMRC co-operation in the future would mean that probity checks on honours nominees could not be carried out in respect to their tax affairs.

I have reached this opinion taking into account the matters noted in the submission to me dated 16 January 2019.

I also note that officials intend to apply section 37(1)(b) to other information held for this request."

38. The Memorandum of Understanding details the legal basis on which HMRC share information with the Cabinet Office. The Memorandum of

Understanding provides that whilst disclosure of the requested information from HMRC to the Cabinet Office is permitted under the CRCA, it is done so with a caveat of confidentiality:

"The Cabinet Office Honours Secretariat will keep the information disclosed by HMRC confidential and without limiting its legal obligations under Data Protection legislation or otherwise, will ensure that:

- (i) it only uses the information for the purposes that it is provided for namely, to inform a decision about whether to confer an honour or an individual;*
- (ii) any individual's HMRC risk rating of medium or high is not shared beyond the members of the Main Honours Committee, the named honours contact in the No. 10 Appointments Team and the Prime Minister; and*
- (iii) it does not onwardly disclose the information to any other parties.*

39. The Cabinet Office also provided a submission from HMRC which confirmed HMRC's concerns regarding disclosure. The Cabinet Office confirmed that in line with this submission, it considered that disclosure *would* prejudice the relationship between the Cabinet Office and HMRC and therefore *would* prejudice the free and frank provision of advice from HMRC.
40. The Cabinet Office explained that if HMRC stopped supplying tax risk ratings as part of the honours probity assessment, it would have serious consequences for both the integrity of the honours system and public confidence that honours are awarded to people who are in good standing in their private lives.
41. In respect of section 36(2)(c), the Cabinet Office explained that the prejudice to the effective conduct of public affairs which would result from disclosure is twofold and results from the fact that HMRC would stop supplying tax assessments for honours nominees were this information to be disclosed. The Cabinet Office explained that if this were to happen, it would prevent the Cabinet Office from ensuring that everything possible had been done to ensure that it had minimised the risk of the honours system being brought into disrepute through the conduct of nominees. Secondly, it would prevent the Cabinet Office from enforcing the position that poor tax behaviour is incompatible with the receipt of an honour, which in turn might result in individuals being recognised with honours by The Queen whilst simultaneously being censured by HM Government for poor or possibly illegal tax behaviour.

42. Having regard to the submissions before the qualified person and the submission provided as part of this investigation, the Commissioner's view is that the opinion given is a reasonable one. The Commissioner accepts that there is a significant risk that disclosure of the requested information would prejudice the relationship between the Cabinet Office and HMRC.
43. The Commissioner considers that HMRC are likely to be reticent to continue providing the information set out in the Memorandum of Understanding if the Cabinet Office were to disclose information received in accordance with it. She also accepts that if the Cabinet Office did not receive this information, it would prejudice its ability to ensure that nominees for honours have acceptable tax affairs and would prevent the Cabinet Office from conducting thorough probity checks.
44. The Commissioner is therefore satisfied that sections 36(2)(b)(i) and 36(2)(c) are engaged in relation to this information.
45. The Commissioner notes that the qualified person's opinion was not sought within the statutory timescale as the Cabinet Office sought to claim reliance on section 36 at the internal review. However, given that the opinion was sought at the point the Cabinet Office claimed reliance on section 36, this does not mean that the opinion is unreasonable.

Public interest test

46. Section 36(2) is a qualified exemption and therefore the Commissioner must consider whether in all circumstances of the case, the public interest in maintaining the exemptions at sections 36(2)(b)(i) and 36(2)(c) outweighs the public interest in disclosing the information.
47. In *Guardian and Heather Brooke v the Information Commissioner and the BBC*³, the Tribunal provided some general principles about the application of the public interest test in section 36 cases, as follows:
 - The lower the likelihood is shown to be that the free and frank exchange of views or provision of advice would be inhibited, the lower the chance that the balance of the public interest will favour maintaining the exemption.

³ Appeal no EA/2006/0011 and EA/2006/0013

- While the Commissioner cannot consider whether prejudice is likely (that is for the qualified person to decide), she is able to consider the severity, frequency or extent of any likely prejudice.
 - Since the public interest in maintaining the exemption must be assessed in the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought.
 - The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining the exemption will diminish over time.
 - In considering factors against disclosure, the focus should be on the particular interest that the exemption is designed to protect.
 - While the public interest considerations in the exemptions from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad ranging and operate at different levels of abstraction from the subject matter of the exemption.
 - Disclosure of information serves the general public interest in promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation of the public in the democratic process.
48. Both the Cabinet Office and the complainant provided the Commissioner with public interest arguments.

Balance of the public interest

49. The complainant considers that the public interest test carried out by the Cabinet Office did not take into account the fact that he specified that the named of relevant individuals should remain secret.
50. He also considers that greater transparency could serve to protect the integrity of the system. He explained that the general public would agree with both the Cabinet Office and HMRC that an individual's tax record should be taken into account when Honours are being considered. However, to be sure the system is working properly, he considers that members of the public have a right to know how often the warnings are being used and to what effect.

51. He also argued that transparency would have a wider benefit as it may encourage those individuals who are keen to be considered for an Honour to get their tax affairs in order.
52. The Cabinet Office acknowledged that there is a legitimate public interest in understanding how probity checks are carried out within the honours system. The Cabinet Office set out that in order to meet this public interest, it has published its agreements with HMRC and the Police on GOV.UK as part of a wider operation of the honours system; and HMRC has published on GOV.UK the aggregated statistics about the advisory ratings it has provided to the Honours and Appointments Secretariat. The Cabinet Office explained that it has also set the checks in context by giving some narrative on probity matters in the most recent report on the operation of the honours system which has also been published on GOV.UK.
53. The Cabinet Office considers that this is the appropriate way to balance the public interest in transparency against wider considerations of confidentiality and legal duties.
54. The Cabinet Office also considers that there is a stronger public interest in senior officials being able to receive advice from departmental colleagues and colleagues across government. It considers that, in light of the proactive publication set out above, there is no compelling public interest that overrides the very strong public interest in maintaining the confidentiality of this information.
55. The Commissioner acknowledges that the public has a legitimate interest in being informed about the honours system and what information is considered when deciding to award or reject an individual's honour. She notes that the Cabinet Office and other public authorities publish a range of information on the nomination process and the Memorandum of Understanding with HMRC regarding the information obtained during this process. The Commissioner appreciates, however, that the complainant is seeking to confirm that this procedure is followed in all cases.
56. With regard to the weight that should be attributed to maintaining the section 36 exemption, as a general principal 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 and to receive information that aids those discussions.
57. Furthermore, the Commissioner accepts that in light of HMRC's submission, if the requested information were to be disclosed, HMRC is

likely to refuse to provide this information in future. The Cabinet Office and HMRC have confirmed that disclosure would not be in accordance with the Memorandum of Understanding and potentially in breach of CRCA.

58. The Commissioner accepts that disclosure of this information would erode the explicit confidentiality of this information, and thus damage the relationship between the Cabinet Office and HMRC, which would not be in the public interest.
59. In the specific circumstances of this case, the Commissioner notes that the Cabinet Office does disclose information on the process and it is known that in order to receive an honour, individuals should not have any tax evasion or avoidance issues with HMRC.
60. The Commissioner is mindful that Parliament chose to designate section 36 as a qualified exemption. It follows that there will be some cases where the public interest in maintaining the exemption does not in fact outweigh the public interest in disclosure. This underlines the importance of considering the circumstances of each particular case. However, in this case the Commissioner is not persuaded that there is a strong public interest in disclosure, over and above the general public interest in transparency acknowledged above. In the Commissioner's opinion the public interest in maintaining the exemption is considerably stronger.
61. The Commissioner does not doubt that the public would be interested in examining the information falling within the scope of the request. However, she is not persuaded that its disclosure would serve any particular or specific public interest albeit it would obviously serve the general interest in transparency in relation to how the Cabinet Office's processes honours cases. Consequently, given the significant weight that the Commissioner considers should be given to the public interest in maintaining the exemption, she has concluded that the public interest in maintaining sections 36(2)(b)(i) and 36(2)(c) outweighs the public interest in disclosing the information.

Section 37: Communications with Her Majesty, etc. and honours

62. The Cabinet Office confirmed that it was relying on section 37(1)(b) in relation to the last part of the first request, the second, fourth and fifth questions:

"...please specify whether they are male or female."

"Did the individual who was subject to a red light still get an Honour during that year or on a later occasion. Did they get the Honour they were recommended for? Alternatively did they get a lower ranking

Honour as a result of the red light? Alternatively did they not get an Honour at all after the red light was flagged up. In the case of each individual can you specify what happened to their recommendation as a result of the red light warning."

"In the case of each individual and each individual red light warning can you specify which particular Honours committee was informed of the red light warning."⁴

"In the case of each individual were they or their representatives notified of the red light warning and informed of the implications of that warning for their particular Honours recommendation."

63. Section 37(1)(b) of the Act states that information is exempt if it relates to the conferring by the Crown of any honour or dignity.
64. Given that the request specifically seeks information about the awarding of honours ("*Please note that I am only interested in information which relates to the proposed and actual Birthday and New Year Honours Lists of 2014, 2015, 2016, 2017, 2018*") the Commissioner is satisfied that the withheld information clearly falls within the scope of the exemption at section 37(1)(b). The information itself does not need to be sensitive or its disclosure prejudicial to any party to engage the exemption, it simply needs to be within the class of information set out in the exemption.
65. Section 37(1)(b) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of the Act. The Commissioner will therefore consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
66. The Commissioner is mindful that Parliament chose to designate section 37(1)(b) as a qualified exemption. It follows that there will be some cases where the public interest in maintaining the exemption does not in

⁴ The Cabinet Office has confirmed that it is only relying on section 37(1)(b) in relation to the information held prior to May 2017. The Memorandum of Understanding between HMRC and the Cabinet Office was implemented in May 2017 and section 3.5 states:

"The Cabinet Office Honours Secretariat will keep the information disclosed by HMRC confidential and ... will ensure that any individual's HMRC risk rating of medium or high is not shared beyond the members of the Main Honours Committee, the named honours contact in the No.10 Appointments team and the Prime Minister".

fact outweigh the public interest in disclosure. This underlines the importance of considering the circumstances of each particular case.

67. The Cabinet Office acknowledged that the Commissioner has previously taken the view that the balance of the public interest under section 37 may *sometimes* favour wider disclosure, particularly when considering aggregated data rather than information about readily identifiable individuals. However, the Cabinet Office takes the view that those involved in the honours system require the freedom to be able to discuss and deliberate honours cases with the freedom to express their views frankly. Those involved in the discussions require a safe space to consider and deliberate both at the time of discussion and for some time following. That remains the case when the information under discussion is sensitive judgements of a nominee's tax affairs, which can be a matter of both compliance with the tax regime and a matter of personal reputation for the individual under discussion.
68. With respect to the request for the nominees' gender, the Cabinet Office explained that it considered that the number of people for whom HMRC gave a high risk rating is so small as to risk the possibility of a breach of confidence were the genders of the individuals to be revealed. It acknowledged that there is a fine judgement of the public interest test, but it considers that the risk of identification of the individuals is significant because of public knowledge about some high profile individuals whose possible nomination for an honour was a matter of public knowledge and speculation as a result of their particular prominence at the time.
69. With respect to the information requested in question 2, the Cabinet Office confirmed that it recognises that there is a public interest in understanding what role probity information plays in decisions concerning honours recommendations. However, the Cabinet Office considers that the public interest is met in the public provision of the agreement between HMRC and the Cabinet Office in which it is stated that "*poor tax behaviour is not consistent with the award of an honour*" and through HMRC's supply of aggregated data about the number of people with a high risk rating. The Cabinet Office explained that data on what effectively would constitute the case history of any nominee who at some point attracted a high risk rating would not, of itself, add anything to this understanding. This is particularly the case given that risk ratings are not static: each time an individual is assessed, the outcome may be different and the probity position may change over time. The Cabinet Office confirmed that in addition, other probity checks are also carried out on nominees alongside other sources of information. The Cabinet Office explained that in and of itself, a tax rating is only one, albeit very significant, piece of information about a nominee. Honours committees

must weigh all this evidence to reach judgements and ultimately recommendations to the Prime Minister and The Queen.

70. With respect to the information regarding which committee received information on an individual's risk rating, the Cabinet Office confirmed that its arguments were similar to those already set out but added that the number of people assigned a high risk rating is so small as to risk identification resulting in a breach of confidence should the honours committees who reviewed the information be revealed.
71. With respect to the information regarding whether an individual is informed if they receive a high risk rating, the Cabinet Office confirmed that its arguments were similar to those already provided but added that non-disclosure of information relating to individual cases ensures that those involved in the honours system can take part on the understanding that their confidence will be honoured and that decisions about honours are taken on the basis of full and honest information about the individual concerned. The Cabinet Office acknowledged that the request did not specify the names of individuals, but it considers that the number of honours nominees affected by high risk ratings is so small as to carry a very strong risk that individuals may be identified.
72. The complainant considers that the public interest lies in disclosure. His arguments in favour of disclosure are as set out as above in the consideration of section 36.
73. With regard to the weight that should be attributed to maintaining the section 37(1)(b) exemption to withhold the information relating to nominee's gender, the Commissioner accepts that if the information on which views and opinions are provided, were subsequently disclosed then it is likely that the source of that information may be reluctant to do so or would make less candid contributions. The Commissioner acknowledges that the request is for high-level information regarding the gender of the nominees, however, this information would have to be cross referenced with the information provided by HMRC, which the Cabinet Office has confirmed it is not permitted to do under the Memorandum of Understanding.
74. In any event, it is not apparent to the Commissioner what value this information would provide the public regarding the process and discussions around awarding nominees. The knowledge that a specific number of nominees with red light warnings were a certain gender is unlikely to further public debate on the Honours proceedings.
75. In light of the confirmation that HMRC would discontinue providing the information in the event of disclosure and the apparent lack of value this information would provide, the Commissioner has concluded that the

Cabinet Office is entitled to rely on section 37 to withhold the nominees gender.

76. With regards to the information requested in question 2, the Commissioner does not doubt that the public would be interested in examining this information and she respectfully disagrees with the Cabinet Office that disclosure would not add to the public's understanding of the nominations process. She considers that disclosure could aid the public in understanding to what extent the high risk rating affects a nomination and that the high risk rating has the intended consequence of a reconsideration of whether the nominee is suitable for an honour.
77. However, the Commissioner accepts that there is a fundamental argument in favour of maintaining the exemption to protect the safe space and free and frank discussions of the committees. There may be situations where it is still appropriate to award an honour in spite of a high risk rating and in the absence of the supporting evidence regarding this, the committees may receive undue criticism creating a reluctance to consider all factors in future. This could potentially lead to a committee basing a decision on a single source of information and prevent the free and frank discussion of a nominee's probity. Similarly, it could lead to a potential exposure of the other probity checks undertaken for those who were given a low risk rating but not awarded an honour.
78. Consequently, given the significant weight that the Commissioner considers should be given to the public interest in maintaining the exemption, she has concluded that the public interest in maintaining the exemption contained at section 37(1)(b) outweighs the public interest in disclosing the information.
79. With respect to the information requested in questions 4 and 5, the Commissioner accepts that there is a fundamental requirement for a safe space in which to conduct free and frank discussions and for this reason she considers the balance of the public interest lies in maintaining the exemption.
80. As the Commissioner has decided that the Cabinet Office is entitled to withhold the information requested in request 4, she has not gone on to consider whether it is exempt under section 40(2) or section 41(1). She does, however, find that the Cabinet Office has breached section 17(3) as it did not inform the complainant that information within the scope of question 4 (post May 2017) is available via the Memorandum of Understanding and is therefore exempt under section 21 of the Act.

Other matters

81. Whilst there is no statutory time frame in which an internal review must be completed, the Commissioner has issued guidance stating that public authorities should aim to complete an internal review within 20 working days and only in extenuating circumstances should this take as long as 40 working days. In this case, the Cabinet Office took 68 working days to provide the outcome of its internal review. It is not apparent why the Cabinet Office required this long to perform its internal review and the Commissioner is disappointed that the Cabinet Office did not perform this in a more timely manner. As the Government department responsible for the Freedom of Information Act, the Commissioner would expect the Cabinet Office to take its responsibilities seriously and ensure that internal reviews are conducted in an appropriate length of time.
82. The Commissioner is also disappointed that the Cabinet Office did not engage with her officer as she would expect a public authority to do so. The Commissioner's officer requested the Cabinet Office's submissions on 25 July 2019 but did not receive them until 10 Jan 2020 following the issue of an information notice requiring the Cabinet Office to respond. The Commissioner expects the Cabinet Office to improve its engagement with her officers.

Right of appeal

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

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

Tel: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

84. 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.

85. 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

**Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**