

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 18 August 2009

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

Summary

The complainant requested information the Cabinet Office held about the decision to award Robert Kerslake a Knighthood and Michael Hedges a CBE in the 2005 New Year's Honours list. The Cabinet Office provided the complainant with the short citation in relation to both individuals and explained that it considered the remainder of the information it held to be exempt from disclosure by virtue of the exemption contained at section 37(1)(b) of the Act (conferring of an honour by the Crown) and some of the information to also be exempt from disclosure on the basis of section 40(2) of the Act because disclosure would breach the first data protection principle. The Commissioner has concluded that all of the withheld information is exempt from disclosure under section 37(1)(b) of the Act and that the public interest favours withholding the information.

The Commissioner's Role

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

Background

2. The request which is the focus of this notice sought information about the decision to confer honours on two individuals, Robert Kerslake and Michael Hedges.

3. In the New Year's honours list of 2005, Mr Kerslake was appointed Knight Bachelor for the services to Local Government. In the same list, Mr Hedges was awarded a CBE for services to the Police.

The Request

4. On 23 February 2006 the complainant requested from the Cabinet Office 'the rationale for the Honours bestowed upon Michael Hedges and Robert Kerslake'. He also asked for a copy of the 'forfeiture procedure with respect to honours' or information about where he could obtain one.
5. The Cabinet Office replied on 14 March 2006 and explained that the information about the named individuals was being withheld on the basis of the exemptions contained at sections 37(1)(b) and 40(2) of the Act. The Cabinet Office explained that the public interest test favoured maintaining the section 37 exemption. In relation to section 40(2) the Cabinet Office stated that disclosure would be in breach of the first data protection principle in that it would be unfair. The Cabinet Office did however provide the complainant with some information in relation to the forfeiture procedure with regard to honours.
6. The complainant wrote to the Cabinet Office on 19 March 2006 (although the letter is dated 2005) and stated 'I would like you to conduct an internal review into the decision by the Ceremonial Secretariat to refuse to provide the information requested under the Freedom of Information Act concerning the background and reasons why Michael Hedges and Robert Kerslake received honours in 2005'.
7. The Cabinet Office replied on 12 April 2006, upholding the original decision. In addition to what it had already stated, it pointed out that the 'short citations' for each of those honoured were already in the public domain and therefore exempt from disclosure under section 21 of the Act, although it reproduced them for ease of reference. It advised the complainant of his right to approach the Commissioner.

The Investigation

Scope of the case

8. The complainant wrote to the Commissioner on 18 April 2006. In this letter he asked the Commissioner to consider a number of requests he had submitted to various public authorities, including the request detailed above.
9. In this letter the complainant also included copies of an earlier request dated 10 January 2005 which he had submitted to the Cabinet Office. This request sought all information about the decision to award three individuals with honours – the two individuals named above and a third, Dave Veness. The complainant

provided the Commissioner with a copy of the refusal notice issued in response to the request of 10 January 2005.

10. During the course of his investigation, in a letter dated 8 October 2008, the Commissioner confirmed to the complainant that the scope of this investigation was simply to focus on the Cabinet Office's handling of his request dated 23 February 2006 and did not encompass the Cabinet Office's handling of his earlier request of 10 January 2005.

Chronology

11. Unfortunately, due to a backlog of complaints about public authorities' compliance with the Act, the Commissioner did not begin his investigation of this complaint immediately. The Commissioner did not write to the Cabinet Office until 16 August 2007. In this letter the Commissioner asked to be provided with copies of the information that had been withheld along with submissions to support the Cabinet Office's position that this information was exempt from disclosure on the basis of sections 37(1)(b) and 40(2).
12. The Cabinet Office provided the Commissioner with a substantive response on 1 October 2007.
13. On 3 October 2007 the Commissioner asked the Cabinet Office to provide some copy correspondence, which it did on 5 October 2007.

Findings of fact

14. The Cabinet Office's website explains how the current United Kingdom honours system operates. Individuals are nominated by an individual or organisation familiar with the work of the candidate, or by a government department that has identified a candidate within its sphere of interest. Each case is sifted by the Ceremonial Secretariat of the Cabinet Office. Departments' candidates are assessed by an internal committee and then submitted to 10 Downing Street. In the cases of non-departmental candidates, comments and feedback are obtained from Lord Lieutenants, outside bodies and departments which may have an interest in an aspect of the candidate's work. All cases are then decided by the Honours team of the Ceremonial Secretariat.
15. Within the Honours team each case is considered by one of the specialist assessment sub-committees, composed of senior civil servants and independent experts. Their assessments are sent to the main selection committee. The main committee assesses the proposals and forwards its recommendations to the Cabinet Secretary who, in turn, submits the list to the Prime Minister for submission to the Monarch.
16. Information which may be generated in this process includes the Honours Citation Form for each candidate, comments provided by third parties on the achievements of candidates and notes of the committees' meetings.

17. The Cabinet Office has explained that it considers **all** of the information falling within the scope of this request to be exempt from disclosure on the basis of section 37(1)(b) of the Act. The Cabinet Office has explained that it believes that **some** of the withheld information is also exempt from disclosure on the basis of section 40(2) of the Act.

Analysis

Exemptions

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

18. Section 37 is a class based exemption. That is to say if information falls within the scope of the section it is automatically exempt; there is no need for the public authority to demonstrate any level of prejudice that might occur if the information was disclosed in order for the exemption to be engaged.
19. Section 37(1)(b) of the Act provides a specific exemption for information that relates to the conferring by the Crown of any honour or dignity.
20. Having reviewed the documents which comprise the withheld information the Commissioner is satisfied that they clearly relate to the conferring by the Crown of honours, namely the decision to appoint Mr Kerlake a Knight Bachelor and Mr Hedges a CBE.
21. However, section 37(1)(b) is a qualified exemption. Therefore, the Commissioner must consider the public interest test set out at section 2(2)(b) of the Act and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
22. The Cabinet Office has provided the Commissioner with a detailed analysis of the public interest arguments in this case, especially the arguments in favour of withholding the information. The Commissioner has outlined these arguments below along with the additional public interests both he and the complainant have identified, before going on to consider where the balance of the public interest lies.

Public interest arguments in favour of withholding the information

23. The Cabinet Office argued that the public interest in maintaining the exemption contained at section 37(1)(b) is based upon the importance of confidentiality in ensuring the effective operation of the honours system. Indeed the Cabinet Office suggested that the existence of section 37(1)(b) in law reflects the fact that this view was endorsed by Parliament.
24. The Cabinet Office identified a number of different facets to this public interest argument, namely:

25. Communications between and amongst officials and honours assessment committees and contributors to citations should remain confidential to ensure that business can be operated in a spirit of openness and trust.
26. It is particularly important that officials who conduct honours assessments can carry out their work free from pressure from, or on behalf of, potential or actual candidates. Presently, officials and honours committees are presented with nominations for a variety of individuals and must determine on the basis of the information contained in the citations which of the cases are stronger. There is a strict limit on the number of honours available and only the most deserving candidates will succeed. It is important that each nomination should be judged objectively on the basis of the information given and its relative strength in comparison with others, rather than on the basis of whether a decision will meet approval from various sectors and pressure groups.
27. The members of the honours committees and the officials working within the system were recruited with the explicit undertaking by the government that discussions of candidates, successful or unsuccessful would remain confidential.
28. The Cabinet Office suggested that even if disclosure of information relating to the awarding of an honour did not result in the release of particularly candid or frank discussions, it is important nevertheless that the principle of confidentiality should remain.
29. It is was also in the public interest to maintain the confidentiality of the process in order that honours assessment committees continue to receive free and frank advice and hold thorough and candid discussions about individual honours candidates. Failure to maintain the confidentiality of their work would have a significant and deleterious impact on the quality of the decision making and on the integrity of the system.
30. The Cabinet Office also noted that disclosure of the information would serve no constructive process because there was no right of appeal or review in relation to the award of an honour by HM Queen. Moreover, the fact that an individual may disagree with the decision to confer an honour is not relevant to the public interest balance.
31. The Cabinet Office also explained that it had taken into account the fact that the publication of the names and short citations is in itself a statement of the committees' views and contributes to the transparency of the process.

Public interest arguments in favour of disclosing the requested information

32. The Cabinet Office noted that there was a general public interest in the transparency of the process for awarding honours and disclosure of the requested information may add to that transparency.
33. The Commissioner believes that increased transparency in the honours system would be in the public interest because it could lead to increased public confidence in the operation of the system.

34. The complainant argued that disclosure of the information was necessary because in his opinion the two individuals were not deserving of the awards which they received.

Balance of the public interest arguments

35. With regard to the specific arguments that the Cabinet Office has advanced in support of the importance of the confidentiality in the honours system, the Commissioner believes that their arguments are similar to two concepts used in relation to the application of the public interest test under section 35(1)(a).
36. 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 particular 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.
37. The second concept is that of a chilling effect which 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 was disclosed under the Act.
38. The safe space argument can be compared to the argument advanced by the Cabinet Office at paragraph 26, i.e. that the decisions to award particular honours need to be made on the merits of each case without the interference from various sectors and pressure groups. In theory, the Commissioner accepts the logic of this argument in this instance. It would clearly not be in the public interest if media or public pressure interfered with the established system of awarding honours
39. 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. In the context of this case it is clear that by the time of the complainant's request in February 2006 the decision making process in relation to the awarding of these particular honours had obviously been completed. Therefore disclosure of the requested information in this case would not lead to any prejudicial media involvement or lobbying from third parties which would interfere with the Cabinet Office's recommendation that Mr Kerlake be awarded a Knight Bachelor and Mr Hedges be awarded a CBE. Consequently, this reduces the force of the arguments in this case for the need for officials to have a safe space for deliberation.
40. However, this does not altogether negate the strength of the safe space argument generally. 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 closely aligned to the concept of the chilling effect described above. The

Commissioner is conscious that although the Information Tribunal has on a number of occasions indicated that such arguments should not be dismissed out of hand, public authorities have found it difficult to substantiate chilling effects with significant evidence.

41. The Commissioner notes that the Tribunal has also acknowledged that the chilling effect arguments have to be considered on a case by case basis and in particular with reference to the specific information that has been withheld. Furthermore the Commissioner does not consider that a direct parallel can be drawn between the concept of the chilling effect in relation to policy formulation and the decision making process surrounding the awarding of honours.
42. The Commissioner believes that a key distinction is the nature of the issues discussed in the information which falls within section 35(1)(a) of the Act and that which falls within section 37(1)(b). The nature of the discussions by those involved in the honours system, and recorded in information which falls within the scope of section 37(1)(b), obviously involves the discussion as to whether individuals are deserving of an award, and if so, the type of award which is appropriate. Such discussions inevitably involve making candid and frank assessments of an individual's suitability for a particular award, including, in some circumstances, why an individual's achievements, while notable, are not sufficient to merit the award of an honour.
43. Therefore, the Commissioner accepts that an effect, similar in nature to the chilling effect, is likely to be created if information used in the honours assessment process is routinely disclosed. With regard to the specific information which is the focus of this request, the Commissioner accepts that parts of the information are not overly candid or frank in nature although they still obviously contains direct comments about the merits of two individual's nominations. Therefore, the Commissioner accepts that disclosure of this information could lead to those involved in the honours system being less candid in future about the nominations which are being assessed.
44. Moreover, 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. The Commissioner 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.
45. Furthermore, the Commissioner is conscious of the significant numbers of nominations that the honours system has to process. The Commissioner understands that the Nominations Team at the Ceremonial Secretariat receives on average 3,500 nominations each year. In the three year period 2006 to 2008 these resulted in 181 Dames/Knights and 2 Companions of Honour. There were also 647 CBEs, 1392 OBEs and 3499 MBEs awarded.¹

¹ Figures taken from the report produced by the Cabinet Office and published in July 2008 entitled '[Three years of the operation of the reformed honours system](#)'

46. Given the significant number of nominations that are assessed and honours that are awarded, the Commissioner believes that the likelihood of the process being harmed by a loss of frankness and candour could be said to be relatively high. Therefore even if the disclosure of this information would only lead to a relatively minor, though still prejudicial loss of candour on the part of the officials involved, given the number of nominations that are assessed the effect on the process could still be significantly adverse.
47. In reaching this conclusion, the Commissioner wishes to emphasise that he is not suggesting that there is an inherent public interest in non-disclosure of information which falls within the scope of section 37(1)(b). Indeed the Tribunal has on a number of occasions indicated that there is no inherent public interest in withholding information simply because it falls within the scope of the a class based exemption. This approach was supported by the High Court in the case *OGC v The Information Commissioner*.² However, a significant amount of information which falls within the scope of section 37(1)(b) is likely to include candid discussions about nominations for honours and for the reasons outlined above in the vast majority of cases there is likely to be a public interest in the confidentiality of such discussions being preserved.
48. With regard to the argument set out at paragraph 30, the Commissioner accepts that disclosure of this information may not serve any constructive process given that there is no right of appeal in relation to an honour that has been awarded. However, that is not to say that disclosure of this information would not contribute towards making the honours system more transparent and accountable. In other words, disclosure of information can still be in the public interest even if it does not result in a particular outcome or specific result. Indeed, disclosure of information such as this could, by increasing the transparency of the honours system, result in better quality decision making because those involved will be aware that their decisions will be subject to some level of public scrutiny.
49. In the Commissioner's opinion the public interest arguments in favour of disclosing information that would show the honours system to be objective, accountable and transparent should be given appropriate weight.
50. The Commissioner notes that in 2005 two independent reviews were undertaken into how honours system operated and following these reviews significant changes were made to the system, aimed at making the system more transparent. For example, a new system of eight honours committees was established with non-civil servants in the chair and in the majority on all committees. Opportunities for members of the public to sit on the committees were advertised in the press. The chairs and the members of the committees will have their names made public.
51. However, the honours which are the subject of the request for information in this case were awarded in the New Year's List of 2005, i.e. before the introduction of

² See *Office of Government Commerce v Information Commissioner & the Attorney General* [2008] EWHC 737 (Admin) (11 April 2008), in particular paragraph 79.

these reforms. In weighing the balance of the public interest in this case the Commissioner has given little weight to the impact of these reforms.

52. With regard to the complainant's argument that the disclosure of this information is necessary given the question of propriety surrounding the two individuals in question, clearly the Commissioner cannot comment explicitly on the contents of the withheld information as to do so would negate the purpose of this decision. However, having considered the arguments advanced by the complainant and having viewed the withheld information itself, the Commissioner does not believe that disclosure of this information would be likely to assist in addressing the complainant's specific concerns about these particular honours.
53. In conclusion, the Commissioner believes that in this case the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information. In reaching this conclusion the Commissioner does recognise that disclosure could contribute to improving the transparency and accountability surrounding the process of awarding honours and thus increase the public's confidence in the system. However, the Commissioner believes that disclosure of this information would begin to erode the confidentiality of the operation of the honours system and he believes that for the system to operate efficiently and effectively some level of confidentiality is necessary. The Commissioner has placed particular weight on the fact that those involved in the honours system need to be able to make candid and frank comments in the future. He believes that strong counter-veiling arguments would need to be made in support of disclosure of this kind of information held only for this purpose before an order for disclosure would be justified in the public interest. Having looked at the information that is the subject of this particular case, he does not believe that such arguments can be made, or at least not sufficiently strongly that the public interest in favour of disclosing the requested information could be said to be greater than or equal to that in maintaining the exemption.
54. In light of his findings in relation to section 37(1)(b) the Commissioner has not gone on to consider whether some of the withheld information is also exempt by virtue of section 40(2).
55. Furthermore, the Commissioner notes that some of the withheld information would also fall within the scope of the exemption contained at section 40(4) of the Act. This section provides that information is exempt from disclosure under the Act if it constitutes personal data which would be exempt from disclosure under the Data Protection Act 1998 (DPA) to the individual whose personal data it is, were they to request it. The DPA contains an exemption from the subject information provisions for information processed for the purposes of conferring a Crown honour (Paragraph 3, Schedule 7).

The Decision

56. The Commissioner's decision is that the information falling within the scope of the request is exempt from disclosure on the basis of section 37(1)(b) of the Act and

in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Steps Required

57. The Commissioner requires no steps to be taken.

Right of Appeal

58. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 18th day of August 2009

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Freedom of Information Act 2000

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 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

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 17(1) provides that -

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

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

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).”

Data Protection Act 1998

Schedule 7 – Miscellaneous Exemptions

- ‘3. Personal data processed for the purposes of –
- (a) assessing any person’s suitability for judicial office or the office of Queen’s Counsel, or
 - (b) the conferring by the Crown of any honour,
- are exempt from the subject access provisions’.