

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 5 July 2010**

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

### Summary

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The complainant, a firm of solicitors, submitted a number of requests to the Cabinet Office on behalf of one of its clients, Lord Ashcroft. The requests focused on Lord Ashcroft's first nomination for a working peerage in 1999. The Cabinet Office confirmed that it held information falling within the scope of these requests but refused to provide this information relying on the exemptions contained at sections 40(1), 40(2) and 37(1)(b) of the Act. (The Cabinet Office also provided the complainant with a response with regard to whether its client was entitled to this information under the Data Protection Act.) For the purposes of this notice the Commissioner has considered the Cabinet Office's handling of the requests under the Act. He has concluded that all of the requested information is Lord Ashcroft's personal data and therefore the Cabinet Office was correct to refuse to disclose this information under the Act on the basis of section 40(1). The Commissioner has also concluded that in light of the effect of section 40(5) the Cabinet Office was not in fact obliged to confirm or deny whether it held such information.

### The Commissioner's Role

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

## The Request

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2. The complainant, a firm of solicitors, wrote to the Cabinet Office on 23 July 2009 and submitted a number of requests on behalf of one of its clients, namely Lord Ashcroft. The requests which are relevant to this complaint were those which the complainant numbered 3, 4, and 7. All of these requests focused on Lord Ashcroft's first nomination for a working peerage in 1999. The text of the relevant requests read:

'3. Do the Cabinet Office "papers relevant to this request", [the Commissioner understands that 'this request' was a separate information request submitted to the Cabinet Office from a third party] to which Sir Gus referred in his letter to our client of 21 July 2009, (or any other Cabinet Office records) include any record evidencing or relating to any suggestion, agreement or discussion which was made or took place at any time before our client gave his undertakings, as to the perceived need for any assurances or undertakings as to residence to be given by our client, the reasons why they should be given, what their content should be, the manner in which they should be given or to whom they should be addressed?

4. Do the Cabinet Office "papers relevant to this request" or any other Cabinet Office records include any record evidencing or relating to any suggestion, agreement or discussion which was made or took place at any time on or after the date on which the undertakings were given as to the interpretation, meaning or effect that should be given to our client's undertakings?

7. If the answer to any of the questions 3, 4, and 6(1) and 6(2) above is yes, then in the case of each such record:

- (a) What is the date of the record?
- (b) What form does that record take?
- (c) To whom was the document containing the record addressed?'

3. In submitting these requests the complainant asked that these requests were considered under both the Act and the Data Protection Act 1998 (the DPA).
4. The Cabinet Office responded on 1 September 2009. In respect of the Act, the Cabinet Office confirmed that it held information falling within the scope of the requests. (Although in the Commissioner's opinion this confirmation did not explicitly state whether it held information falling

under all of the requests or only some of them.) However the Cabinet Office explained that under the Act it considered the information which it did hold to be exempt from disclosure on the basis of sections 40(1), 40(2) and 37(1)(b). In respect of the DPA, the Cabinet Office explained that all of Lord Ashcroft's personal data which fell within the scope of the requests was exempt from subject access provisions on the basis of section 37 and Schedule 7 paragraph 3(b) of the DPA.

5. The complainant contacted the Cabinet Office on 11 September 2009 and asked for an internal review of the refusal under the Act to be conducted.
6. The Cabinet Office informed the complainant of the outcome of the review on 5 October 2009. This review upheld the application of the exemptions cited in the refusal notice and also explained that the Cabinet Office considered some of the information to be exempt from disclosure on the basis of section 41(1) of the Act. The Cabinet Office's letter also confirmed that its position in respect of the DPA remained unchanged.

## The Investigation

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### Scope of the case

7. On 30 November 2009 the complainant contacted the Commissioner in order to complain about the Cabinet Office's handling of the requests set out above. The complainant asked the Commissioner to consider the Cabinet Office's handling of the requests under both the Act and the DPA.
8. For the purposes of this Notice the Commissioner can only consider whether the Cabinet Office has complied with the requirements of the Act.
9. However, the Commissioner has separately considered whether the Cabinet Office complied with the requirements of the DPA and communicated the outcome of his assessment to the complainant on 17 March 2010.

### Chronology

10. On 12 April 2010 the Commissioner contacted the Cabinet Office in respect of how it handled these requests under the Act. The Commissioner asked to be provided with a copy of the information

which fell within the scope of the requests. In asking for this information the Commissioner noted that the requests set out above did not seek complete copies of relevant records; rather requests 3 and 4 only sought confirmation as to whether information was held – effectively a yes or no answer – and request 7 only sought certain details about records that may be held. However, for the purposes of his investigation the Commissioner asked to be provided with complete copies of the actual records themselves. The Commissioner also asked the Cabinet Office to provide detailed arguments to explain why it believed that the exemptions contained at sections 40(1), 40(2), 37(1)(b) and 41(1) provided a basis to withhold the requested information along with clarification as to which exemptions applied to which parts of the withheld information.

11. The Cabinet Office provided the Commissioner with a substantive response on 2 June 2010. In this response the Cabinet Office explained that it believed that its refusal notice of 1 September 2009 did clearly inform the complainant that its answer to questions 3 and 4 was 'yes' because it confirmed that it held information falling within the scope of the requests. The Cabinet Office's response went on to explain that some of the information falling within the scope of request 7 was published by the Public Administration Select Committee following their special evidence session on 18 March 2010. Therefore the Cabinet Office explained that it was now only seeking to rely on section 37(1)(b) to withhold the information which had not been placed in the public domain. However, the Cabinet Office explained that it believed that all of the information falling within the scope of request 7 constituted the personal data of Lord Ashcroft and thus all of the information was exempt from disclosure on the basis of section 40(1) of the Act. The Cabinet Office also made some comments about the application of sections 40(2) and 41 but explained that it did not consider it necessary to provide detailed submissions in light of its position on section 40(1). Finally, the Commissioner was provided with complete copies of the actual records which contained the recorded information falling within the scope of request 7.

## Analysis

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### Exemptions

#### Section 40 – personal data

12. The Cabinet Office has argued that all of the information falling within the scope of request 7 is exempt from disclosure on the basis of section 40(1) of the Act.

13. This section states that:

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

14. Personal data 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.’

15. In its submissions to the Commissioner the Cabinet Office explained that it believed that the information falling within the scope of request 7 was Lord Ashcroft’s personal data because it clearly related to him. Having considered the information in question the Commissioner agrees with the Cabinet Office’s assessment; the information is Lord Ashcroft’s personal data because it focuses on his nomination for a working peerage and therefore relates to him. The Commissioner is therefore satisfied that this information is exempt from disclosure under the Act on the basis of the exemption contained at section 40(1).

16. In light of this conclusion the Commissioner has not considered whether the exemptions contained at sections 37(1)(b), 40(2) and 41(1) of the Act would also provide a basis, at the time the request was submitted, to withhold parts of the information falling within the scope of request 7.

17. The Commissioner notes that section 40(5) of the Act also states that:

'The duty to confirm or deny: does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).'

18. Therefore in responding to request 7 under the Act, the Cabinet Office was not in fact obliged to actually confirm or deny whether it held information of the nature requested.

19. In the Commissioner's opinion requests 3 and 4 effectively ask the Cabinet Office to confirm whether the information that would answer request 7 is held. For reasoning set out above it follows that the Commissioner believes that the information that would answer requests 3 and 4 is also Lord Ashcroft's personal data and thus exempt from disclosure on the basis of section 40(1) of the Act. It also follows that the Cabinet Office was not required to respond to requests 3 and 4 under the Act in light of the effect of section 40(5).

### **Procedural Requirements**

20. Section 10(1) of the Act requires that a public authority must comply with a request promptly and in any event no later than the twentieth working day following the date of receipt.

21. Section 17(1) requires a public authority to issue a refusal notice in line with the time for compliance set out in section 10(1).

22. In this case the complainant submitted its request on 23 July 2009 and the Cabinet Office did not issue its refusal notice until 1 September 2009. By failing to issue this refusal notice within twenty working days the Cabinet Office breached section 17(1).

### **The Decision**

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23. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- The information held by the Cabinet Office which falls within the scope requests 3, 4 and 7 is exempt from disclosure on the basis of section 40(1) of the Act.

24. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The Cabinet Office breached section 17(1) of the Act by failing to provide a refusal notice within 20 working days following the date of the request.

## Right of Appeal

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://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 sent.

**Dated the 5<sup>th</sup> day of July 2010**

**Signed .....**

**David Smith  
Deputy Commissioner**

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



## **Legal Annex**

### **Freedom of Information Act 2000**

#### **General Right of Access**

**Section 1(1)** provides that -

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

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

**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."

#### **Effect of Exemptions**

**Section 2(1)** provides that –

"Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

- (a) the provision confers absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply."

**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"

### **Time for Compliance**

**Section 10(1)** provides that –

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

### **Refusal of Request**

**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."

### **Communications with Her Majesty**

**Section 37(1)** provides that –

"Information is exempt information if it relates to-

- (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household, or
- (b) the conferring by the Crown of any honour or dignity."

### **Personal information**

**Section 40(1)** provides that –

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

**Section 40(2)** provides that –

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

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

**Section 40(3)** provides that –

"The first condition is-

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

### **Information provided in confidence.**

**Section 41(1)** provides that –

"Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would

constitute a breach of confidence actionable by that or any other person.”

## **Data Protection Act 1998**

### **Part I**

1) In this Act, unless the context otherwise requires—

“personal data” means data which relate to a living individual who can be identified—

(a)

from those data, or

(b)

from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

## **Miscellaneous Exemptions**

**Section 37** provides that –

“Schedule 7 (which confers further miscellaneous exemptions) has effect.”

## **Schedule 1**

The first principle 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.

## Schedule 2

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

1. The data subject has given his consent to the processing.
2. The processing is necessary— (a) for the performance of a contract to which the data subject is a party, or (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
4. The processing is necessary in order to protect the vital interests of the data subject.
5. The processing is necessary—
  - (a) for the administration of justice
  - (b) for the exercise of any functions conferred on any person by or under any enactment
  - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department
  - (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
6. — (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.  
  
(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.

## Schedule 7

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