Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 June 2011

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

Summary

The complainant asked the Cabinet Office to provide all information it held dating from 1 January 1998 to 31 December 2000 relating to the awarding of a peerage to Lord Ashcroft. The Cabinet Office refused the request on the basis of sections 21, 37(1)(b), 40(2) and 41(1). The complainant asked the Commissioner to consider the application of the latter three of these exemptions. The Commissioner has decided that a number of documents falling within the scope of the request are not exempt from disclosure on the basis of these three exemptions and therefore they need to be disclosed. The remaining information is exempt from disclosure on the basis of section 37(1)(b).

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. Michael (now Lord) Ashcroft was first nominated for a peerage by the then Leader of the Opposition, The Right Honourable William Hague MP, in March 1999. The Political Honours Scrutiny Committee (PHSC), the body then responsible for considering nominations, recommended that the peerage not be awarded.

3. When nominated a second time in 2000 Lord Ashcroft was awarded a peerage. A 'note for editors' was issued with the press release in March 2000 announcing this; the editor's note stated that:

> 'In order to meet the requirements for a Working Peer, Mr Michael Ashcroft has given his clear and unequivocal assurance that he will take up permanent residence in the United Kingdom again before the end of the calendar year. He would be introduced into the House of Lords only after taking up that residence. These undertakings have been endorsed by the Leader of the Conservative Party and conveyed to the Prime Minister – and to the Political Honours Scrutiny Committee.'

4. Following a period of media and parliamentary interest as to the exact nature of the undertaking given by Lord Ashcroft in March 2000, in March 2010 the Public Administration Select Committee (PASC) announced that it would be holding a one-off evidence session on propriety and peerages. The Chair of PASC, Dr Tony Wright MP, confirmed that the session would:

> '…explore the process through which Michael Ashcroft's undertaking of 23 March 2000 to take up 'permanent residence' in the UK as a condition for his introduction into the House of Lords came to be interpreted in subsequent dialogue with the Government as 'long-term residence', with likely consequent tax implications.'

5. The PASC asked the Cabinet Office to supply any papers relating to this 'subsequent dialogue' along with a brief statement describing the nature of the dialogue and the identities of those directly involved or otherwise consulted. In response to this request, the Cabinet Office provided the PASC with a brief memorandum attached to which were 17 documents recording the discussions with the PHSC. However, the memorandum noted that 'A small amount of internal correspondence between the Secretary and Committee members is not included; the conclusions are fully reflected in the letters from the Secretary to Sir Hayden Philips'. The memorandum and its attachments were placed into the public domain when it was provided to the PASC.

The Request

6. The complainant submitted the following request to the Cabinet Office on 2 March 2010:

> 'Please disclose under the FOI Act:
>
> **All information dating from 1 Jan 1998 to 31 Dec 2000 relating to the awarding of a peerage to Michael Ashcroft, including material relating to his suitability for this award.** [Emphasis in original]
>
> This should include all of the following material if held:
>
> - any certificate referring to his political donations
>
> - any recommendations received for him to be given a peerage
>
> - any correspondence with government departments relating to whether or not he should be honoured in this way
>
> - any correspondence with any member or representative of the Political Honours Scrutiny Committee relating to whether he should be honoured in this way and (if applicable) under what conditions or circumstances
>
> - any correspondence sent to or from the Ceremonial Officer referring to Michael Ashcroft
>
> - any records or documents created or distributed by members or staff of the Political Honours Scrutiny Committee which refer to Michael Ashcroft.
>
> In terms of correspondence please include emails and memos.'

7. The Cabinet Office responded on 31 March 2010 and explained that some of the information falling within the scope of the request was published by the PASC on 18 March 2010 and was available on its website and provided the complainant with the relevant link.[1] The

[1] This information can now be viewed at: http://www.publications.parliament.uk/pa/cm200910/cmselect/cmpubadm/470/470we02.htm

Cabinet Office explained that it considered this information to be exempt from disclosure on the basis of section 21 of the Act as it was reasonably accessible to the complainant. The Cabinet Office explained that it considered the remainder of the information to be exempt from disclosure on the basis of sections 37(1)(b), 40(2) and 41(1) of the Act.

8. The complainant contacted the Cabinet Office on 8 April 2010 and asked it to conduct an internal review of its decision to withhold the information that was not in the public domain.

9. On 9 August 2010 the Cabinet Office informed the complainant of the outcome of the internal review; the review upheld the application of the exemptions as set out in the refusal notice.

The Investigation

Scope of the case

10. The complainant contacted the Commissioner on 24 August 2010 in order to complain about the Cabinet Office's application of sections 37(1)(b), 40(2) and 41(1) of the Act. The complainant provided submissions to support her view that the exemptions had been incorrectly relied upon. The Commissioner has not set out these submissions here but has included them in the relevant sections of the Analysis section below.

Chronology

11. The Commissioner contacted the Cabinet Office on 23 December 2010 and asked to be provided with a copy of the information that had been withheld along with submissions to support the application of the three disputed exemptions.

12. The Cabinet Office responded on 8 March 2011 and provided submissions to support its application of the various exemptions. With regard to accessing the withheld information itself the Cabinet Office informed the Commissioner that given the volume of information, and the fact that some of it was sensitive in nature, it explained that it would prefer the Commissioner to view this information in situ rather than send copies of it to the Commissioner's office.

13. A representative of the Commissioner's office visited the Cabinet Office on 31 March 2011 in order to view the relevant information.

14. The Commissioner contacted the Cabinet Office again on 8 April 2011 and explained that in order for him to fully consider the significant amount of information that had been withheld he had decided that he needed to actually be provided with a copy of this information rather than simply having to view it in situ. The Commissioner therefore repeated his request to the Cabinet Office to be provided with a copy of withheld information.

15. The Cabinet Office complied with this request by providing the Commissioner with a copy of the withheld information on 18 May 2011.

Analysis

Exemptions

Section 37(1)(b) – conferring of an honour or dignity

16. 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 may occur if the information was disclosed in order for the exemption to be engaged.

17. 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.

18. The Commissioner is satisfied that all of the withheld information clearly relates to the conferring by the Crown of an honour, specifically the decision to award Lord Ashcroft with a life peerage, and thus the information falls within the scope of section 37(1)(b).

19. 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.

Public interest arguments in favour of maintaining the exemption

20. The Cabinet Office argued that the basic tenet of the honours system rests upon confidentiality. It is fundamental to the honours system at the time when Lord Ashcroft's peerage was awarded, as it is now, that those involved in assessing nominations can offer truthful and honest observations in confidence. The Cabinet Office also noted that Parliament recognised the peculiar nature of the honours system, and

that there may be a public interest in not disclosing information relating to honours by specifically defining as sixty years the period before which information relating to honours becomes 'historical' under section 63 of the Act.

21. The Cabinet Office noted that given the broad request the withheld information covered a wide range of material. It had considered whether disclosure of this material would offer the public more knowledge about the about the process of the award of this peerage and it had concluded that it would not. This is because the key factual details of the process were already in the public domain as they were published by the PASC in March 2010 in the form of the Cabinet Office's memorandum. The Cabinet Office argued that these documents had put into the public domain the process and decisions taken at the time and it did not consider that the withheld information would further inform the public debate on this matter.

Public interest arguments in favour of disclosing the requested information

22. The Cabinet Office acknowledged that there were generic factors in favour of disclosing information about honours, namely providing the public with an understanding of the nomination process which could contribute to the genuine need for transparency and openness.

23. The complainant argued that the circumstances surrounding Lord Ashcroft are unique, due to widespread public concern relating to his appointment. The complainant suggested that this has already been recognised by the Cabinet Office in the release of some information relating to this case. This has not been done or required for any other peerage. The Cabinet Office's decision to withhold the requested information does not reflect the uniqueness of Lord Ashcroft's appointment to the Lords and the public had justifiable concerns surrounding his appointment that can only be satisfied by disclosure of all the requested information.

Balance of the public interest arguments

24. As a general principle the Commissioner accepts the Cabinet Office's fundamental argument that for the honours system to operate efficiently and effectively there needs to be a level of confidentiality which allows those involved in the system to freely and frankly discuss nominations. The Commissioner also accepts that disclosure of information that would erode this confidentiality, and thus damage the effectiveness of the system, would not be in the public interest. In general then the Commissioner believes some significant weight should be given to information falling within the scope of 37(1)(b).

25. 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 a number of Information Tribunal decisions have indicated that there is no inherent public interest in withholding information simply because it falls within the scope of 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.

26. Similarly, while the Commissioner accepts that weight should be given to the generic arguments in favour of maintaining the exemption, he believes that notable weight should also be given to the public interest in disclosing information concerning honours nominations. In his opinion the public interest is clearly served by having an honours system that is objective, accountable and transparent. In the Commissioner's view this is particularly true in respect of the awarding of peerages because the recipients are entitled to take a seat in the House of Lords and thus have an influence on the passage of legislation in Parliament and may be eligible to join the Government of the day. This is in contrast, for example, to individuals who receive another form of honour or dignity conferred by the Crown, such as a knighthood, who may well receive some kudos from the receipt of such an award but do not become members of the UK's legislature.

27. However, as with all cases the actual weight that should be attributable to these arguments is dependent on the content of the requested information itself. Having considered the information in this case carefully the Commissioner does not agree with the Cabinet Office's assessment that disclosure of this information would add nothing at all to the public's understanding of the discussions concerning the undertaking given by Lord Ashcroft. In particular although the key facts are in the public domain surrounding the giving of the undertaking regarding residency, in the Commissioner's opinion disclosure of **some** of the withheld information would further inform the public about the subsequent process. (The Commissioner has provided the Cabinet Office with an annex which identifies this information. One of these documents contains comments about another individual's nomination

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

and the Commissioner accepts that the public interest in relation to section 37(1)(b) favours withholding this information).

28. The Commissioner believes that there are two compelling reasons why these parts of the withheld information should be disclosed: Firstly because of concerns raised at the time of the peerage as to whether the conditions had been satisfied, questions that continue to be relevant some years later; and secondly because parts of the withheld information reveal important details about reliance placed upon the undertaking.

29. There is also a further 'class' of information contained in the withheld information, namely press clippings relating to Lord Ashcroft, for which the Commissioner believes that the public interest favours disclosure of the information. In relation to this type of information the Commissioner does not believe that this is because of some overwhelming public interest in its disclosure, but rather because he believes that such clippings can be disclosed without any real or significant harm occurring to the honours process. Specifically, the clippings contain information which was easily available to the public at the time of the Lord Ashcroft's nominations. Therefore, the public interest tips in favour of disclosing such information rather than maintaining the exemption.

30. However, with regard to the remaining information which focuses on Lord Ashcroft's first nomination in 1999 and the events leading up to the decision to award him a peerage in March 2000, the Commissioner does not believe that the public interest in disclosure of this information is so weighty. Therefore in his opinion the balance tips in favour of withholding this information, given the significant public interest in maintaining the confidentiality of the honours process. In reaching this particular conclusion the Commissioner notes that this information, which is associated with both nominations, includes candid comments of various individuals the disclosure of which could undermine the confidentiality of the honours system in a more direct manner than the information he has concluded should be disclosed. Furthermore the Commissioner believes that the key factual details upon which Lord Ashcroft's first nomination was refused and the reasons why the second nomination succeeded are already in the public domain.

Section 40 – personal data

31. The Cabinet Office has also argued that all of the withheld information is exempt from disclosure on the basis of section 40(2). The Commissioner has therefore considered whether this exemption

provides a basis to withhold the two types of information he believes should be disclosed.

32. Section 40(2) of the Act states that personal data is exempt if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (the DPA).

33. Clearly then for section 40(2) to be engaged the information being withheld has to constitute 'personal data' which is defined by the DPA as:

> '…data which relate to a living individual who can be identified
>
> a) from those data, or
>
> b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
>
> and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'

34. The Cabinet Office has explained that its considers all of the withheld information to constitute Lord Ashcroft's personal data and that parts of the withheld information also include the personal data relating to other individuals associated with considering Lord Ashcroft's nominations. Having reviewed the withheld information in detail the Commissioner agrees with the Cabinet Office's assessment as to why the information constitutes personal data as defined by the DPA.

35. The Cabinet Office has argued that disclosure of the withheld information would be unfair and thus breach the first data protection principle which states that:

> 'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
>
> (a) at least one of the conditions in Schedule 2 is met, and
>
> (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

36. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
    - what the public authority may have told them about what would happen to their personal data;
    - their general expectations of privacy, including the effect of Article 8 ECHR;
    - the nature or content of the information itself;
    - the circumstances in which the personal data was obtained;
    - particular circumstances of the case, e.g. established custom or practice within the public authority; and
    - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.

- The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
    - whether information of the nature requested is already in the public domain;
    - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?

37. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure.

38. In considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject (i.e. the individual whose personal data the information is), it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.

39. The Cabinet Office has argued that Lord Ashcroft would have had a reasonable expectation that his personal data would not be disclosed as part of the consideration of his peerage given that the awarding of honours and peerages is done on a confidential basis and that would be understood by both those considering any award and any nominee.

Such an understanding would also apply to the views of the other individuals who would only have expressed their views on the basis that they were being made and received in confidence.

40. With regard to the consequences of disclosure, the Cabinet Office argued that Lord Ashcroft would regard the disclosure of further personal data as an infringement of his rights and release of the opinions of the individuals who considered the nominations would undermine the basis upon which the Committee's consideration of peerages was undertaken.

41. In a previous decision notice the Commissioner acknowledged that Lord Ashcroft would of course have had *some* expectation of confidentiality based upon his knowledge of how the PHSC operated. However, the Commissioner concluded that given the controversial nature of his nomination his expectation would not necessarily be as great as that of a person with a less prominent public profile or non-controversial nominee would have been.[3]

42. Furthermore, in respect of the consequences of disclosing Lord Ashcroft's personal data, the same notice also drew a distinction between personal data relating to Lord Ashcroft in an official capacity and personal data relating more directly to his private life:

> '40. The conferring of a working peerage enables the holder to sit in the House of Lords and be an active member of the United Kingdom's legislature. Such membership of the House of Lords is by appointment, not by election. Membership cannot be removed by electoral defeat but is for life. The Commissioner believes that membership of the House of Lords carries with it important rights, privileges and responsibilities. He therefore considers that the requested information can be properly characterised as being Lord Ashcroft's personal data but fundamentally relating to his public role.
>
> 41. The distinction between personal data relating to a person's private life and a person's public life, leads the Commissioner to conclude that Lord Ashcroft's interests should not be considered as the first and paramount consideration. The Commissioner considers that the information requested by the complainant is inextricably

[3] See FS50197952, paragraph 38.

> linked to Lord Ashcroft's nomination for a public role and cannot be considered as being 'private' in this context.'

43. The Commissioner believes that these two arguments set out in the previous notice are equally applicable to the personal data of Lord Ashcroft's which is being considered here. Therefore the Commissioner does not believe that disclosure of the information relating to how the undertaking was enforced would be unfair.

44. In relation to the various newspaper clippings, given the content of these was previously very widely available in the public domain the Commissioner is satisfied that they can be disclosed in response this request without this being unfair to Lord Ashcroft.

45. With regard to the information which constitutes the personal data of other individuals the Commissioner notes that these are individuals involved with Lord Ashcroft's peerage nomination in an official and professional capacity rather that in a personal capacity. In the Commissioner's opinion this means that it would be significantly less unfair for such information to be disclosed. Furthermore the Commissioner would highlight that he is not ordering disclosure of the individuals' deliberations concerning Lord Ashcroft's nominations. Thus the information does not include the individuals' candid comments as to Lord Ashcroft's suitability for a peerage which are included in other parts of the withheld information. Moreover, the Commissioner notes that the names of officials have not been redacted from the information previously disclosed by the Cabinet Office to the PASC. In light of these factors the Commissioner does not believe that disclosure would be unfair to the various other data subjects.

46. Turning to the conditions in Schedule 2 of the DPA, the Commissioner believes that the most appropriate one in this case is the sixth condition which states that:

> 'The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, expect where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms of legitimate interests of the data subject'.

47. The Cabinet Office's position is that it was necessary to provide the information that it did to the PASC in order to fulfil the legitimate interest of the Select Committee. Consequently, the Cabinet Office does not believe that disclosure of the remaining information is necessary for the purposes of anyone's legitimate interests given that the content of this information was in fact reflected in documents

provided to the PASC. The Cabinet Office further believes that even if the disclosure was necessary then disclosure would prejudice the legitimate interests of Lord Ashcroft and the other individuals given the basis upon which the information was communicated and received.

48. The Commissioner is of a different opinion; in his view disclosure of the information which focuses on the issues relating to the verification and enforcement of this undertaking is necessary for the reasons set out above in relation to section 37(1)(b). Furthermore for the reasons set out above regarding why disclosure would not be unfair, the Commissioner does not believe that disclosure would significantly prejudice the rights and freedoms of the various data subjects, including Lord Ashcroft. With regard to the newspaper clippings, whilst the Commissioner accepts that their content, having at one point been easily accessible in the public domain, is likely to be far less informative than the other class of information that he is ordering disclosure of, he still believes that it can be argued that disclosure of such is necessary in order to met the general though compelling interests of accountability and transparency.

Section 41 – information provided in confidence

49. The Cabinet Office has argued that all of the requested information is also exempt from disclosure on the basis of s41(1) of the Act. Again, the Commissioner has simply considered whether this exemption provides a basis to withhold the two classes of information he believes are not exempt from disclosure on the basis of sections 37(1)(b) and 40(2).

50. Section 41(1) states 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.'

51. Therefore for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.

52. With regard to section 41(1)(b), in most cases the approach adopted by the Commissioner in assessing whether disclosure would constitute

an actionable breach of confidence is to follow the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415 (the *Coco* test).

53. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:

- Whether the information had the necessary quality of confidence;
- Whether the information was imparted in circumstances importing an obligation of confidence; and
- Whether an unauthorised use of the information would result in detriment to the confider.

54. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

Was the information obtained from a third party?

55. In the circumstances of this case the Cabinet Office argued that the information in the scope of the request had been obtained from Lord Ashcroft, members of the PHSC, officials at other government departments as well as a number of other third parties. Furthermore the Cabinet Office has argued that section 41 applies not only to correspondence from these individuals but also to subsequent correspondence, including that from the Cabinet Office to third parties and internal Cabinet Office communications in which reference is made to the confidential information that has been received.

56. The Commissioner has carefully examined the information he believes is not exempt from disclosure on the basis of sections 37(1)(b) and 40(2). The Commissioner accepts that some of this information clearly comprises communications provided to the Cabinet Office by third parties and thus falls within the scope of section 41(1). With regard to the remaining information although this compromises communications generated by the Cabinet Office or even communications within the Cabinet Office, the Commissioner accepts that these documents do sufficiently reveal the content of communications previously received by the Cabinet Office to met the requirements of section 41(1)(a).

Does the information have the necessary 'quality of confidence'?

57. The Commissioner believes that information will have the necessary quality of confidence if it is not otherwise accessible to the requestor, is more than trivial and is of importance to the confider. Information will not have the necessary quality of confidence if it is already in the public domain.

58. The Cabinet Office has argued that given the nature of the honours system it is clear that the withheld information has an inherent quality of confidence about it. Having considered the information about the verification of the undertaking the Commissioner agrees with this view point: it is clear that information is more than trivial given its content and the reasons why it was provided to the Cabinet Office, and moreover that it is of importance to the confider regardless of who the particular confider was. The Commissioner is also satisfied that although certain information about Lord Ashcroft's peerage is now in the public domain, he accepts that this particular part of the withheld information is not. The only exceptions to this are the newspaper clippings which he does not accept as having the necessary quality of confidence.

Does the information have the necessary obligation of confidence?

59. The Commissioner recognises that an obligation of confidentiality may be expressed explicitly or implicitly. Whether or not there is an implied obligation of confidence may depend on the nature of the information itself, and/or the relationship between the parties.

60. The Cabinet Office has again argued that given the nature of the honours process the committee members and departmental officials would have expected their views regarding Lord Ashcroft's nomination to be kept confidential. Again, given the nature of the process the Commissioner is prepared to accept this argument.

Would disclosure be detrimental to any party?

61. The Cabinet Office, whilst noting that it was not necessary to show any detriment, argued that disclosure of withheld information would still be detrimental both to those who provided the information and to those who are the subject of the information given that it disclosure would reveal their views and opinions on matters of a personal and private nature.

62. The Commissioner is prepared to accept that disclosure could be determined prejudicial for the reasons described by the Cabinet Office.

Would disclosure of the confidential information be actionable?

63. Although section 41 of the Act is an absolute exemption and thus not subject to the public interest test contained at section 2 of the Act, the common law concept of confidence suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The Commissioner must therefore consider whether the public interest in disclosing the information overrides the duty of confidence that is owed.

64. The Cabinet Office explained that the public interest in maintaining confidentiality in the circumstances of this case mirrored those in respect of section 37(1)(b). That is to say confidentiality is a central tenet of the honours nominations process because it enables those responsible for considering the nominations in order to ensure that nominations are properly and effectively scrutinised. It is essential that third parties from whom information is obtained are able to provide full and frank contributions in the knowledge that these will be treated in confidence. If this were not the case the Cabinet Office argued that contributors would be reluctant to provide information or to provide candid views and thus the quality of the scrutiny process would be affected.

65. The Commissioner accepts that there is weighty public interest in maintaining confidences. Furthermore, the Commissioner accepts that the honours system operates on the provision of confidential information concerning nominees. It would clearly not be in the public interest for those persons making nominations to do so without a reasonable expectation that the information they provided in candour would be treated with a significant degree of confidence. Similarly it is in the public interest that nominees are subject to the necessary degree of scrutiny to ensure their suitability for the important role they will play. Nevertheless, the Commissioner believes that in the particular circumstances of this case the public interest in disclosing additional information relating to the verification and enforcement of the undertaking given by Lord Ashcroft overrides the public interest in maintaining the confidence. In this respect the Commissioner considers that disclosure of simply this information would not result in the undermining of confidentiality of the honours process for the reasons discussed above. That is to say, the particular circumstances of Lord Ashcroft's nomination can be clearly distinguished from other nominations and furthermore the information which the Commissioner is ordering disclosure of does not include greater disclosure of the committee's considerations of the merits of Lord Ashcroft's nomination.

Procedural Requirements

Sections 1 and 10

66. By failing to disclose within 20 working days of the request the information which the Commissioner has now concluded is not exempt, the Cabinet Office breached sections 1(1)(b) and 10(1).

The Decision

67. 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:

- With the exception of the information listed in the confidential annex, the Commissioner is satisfied that the requested information is exempt from disclosure on the basis of section 37(1)(b) and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

68. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- Sections 37(1)(b), 40(2) and 41(1) do not provide a basis to withhold the information listed in the confidential annex.

- The Cabinet Office breached sections 1(1)(b) and 10(1) by failing to disclose this information within 20 working days of receiving the request.

Steps Required

69. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- To provide the complainant with the information listed in the confidential annex.

70. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

71. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

72. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

73. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. In this case the complainant requested an internal review on 8 April 2010 and the Cabinet Office did not inform her of the outcome until 9 August 2010. The Commissioner expects that the Cabinet Office's future handling of internal reviews will conform to his recommended timescales.

Right of Appeal

74. 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: 0300 1234504
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

75. 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.

76. 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 29th day of June 2011

Signed ……

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

Legal Annex

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 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

(a) section 21

(b) section 23

(c) section 32

(d) section 34

(e) section 36 so far as relating to information held by the House of Commons or the House of Lords

(f) in section 40 –

(i) subsection (1), and

(ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,

(iii) section 41, and

(iv) section 44"

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."

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(2) provides that –

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

(c) it constitutes personal data which do not fall within subsection (1), and

(d) either the first or the second condition below is satisfied."

Section 40(3) provides that –

"The first condition is-

(e) 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-

1. any of the data protection principles, or

2. section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(f) 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-

(g) it was obtained by the public authority from any other person (including another public authority), and

(h) 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."