Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 May 2016

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office for a copy of the letter proposing that Robert Kerslake be made a life peer and the letter in which this proposal was accepted. The Cabinet Office refused to disclose the requested information on the basis of section 37(1)(b) of FOIA which provides an exemption for information which relates to the conferring of an honour or dignity. The Commissioner has concluded that the requested information is exempt from disclosure on the basis of section 37(1)(b) but that in all the circumstances of the case the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the information.

2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - Provide the complainant with a copy of the information falling within the scope of his request (ie a copy of the same information included in Annex A of the Cabinet Office's letter to the Commissioner of 29 March 2016).

3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. The complainant sent the following email to the Cabinet Office on 9 March 2015:

> *'Will you please provide the document that confirms the proposal of Robert Kerslake for a Life Peerage.'*

5. The Cabinet Office contacted the complainant on 12 March 2015 and asked him to clarify the nature of the information that he was seeking.

6. In a response sent the same day, complainant explained that he was seeking the following:

> *'To clarify the requirement for the provision of information:*
>
> *- please provide the letter proposing that Robert Kerslake be made a life peer*
> *- please provide the letter accepting that Robert Kerslake should be made a life peer*
>
> *For each of the above, which must also identify the authors, there may also be attached documents, for example, relevant history and rationale as to why Robert Kerslake should be awarded a life peerage.'*

7. And in response to a further request for clarification, the complainant provided this further clarification on 16 March 2015:

> *'To further clarify:*
> *Someone must have written a letter proposing that Robert Kerslake be made a life peer. It is that letter that is required.*
> *Whoever that letter was sent to, it would have been duly processed, and a reply eventually sent, to whoever, saying that the proposal has been accepted.*
> *Of course, during the process between initial proposal and final acceptance, several other documents will have been generated.*
> *As can be seen from the above, I also require those documents.'*

8. The Cabinet Office responded on 14 April 2015 and explained that it held information falling within the scope of the request but considered it to be exempt from disclosure on the basis of sections 37(1)(a) (communications with the Sovereign), 37(1)(b) (conferring of an honour or dignity) and 40(2) (personal data) of FOIA.

9. The complainant contacted the Cabinet Office on the same date and asked for an internal review to be undertaken.

10. The Cabinet Office informed the complainant of the outcome of the review on 15 September 2015. The review concluded that the requested information was exempt from disclosure on the basis of sections 37(1)(b) and 40(2) of FOIA. The review did not refer to the Cabinet Office's previous reliance on section 37(1)(a).

Scope of the case

11. The complainant contacted the Commissioner on 16 September 2015 to complain about the Cabinet Office's refusal to provide him with the information that he requested. He explained that he was also dissatisfied with the length of time it had taken the Cabinet Office to complete its internal review.

12. During the course of the Commissioner's investigation the Cabinet Office confirmed that the only exemption upon which it was seeking to withhold the requested information was section 37(1)(b) of FOIA.[1]

Reasons for decision

Section 37(1)(b)

13. Section 37(1)(b) of FOIA provides that information is exempt if it relates to the conferring by the Crown of any honour or dignity.

14. Given the nature of the information requested by the complainant the Commissioner is satisfied that the withheld information clearly falls within this description and thus is exempt from disclosure on the basis of section 37(1)(b) of FOIA.

15. 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 FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public

[1] The Commissioner wishes to note that he initially contacted the Cabinet Office on 3 December 2015 and asked it provide him with a copy of the withheld information and submissions to support the application of the various exemptions. Having received no response to this letter the Commissioner issued the Cabinet Office with an Information Notice on 11 February 2016 which required this information to be provided to him within 30 calendar days. The Cabinet Office provided this information to the Commissioner on 29 March 2016.

interest in disclosing the information. When the public interest factors are equally balanced in any case this presumption in disclosure set out at section 2(2)(b) operates to require that the information must be disclosed.

Public interest arguments in favour of maintaining the exemption

16. The Cabinet Office emphasised that the principle of confidentiality is central to the functioning of the appointments system. Those involved in discussions about individual cases need a safe space to discuss and deliberate on cases. The Cabinet Office argued that such a safe space allows those involved to engage in frank discussions without external comment, speculation or enquires. It noted that such pressure or hindrance may distort the integrity of the process and divert resources from the task in hand.

17. Furthermore, the Cabinet Office argued that disclosure of information relating to specific appointments would have a negative impact on future discussions. This is because those participating in the appointments system may be reluctant to do so if they thought that their views, given in confidence, were likely to be published.

18. The Cabinet Office emphasised that it was not in the public interest to threaten the integrity of the appointments system.

Public interest in the disclosure of the withheld information

19. The complainant argued that there was a clear public interest in the disclosure of information regarding the appointment of life peers; he emphasised that Lords have a high public profile. He also refused to accept, '*that those who publicly ascribe to openness, honesty, transparency and accountability could be dissuaded from engaging in the process unless they are guaranteed secrecy, absolute discretion, and zero accountability.*'

Balance of the public interest

20. With regard to the safe space arguments advanced by the Cabinet Office, the Commissioner notes that at the point the complainant submitted his request, ie 9 March 2015, the decision making process in respect of this particular life peerage had already been concluded. That is to say, confirmation of the life peerage granted to Lord Kerslake had been announced on 26 February 2015.[2] Therefore in the Commissioner's

[2] https://www.gov.uk/government/news/peerage-for-sir-bob-kerslake

opinion the safe space arguments do not attract any particular weight. In other words, the Commissioner does not accept that the Cabinet Office needed a safe space, free from interference and distraction, to discuss Lord Kerslake's nomination.

21. With regard to the chilling effect arguments, in the Commissioner's opinion the withheld information does not contain any information which could be accurately described as candid or frank in nature. Nor does it contain any detailed discussions regarding the merits of Lord Kerslake's nomination. However, the Commissioner does acknowledge that the withheld information is relatively recent, ie it was created shortly before the request was submitted. Taking these factors into account, the Commissioner considers that only a relatively limited amount of weight should be given to the chilling effect arguments. Whilst it is the case that the information is recent, given its contents the Commissioner even if the withheld information in this case was disclosed, considers that those involved in contributing to discussions about future honours nominations would still have the expectation that their contributions would be treated confidentially.

22. The Commissioner agrees with the complainant that there is a clear public interest in ensuring that the honours system is transparent and accountable. That said, given the nature of the withheld information, in the Commissioner's opinion the degree to which disclosure of this information would contribute towards these aims is somewhat limited.

23. Ultimately, the Commissioner has concluded that the public interest factors on both sides are equally balanced. In his opinion there is limited weight that should be attributed to the public interest in disclosing this information. However, for the reasons explained above, the Commissioner considers that no weight should be attributed to the safe space arguments and only limited weight should be attributed to the chilling effect arguments. Consequently, taking into account the assumption in favour of disclosure as set out section 2(2)(b) of FOIA, the Commissioner has concluded that the public interest favours disclosing the withheld information. In reaching this conclusion, the Commissioner wishes to emphasise that he 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. However, for the reasons discussed, he does not accept that disclosure of withheld information in this case would erode this confidentiality.

Other matters

24. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in complex cases to be completed within 40 working days.

25. In the circumstances of this case the complainant requested an internal review on 14 April 2015. The Cabinet Office informed him of the outcome of the internal review on 15 September 2015. It therefore took the Cabinet Office 107 working days to complete its internal review. The Commissioner considers this to be unsatisfactory. In the future he expects the Cabinet Office to ensure that internal reviews are completed within the timeframes set out within his guidance.[3]

[3] https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/#20

Right of appeal

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

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

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

27. 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.

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

Signed ……

Gerrard Tracey
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