

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 August 2018

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information on any rules and/or guidance in the honours system regarding the conferment of honours. The public authority disclosed some of the information held within the scope of the request and withheld the remainder relying on the exemptions at sections 37(1)(b) and 31(1)(g) FOIA.
2. The Commissioner's decision is that the public authority was not entitled to rely on the exemptions at sections 37(1)(b) and 31(1)(g).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information – ie Chapter 6 of the Honours Secretaries Handbook and the validation documents.
4. 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. The complainant submitted a request for information to the public authority on 2 January 2018 in the following terms:

"Please would you let me know in writing if you hold information of the following description:

What rules and/or guidance are there in the honours system regarding the awarding of honours to people with criminal convictions and/or other potential flaws in their character such as cheating at sport, drug taking, offensive behaviour?

Please may I see the information. If you need further details in order to identify the information requested or a fee is payable please let me know as soon as possible.

If you are of the view that there may be further information of the kind requested but it is held by another public authority please let me know as soon as possible."

6. The public authority responded on 25 January 2018. It confirmed that it held information within the scope of the request which it considered exempt on the basis of the exemptions at sections 37(1)(b) and 31(1)(g) FOIA.
7. The complainant requested an internal review of this decision on 25 January 2018.
8. The public authority wrote back to the complainant on 7 March 2018 with details of the outcome of the internal review. The review upheld the original decision.

Scope of the case

9. The complainant contacted the Commissioner on 9 March 2018 in order to complain about the public authority's decision to withhold the information held within the scope of his request.
10. However, during the course of the investigation, the public authority disclosed some of the information held and maintained that the remaining information was exempt on the basis of sections 37(1)(b) and 31(1)(g).
11. Consequently, the scope of the Commissioner's investigation was restricted to the remaining information withheld by the public authority

on the basis of sections 37(1)(b) and 31(1)(g). The disclosed and withheld information are described below.

Reasons for decision

Withheld information

12. The information held within the scope of the request comprises of:

- A Memorandum of Understanding between HMRC and Cabinet Office for access to information from HMRC to assist honours committees in making decisions about awarding honours to individuals¹,
- An Information Sharing Agreement between the National Police Chiefs' Council and Cabinet Office Honours and Appointments Secretariat for accessing information held on the national police computer for the purposes of conducting vetting checks on honours candidates for state honours and appointments²,
- An extract from Chapter 6 of the Honours Secretaries Handbook, a guide to the processing of honours which is used across the civil service³, and
- Two template documents namely, a validation letter and a validation form both issued to Lord-Lieutenants by the Honours and Appointments Secretariat⁴. The letter informs the Lord-Lieutenant that the secretariat is considering a nominee's case for an honour and requests their view on the nominee. The Lord-Lieutenant is expected to provide their view by completing the enclosed validation form.

13. For the avoidance of doubt, neither of the validation documents contain information in relation to any individual or the award of any specific honour.

14. The Commissioner understands that both documents are part of Chapter 6 of the Honours Secretaries Handbook.

¹ Dated 21 March 2017. Hereinafter referred to as the HMRC MoU

² Dated 6 April 2017. Hereinafter referred to as the NPCC MoU.

³ Hereinafter referred to as Chapter 6 of the Honours Secretaries Handbook.

⁴ Hereinafter referred to as validation documents.

15. During the course of the Commissioner's investigation, specifically on 18 July 2018, the public authority disclosed the HMRC MoU and the NPCC MoU to the complainant. The following reason for the disclosure was provided to the complainant: "we now consider that the public interest favours releasing this information."

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

16. The Commissioner has first considered whether the public authority was entitled to rely on the exemption at section 37(1)(b) to withhold Chapter 6 of the Honours Secretaries Handbook and the validation documents.

17. Section 37(1) states:

"Information is exempt information if it relates to—

(a) communications with the Sovereign,

(aa) communications with the heir to, or the person who is for the time being second in line of succession to, the Throne,

(ab) communications with a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne,

(ac) communications with other members of the Royal Family (other than communications which fall within any of paragraphs (a) to (ab) because they are made or received on behalf of a person falling within any of those paragraphs), and

(ad) communications with the Royal Household (other than communications which fall within any of paragraphs (a) to (ac) because they are made or received on behalf of a person falling within any of those paragraphs), or

(b) the conferring by the Crown of any honour or dignity."

Public authority's submissions

18. The public authority considers that the withheld information engages the exemption at section 37(1)(b) because it is on the subject of the process used in order to confer an honour from Her Majesty The Queen. It *relates to* the conferment by the Queen of an honour or dignity.
19. With respect to the balance of the public interest, the public authority acknowledged the general public interest in transparency and recognised the public interest in the workings of the honours system. It however argued that there is a public interest in the process remaining confidential in order to maintain the integrity of the honours system and

to ensure that decisions about honours and awards may continue to be taken on the basis of full and honest information.

20. It is crucial that those who offer opinions do so freely and honestly, in confidence, on the understanding that their confidence will be honoured. This is essential to the integrity of the honours system. In order 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 hold free and frank discussions.
21. Parliament also recognised the particular sensitivity of releasing information about honours by expressly providing that the exemption relating to honours information does not expire after 30 years but instead remains applicable for 60 years after the date of its creation.⁵ The public interest inherent in the section 37(1)(b) is the protection and preservation of the integrity and robustness of the honours system. It would not be in the public interest to disclose the withheld information.
22. The Commissioner asked the public authority to specifically explain how disclosure of the withheld information could prejudice the ability of the Honours and Appointments Secretariat to obtain full and frank opinions in relation to candidates for honours. The public authority argued that disclosure is likely to lead to concerns by Lord-Lieutenants and their Deputies that their opinions of particular individuals could be made public and they would consequently feel less able to have open discussions with the Secretariat.

Complainant's submission

23. The complainant's submission was with respect to the balance of the public interest. He argued that there should be no risk of confidences being betrayed since his request does not identify any individuals, and was about the process rather than individual honours.

Commissioner's position

24. The request was for rules and/or guidance in relation to the vetting of individuals for the award of honours. Information is exempt under section 37(1)(b) if it *relates to* the conferring by the Crown of any honour or dignity. In the Commissioner's view, the term *relates to* should be interpreted broadly. Therefore, having considered the request and the withheld information, the Commissioner accepts that the

⁵ Section 63(3) FOIA.

withheld information relates to the conferring by the Crown of any honour or dignity. The exemption was therefore correctly engaged.

25. The exemption is class-based. This means there is no requirement to demonstrate that disclosure of the withheld information is likely to cause harm/prejudice. The exemption can be engaged once it is determined that the requested information falls within the class of information envisaged by section 37(1) FOIA. Nevertheless, assessing where the balance of the public interest lies inevitably requires consideration of the likelihood of prejudice from disclosure.

Balance of the public interest

26. Therefore, in accordance with the test set out in section 2(2)(b) FOIA, the Commissioner has considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
27. As a general principle the Commissioner accepts the 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. Furthermore, the Commissioner accepts that if views and opinions, provided in confidence, were subsequently disclosed then it is likely that those asked to make similar contributions in the future may be reluctant to do so or would make a less candid contribution. Moreover, 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.
28. However, the Commissioner considers that these principles carry little or no weight in the circumstances of this case. She strongly disagrees with the view that disclosure of the withheld information is likely to lead to concerns by Lord-Lieutenants that their opinions of particular individuals could be made public. There would be no sustainable reason for them to hold that view on the basis of the disclosure of the withheld information. The information does not refer to any individuals or specific honour. The Commissioner agrees with the complainant that the information is about the process. There is simply no risk that it would reveal information provided in confidence. The public authority's position is clearly untenable. Given that the MoUs which are actually more sensitive have been released in the public interest, it is unclear why the public authority considers that the withheld information is likely to result in a chilling effect on free and frank opinions but not the MoUs.
29. The Commissioner considers that there is a strong public interest in being open and transparent about the nature and extent of the vetting

process pursuant to conferring an honour or dignity in order to increase public confidence in the honours system. The withheld information would enhance rather than diminish any ongoing related debate. There is relatively very little public interest in withholding the information.

30. The Commissioner has therefore concluded that on balance, in all the circumstances of the case, the public interest in disclosing the withheld information outweighs the public interest in maintaining the exemption.

Section 31(1)(g)

31. The Commissioner next considered whether the public authority was entitled to rely on the exemption at section 31(1)(g) to withhold Chapter 6 of the Honours Secretaries Handbook and the validation documents.

32. The public authority has relied on section 31(1)(g) and by extension section 31(2)(b) FOIA.

33. Section 31(1)(g) states:

“1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).....”

34. Section 31(2)(b) states⁶:

“2) The purposes referred to in subsection (1)(g) to (i) are-

b) the purpose of ascertaining whether any person is responsible for any conduct which is improper....”

Public authority's submissions

35. The public authority considers that disclosure of the withheld information would be likely to prejudice the exercise by the Honours and Appointments Secretariat committees of its functions for the purposes of ascertaining whether any person is responsible for any conduct which is improper.

⁶ The full text of section 31 is available here:
<http://www.legislation.gov.uk/ukpga/2000/36/section/31>

36. It explained that as part of the vetting procedure, candidates for honours are subject to checks with various organisations in order to discover whether that individual is responsible for conduct which might bring the honours systems into disrepute.
37. It submitted that disclosure of the withheld information has the potential to prejudice "the work done" by the public authority.
38. With respect to the balance of the public interest, the public authority again acknowledged the general public interest in transparency and also recognised the public interest in the workings of the honours system. It however argued that this must be weighed against the importance of confidentiality which is essential to protect the integrity of the honours system and in guaranteeing its effective operation. Withholding the information ensures that those involved in the honours system can take part on the understanding that their confidence will be honoured and that decisions about honours are taken on the basis of full and honest information about the individual concerned.
39. The Commissioner asked the public authority to specifically explain how disclosure of the withheld information would pose a real and significant risk to the ability of the Honours and Appointments Secretariat to ascertain whether a nominee is responsible for any conduct which is improper. The public authority only provided a response with respect to the MoUs as follows: "disclosure of the MoUs has a potentially prejudicial effect on the integrity of the Honours process by providing insight which could be used by a dishonest actor, seeking to conceal matters that would result in the refusal of an honour." It however concluded that on reflection this prejudice was slight and the public interest in disclosure outweighed the public interest in maintaining the exemption. As mentioned, the MoUs were subsequently released to the complainant on 18 July 2018.

Commissioner's position

40. The exemption at section 31(1)(g) and by extension section 31(2)(b) is prejudice-based. This means the exemption can only be engaged once it is determined that the disclosure of the requested information is likely to cause harm/prejudice.
41. The Commissioner considers that there are two possible limbs upon which a prejudice-based exemption can be engaged, either prejudice 'would' occur or prejudice 'would be likely' to occur. The public authority considers that disclosure of the withheld information would be likely to cause harm/prejudice.

42. The Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0026 & 0030)* confirmed that 'would be likely to prejudice' means "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk".
43. The Commissioner considers that the term "ascertaining" in section 31(2)(b) means that the public authority must have the power to determine the matter in hand with some certainty. The public authority must not only be responsible for the investigation but it must also have the authority to make a formal decision as to whether that person has acted in an unethical or unprofessional manner. In many cases the public authority must be responsible for determining whether a conduct is in breach of a formal code of conduct. The exemption will apply if disclosure would or would be likely to prejudice a public authority's ability to ascertain this.
44. The Commissioner does not consider that checks with various organisations by the Honours and Appointments Secretariat committees to discover whether a candidate for an honour is not responsible for any improper conduct is a function which includes the power of "ascertaining" within the meaning of section 31(2)(b). There is no indication that the Secretariat is responsible for investigating the actual conduct with a view to making a formal decision on the matter. Instead, it relies on the judgement of professional bodies/organisations responsible for determining with some certainty whether a conduct has breached any professional or ethical standards.
45. Even if the Commissioner is wrong on this point, she does not consider that disclosure of the withheld information would pose a real and significant risk to the Honours and Appointments Secretariat committees' ability to vet candidates through checks with relevant organisations. The withheld information does not refer to any individual or to any specific honour. The public authority's submission that it would is simply not sustainable.
46. The Commissioner therefore finds that the exemption at section 31(1)(g) was incorrectly engaged.

Right of appeal

47. 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

48. 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.

49. 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

Principal Adviser

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