

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 3 June 2021

**Public Authority:** Cabinet Office  
**Address:** 70 Whitehall  
London  
SW1 2AS

#### Decision (including any steps ordered)

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1. The complainant has requested information as to individuals who have forfeited their honours since 2015. The Cabinet Office applied section 21(1)(b)(information accessible to the applicant by other means) to the majority of the requested information. The remaining information was withheld by the Cabinet Office under section 37(1)(b)(information relating to the conferring by the Crown of any honour or dignity) and section 40(2)(third party personal data).
2. The Commissioner's decision is that the Cabinet Office has correctly applied section 40(2) of FOIA to withhold the relevant information. No steps are required.

#### Request and response

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3. On 31 December 2019, the complainant wrote to the Cabinet Office and requested information in the following terms:

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

*Since and including 2015, the individuals who have forfeited their honours.*

*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. Please continue with this application as soon as possible.*

*I believe that the information requested is required in the public interest for the following reasons:*

- 1. To uphold public confidence that the honours system embraces transparency;*
  - 2. To provide assurance that information on those who forfeit honours is made available, as is information on those who accept honours;*
  - 3. To ensure that money is correctly spent on matters concerning the forfeiture of honours'.*
4. The Cabinet Office responded to the request on 24 January 2020. They advised that '*the majority*' of the information held within the scope of the request was exempt by virtue of section 21(1)(b)(information accessible to applicant by other means) of the FOIA. The Cabinet Office noted that this is an absolute exemption and therefore not subject to the public interest test. The Cabinet Office advised the complainant that he could find the names of individuals who had forfeited their awards in the *London Gazette*, which could be found at [www.thegazette.co.uk](http://www.thegazette.co.uk). The Cabinet Office stated that publication of forfeitures is a long-standing arrangement, reflecting that the *London Gazette* has always been the official Crown record of the honours system.
5. The Cabinet Office went on to advise that:
- 'The Forfeiture Committee does, however, consider each case individually and may take appropriate legal advice on handling, including where there might be broader duty of care issues. In this context, the independent inquiry into Child Sexual Abuse has taken evidence that David Hubert Boothby Chesshyre forfeited his honour in 2019 but the forfeiture was not published in the Gazette. Such instances of non-publication are not determined with the aim of protecting the reputation of the individual who forfeits'.*

6. The Cabinet Office informed the complainant that '*some*' of the information within scope of the request was exempt under section 37(1)(b)(information relating to the conferring by the Crown of any honour or dignity). In respect of the attached public interest test, the Cabinet Office stated that they had considered whether the public interest was better served by release of the information or by withholding it.
7. The Cabinet Office stated that they recognised the public interest in transparency, and the public's awareness of how the honours system works and the way in which such decisions are taken. However, the Cabinet Office stated that such public interest factors favouring disclosure, '*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*'.
8. Having considered '*all the circumstances of the Forfeiture Committee's individual consideration of cases*', the Cabinet Office advised that they had concluded that the public interest was '*better served by withholding the information exempt under section 37(1)(b)*'.
9. The Cabinet Office advised the complainant that they were also withholding '*some*' of the information under section 40(2)(third party personal data). They stated that they considered that disclosure of the information in question would contravene the first data protection principle, which provides that data must be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the Data Protection Act 2018 (the DPA) is met. The Cabinet Office stated that they did not believe that any of the conditions in Schedule 2 to the DPA were met, and as section 40(2) is an absolute exemption, they were not obliged to consider whether the public interest favoured disclosing the information.
10. The complainant replied to the Cabinet Office on the same date and advised that he accepted their application of section 21(1)(b) to the majority of the information requested (i.e. that otherwise accessible in the *London Gazette*), but requested an internal review of the decision to withhold the other information which he had requested.
11. The Cabinet Office provided the complainant with their internal review on 14 February 2020. The review upheld the application of sections 37(1)(b) and 40(2) and found that the balance of the public interest (in respect of section 37(1)(b)) had been fully considered for the reasons set out in their refusal notice of 24 January 2020.

12. However, the Cabinet Office advised the complainant that they were able to inform him that a recommendation to revoke an honour would be sent by the Honours and Appointments Secretariat to the Forfeiture Committee. Each case is considered on its merits and the Committee's recommendations for forfeiture are submitted through the Prime Minister to The Sovereign. If The Sovereign gives approval, a notice of forfeiture is usually placed in the *London Gazette*.

### **Scope of the case**

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13. The complainant contacted the Commissioner on 18 February 2020 to complain about the way his request for information had been handled.
14. The complainant stated that, *'it is particularly surprising that the Cabinet Office cannot even confirm that all forfeitures have been made public. The internal review states that a notice of forfeiture 'is usually' placed in the London Gazette'*.
15. During the course of the Commissioner's investigation, and following discussions with the Commissioner, the Cabinet Office confirmed that they were content for the Commissioner to inform the complainant that the withheld information (that subject to sections 37(1)(b) and 40(2)) was **one** individual only.
16. As the complainant has accepted the Cabinet Office application of section 21(1)(b) to the majority of the information held within the scope of his request, the scope of the Commissioner's investigation has been to determine whether the Cabinet Office were entitled to rely upon sections 37(1)(b) and 40(2) to withhold the residual information (i.e. one individual name) held.

### **Reasons for decision**

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#### **Section 40(2) – Personal information**

17. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester, and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

18. In this case the relevant condition is set out at section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to a member of the public would contravene any of the principles relating to the processing of personal data (the principles) as set out in Article 5 of the General Data Protection Regulation (GDPR).
19. The Commissioner must first determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 of the FOIA cannot apply.
20. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the principles.

*Is the information personal data?*

21. Section 3(2) of the DPA defines personal data as:  
*'Any information relating to an identified or identifiable living individual'.*
22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
23. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
24. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
25. In this case, as the withheld information comprises the name of an individual, and given the context of the information, the Commissioner is satisfied that the information falls within the definition of 'personal data' in section 3(2) of the DPA.
26. The fact that information is personal data does not automatically mean that it is exempt from disclosure under the FOIA. The Commissioner must next determine whether disclosure would contravene any of the principles.
27. The most relevant principle in this case is principle (a).

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

*Would disclosure contravene principle (a)?*

28. Article 5(1)(a) of the GDPR states that:

*'Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject'*.

29. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

30. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

*Lawful processing: Article 6(1)(f) of the GDPR*

31. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f), which states:

*'Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child'<sup>2</sup>.*

32. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:

(i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

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<sup>2</sup> Article 6(1) goes on to state that:-

*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

(ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

(iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

33. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

#### *Legitimate interests*

34. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

35. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

36. In submissions to the Commissioner, the Cabinet Office stated that they considered that there is a legitimate interest in transparency '*for its own sake*' and it therefore followed that there is a legitimate interest in disclosure, '*albeit a very limited one*'. The Cabinet Office also acknowledged that there is a legitimate interest in the public being made aware of those individuals who have forfeited their honours.

37. In this case the Commissioner considers that there is a legitimate interest in disclosing the requested information. As the Cabinet Office noted in their responses to the complainant's request, the names of those whose honours have been forfeited are usually published in the *London Gazette*. Where, as in this case, the name of such an individual is not published and therefore not in the public domain, the Commissioner considers that this will strengthen the legitimate interest in disclosure of the requested information, given the unusual nature of such non-publication.

#### *Is disclosure necessary?*

38. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity, which involves the consideration of alternative measures. That is to say that a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under the FOIA must therefore

be the least restrictive means of achieving the legitimate aim in question.

39. The Commissioner is also assisted by the First Tier Tribunal's comments regarding necessity:

*'A broad concept of protecting, from unfair or unjustified disclosure, the individuals whose personal data has been requested, is a thread that runs through the data protection principles, including the determination of what is 'necessary' for the purpose of identifying a legitimate interest. In order to qualify as being 'necessary' there must be a pressing social need for it<sup>3</sup>.*

40. In submissions to the Commissioner, the Cabinet Office contended that they did not believe that the disclosure of the withheld information (the individual's name) would be necessary to further the general transparency of government, *'which is achieved in multiple other ways'*. However, the Cabinet Office acknowledged that the disclosure of the individual's name would be necessary to establish that individual's identity as a person who has forfeited their honour *'if the legitimate interest in question is knowing the identity of every such person'*.
41. As the Commissioner is of the view that there is a legitimate interest in knowing which individuals have forfeited their honours, and as the Commissioner is satisfied that this legitimate interest cannot be met in a less intrusive manner, the Commissioner considers that disclosure of the withheld information is necessary in order to meet the legitimate interest in disclosure.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

42. The third part of the assessment balances the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

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<sup>3</sup> Ian McFerran v the Information Commissioner, appeal no EA/2012/0030, para 10



43. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause.
  - whether the information is already in the public domain.
  - whether the information is already known to some individuals.
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
44. In the Commissioner's view, a key issue is whether the individual or individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
45. In submissions to the Commissioner, the Cabinet Office confirmed that the withheld information is not already in the public domain. The Cabinet Office advised that the individual had made written representations to the Forfeiture Committee following the recommendation by the Committee that the honour be forfeited. The individual did not wish for the decision to forfeit the honour to be published. Subsequent to those representations, the individual's honour was forfeited without notification in the *London Gazette*. As the Cabinet Office agreed not to publish the forfeiture in the *London Gazette*, they contended that the individual has a strong expectation that their name will not be disclosed.
46. On the facts of this particular case, since the Cabinet Office previously agreed not to publish the individual's forfeiture in the *London Gazette*, the Commissioner accepts that the individual would have a reasonable expectation that their name would not be disclosed in response to this request.
47. The Cabinet Office provided the Commissioner with information explaining the sensitivity of this particular matter. Given the sensitive nature of this information, the Commissioner cannot provide further details in this notice but has done so in a Confidential Annex attached to this notice.
48. The Cabinet Office also noted that if the individual whose honour had been forfeited, were to make a request under Article 15(1) of the GDPR for access to their personal data, the information would be withheld in accordance with paragraph 15(1) of Schedule 2 of the DPA. This provides that the listed GDPR provisions do not apply to personal data

processed for the purposes of the conferring by the Crown of any honour or dignity.

49. The Cabinet Office contended that it would be contrary to the intention which underpins Schedule 2 of the DPA if the provisions of the FOIA could be used to secure the disclosure of personal data which would not be disclosed to the data subject. It would not be in the public interest to enable a requester to acquire personal data relating to the data subject under the FOIA when the data subject would themselves not be able to access it under the GDPR. The Cabinet Office contended that this would be unfair to the data subject, whose right to access their own personal data *'should be at least the equal of that enjoyed by third parties'*. It would also have the effect of undermining the law. The Cabinet Office therefore contended that the public interest is strongly in favour of withholding the individual's name under section 40(2) of the FOIA with respect to the third condition contained in subsection 4A.
50. Section 40(4)(A) provides that on a request under Article 15(1) of the GDPR (general processing: right of access by the data subject) for access to personal data, the information would be withheld in reliance on provision made by or under section 15, 16 or 26 of, or Schedule 2, 3 or 4 to, the DPA. Although a separate exemption, for convenience the Commissioner has considered the above arguments by the Cabinet Office in the context of section 40(2).
51. As the withheld information in this case is the name of the individual whose honour was forfeited but whose name was not published in the London Gazette, rather than any information surrounding the details of that forfeiture, the Commissioner notes that the individual would have no need to make any such subject access request, since they would of course already be aware that their honour had been forfeited.
52. For reasons set out in the Confidential Annex the Commissioner is satisfied that the individual would reasonably expect that their personal data would not be disclosed into the public domain.
53. Furthermore, the Commissioner finds that disclosure of the withheld information into the public domain would be very likely to cause distress to the individual, which would be unwarranted.
54. Consequently, the Commissioner is not satisfied that the Cabinet Office could rely on Article 6(1)(f) as providing a lawful basis for disclosing the individual's name. It follows that disclosure of the withheld information under the FOIA would be unlawful and would contravene principle (a). The Commissioner therefore concludes that the Cabinet Office were entitled to rely on section 40(2) of the FOIA as a basis for withholding the information. Having found that the Cabinet Office were entitled to

Reference: IC-48539-V9Z8



rely on this exemption, the Commissioner has not gone on to consider the application of section 37(1)(b) to the same information.

## Right of appeal

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55. 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@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

56. 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.
57. 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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