Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 January 2010

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

Summary

The complainant asked the Cabinet Office for information relating to an undertaking given by Michael, now Lord Ashcroft in March 2000 concerning his intention to take up permanent residence in the United Kingdom on taking his seat in the House of Lords. The complainant specified the information he wanted to have, namely, the form in which the undertaking was given and identity of the person to whom it was given. The public authority confirmed that it held the information the complainant requested but determined that it should be withheld in reliance of the exemptions contained in sections 37(1)(b), 40(2) and 41 of the Freedom of Information Act 2000 ('the Act').

The Commissioner has decided that the Cabinet Office was wrong to rely on the exemptions provided by sections 37(1)(b), 40(2), 40(4) and 41 in order to withhold the requested information. In consequence of this, the Commissioner finds that the Cabinet office breached section 1(1)(b) of the Act. The Commissioner requires the Cabinet Office to disclose the information which it has improperly withheld.

The Commissioner has also decided that the Cabinet Office breached of section 17(1) of the Act by failing to provide a refusal notice to the complainant, citing the exemptions on which it was relying, within the time for complying with a request.

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. A press release was issued on 31 March 2000 announcing the life peerage award to Michael Ashcroft (now Lord Ashcroft). A 'note for editors' was also issued with the press release and was subsequently read out in the House of Commons on 25 January 2008. This editor's note stated:

> "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."

3. The Political Honours Scrutiny Committee requested that the fact that Lord Ashcroft gave an assurance, endorsed by the Leader of the Conservative Party, should be placed in the public domain and suggested that an appropriate way of doing so would be by way of a note announcing the conferring of working peerages by Her Majesty The Queen.

The Request

4. On 27 November 2007 the complainant wrote to the Cabinet Office to make the following request for information:

> "What form did Michael Ashcroft's undertaking take and to whom was the undertaking given?"

5. The Cabinet Office responded to the complainant's request on 14 January 2008, stating:

> "In respect of your query about the residency undertaking, any relevant information held is exempt by virtue of section 37(1)(b) of the Act relating to information relating to the conferring by the Crown of any honour of [sic] dignity, and sections 40 and 40 of the Act relating to personal information and information provided in confidence."

6. On 15 January 2008 the complainant asked the Cabinet Office to conduct an Internal Review of its refusal to disclose the information he had requested.

7. The Cabinet Office completed its internal review and wrote to the complainant on 27 March 2008. The Cabinet Office confirmed its original decision to apply sections 37(1)(b), 40 and 41 to the requested information and responded to the assertions made by the complainant in his request for internal review.

The Investigation

Scope of the case

8. On 31 March 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant asked the Commissioner to consider his assertion that 'there is a public interest imperative in knowing how people who are not elected get into the legislature'.

Chronology

9. The Commissioner wrote to the Cabinet Office on 2 June 2008. He asked to be sent the withheld information and made enquiries concerning the exemptions that had been claimed in justification for withholding it.

10. The Cabinet Office replied to the Commissioner on 16 July 2008. The Cabinet Office pointed out that the form of the undertaking made by Lord Ashcroft is not publicly known. It asserted that the information contained in the 'note for editors' had been placed into the public domain and this was sufficient to meet the public interest. The Cabinet Office again confirmed its application of sections 37(1)(b) and 41 and specified its application of section 40(2).

11. The Commissioner wrote to the Cabinet Office again on 7 May 2009, seeking further clarification of its application of the exemptions claimed for withholding the requested information.

12. The Cabinet Office replied to the Commissioner's enquiries on 23 October 2009.

13. On 7 December 2009 the Commissioner wrote to the Cabinet Office once more. He made enquiries about its application of section 40(2), the circumstances which brought about Lord Ashcroft's undertaking and what might have been Lord Ashcroft's reasonable expectation that the form of this undertaking would not be disclosed publicly.

14. The Cabinet Office responded to the Commissioner's enquiries on 11 January 2010.

15. During his investigation of this complaint the Commissioner received representations from Lord Ashcroft's solicitors, including copies of letters sent by the solicitors to the Cabinet Office.

Analysis

Exemptions
Section 40

16. Section 40(2) provides an exemption for information which is the personal data of any third party. Where disclosure would breach any of the data protection principles contained in the Data Protection Act 1998 (DPA) subsection 3(a)(i) of section 40 is relevant.

17. In order to rely on the exemption provided by section 40, the information being requested must therefore constitute personal data as defined by the DPA. The DPA at section 1(1) defines personal data 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 to the individual.'*

18. The Cabinet Office maintains that the form or nature of any undertaking given by Lord Ashcroft is exempt from disclosure under the provisions of section 40(2). This is because the information constitutes Lord Ashcroft's personal data.

19. The Commissioner has examined the withheld information and is satisfied that it constitutes the personal data of Lord Ashcroft. He agrees with the Cabinet Office that the requested information is not Lord Ashcroft's sensitive personal data as defined by section 2 DPA.

The first data protection principle

20. The Cabinet Office asserts that the disclosure of the requested information would contravene the first data protection principle as stated in Schedule 1 of the DPA.

21. The first data protection principle has two components:

> *i. The personal data must be processed fairly and lawfully, and*
> *ii. personal data shall not be processed unless one of the conditions in the Data Protection Act 1998 Schedule 2 is met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.*

22. The Cabinet Office informed the Commissioner that it would not be fair to disclose the form of the undertaking given by Lord Ashcroft, on the basis that:

> *"…everyone who participates in the Honours process, but especially in respect of this particular nomination, has operated under the understanding that the details are confidential…'*

23. Similarly, Lord Ashcroft's solicitors make a comparable point in a letter to the Cabinet Office dated 12 October 2009. This letter states:

> *"In the present circumstances, it is obvious on any objective review that Lord Ashcroft's [undertaking] with […] by means of […], including the form and recipient, give rise to a reasonable expectation of privacy (and confidentiality) on the part of Lord Ashcroft in respect of all matters arising concerning that private and personal communication."*[1]

24. The Commissioner agrees with Lord Ashcroft's solicitors to the extent that they have identified one of the key issues on which the notion of fairness must be decided, that is, the reasonable expectation of Lord Ashcroft that the requested information would remain private. He disagrees with the solicitors in respect of the temporal aspect of their assertion; that this expectation relates to 'the present circumstances'. The Commissioner considers that it is more appropriate to consider what would have been Lord Ashcroft's reasonable expectation of privacy at the time he gave his undertaking as well as at the time the complainant made his request.

25. To do this the Commissioner must examine the circumstances which existed during the period leading up to and including the time the undertaking was made.

26. The press release and note for editors placed into the public domain information relating to the contents of Lord Ashcroft's undertaking in an attempt to assuage any concern the public might have had regarding the reasons why Lord Ashcroft's first nomination had been rejected. The only piece of information that was not placed into the public domain at that time, was the form in which the undertaking was given and the identity of its recipient.

27. The question to be addressed here is not whether Lord Ashcroft had a reasonable expectation that the contents of his undertaking would be made public. By the time of the complainant's request the fact that the undertaking had been given had already been placed into the public domain. Rather, the question is whether he had the reasonable expectation that the form and recipient of his undertaking would be made public, given the controversial nature of his nomination and in light of the contents of the undertaking had already been made public.

28. Lord Ashcroft was first nominated for a working peerage in 1999 by the then Leader of the Conservative Party, William Hague. The nomination was

[1] The Cabinet Office consulted Lord Ashcroft about this request in line with the Part IV of the section 45 Code of Practice. The Commissioner has included in this Notice statements made by Lord Ashcroft, or his legal representatives, made to the Cabinet Office and provided to the Commissioner during his investigation of this complaint.

considered by the small, all-party Political Honours Scrutiny Committee[2] and was rejected.

29. According to an answer to a parliamentary question raised by Lord Shinwell in 1976, Lord Peart, the then Lord Privy Seal, stated that:

'My Lords the function of the Political Honours Scrutiny Committee is to report to the Prime Minister whether the persons whose names he submits to them are fit and proper persons to be recommended for appointment to any dignity or honour on account of political services. Their function is one of scrutiny and scrutiny only - to report if the past history or general character of a person render him unsuitable to be recommended. The Committee have no duties of initiation or recommendation, nor are they asked to adjudicate on the nature of the honour submitted, whether it be for Life Peerage or for any other appointment, The criteria for the selection of Life Peers are not, therefore, a matter for the Committee.'[3]

30. In circumstances where the Committee had no objections to the nomination, the Prime Minister would then approve it and recommend the appointment to the Sovereign. Where a nomination was rejected there was no right to appeal the Political Honours Scrutiny Committee's decision. It was the Committee's practice that no reasons were given for the rejection of the nomination.

31. Nevertheless, in Lord Ashcroft's book, 'Dirty Politics Dirty Times', Lord Ashcroft states that he learned that his nomination had been turned down for the following reasons[4]:

- A report into the sinking of the MV *Rema* in April 1998 was due to be published in 2000. There was a possibility that Lord Ashcroft would be criticised by this report.
- Lord Ashcroft was a tax exile.
- Lord Ashcroft was the Belizean Ambassador to the United Nations.
- Lord Ashcroft was rumoured to have underwritten the finances of the Conservative Party.

32. In 2000 William Hague re-nominated Lord Ashcroft for a working peerage. This followed a period of significant interest in Lord Ashcroft by the media and in particular by the press. It was at this juncture that Lord Ashcroft made his undertaking and this in turn resulted in the publication of the press release and note for editors.

33. The Commissioner makes no comment about the circumstances which resulted in the rejection of Lord Ashcroft's nomination for a peerage. Similarly he makes no comment on the nature of, or validity of, the media interest which occurred during this period. Notwithstanding this however, the Commissioner would make the point that Lord Ashcroft had a high public profile at the time of his nomination.

[2] Superseded by the House of Lords Appointments Commission.
[3] http://hansard.millbanksystems.com/lords/1976/nov/16/political-honours-scrutiny-committee
[4] Ashcroft M, Dirty Politics Dirty times – My fight with Wapping and New Labour (Biteback, 2009 Edition) page 80

The subsequent award of his peerage was seen by many as being particularly controversial.

34. The Commissioner believes that it must have been clear to Lord Ashcroft that his nomination for a peerage was controversial, at least to the extent that he deemed it necessary to give his undertaking concerning his residency. Indeed the controversial nature of his nomination is referred to by his solicitors in a letter to the Cabinet Office date 12 October 2009.

35. The Commissioner understands that it is normal practice for a press release to be made when a list of working peers is announced and that on occasion such press releases contain 'Notes for Editors'. In this case it was determined by the Prime Minister's Office that the content of the note to editors was entirely appropriate. The Commissioner believes that the note to editors demonstrates that Lord Ashcroft's nomination was somewhat exceptional and warranted further contextual remarks.

36. The Commissioner has considered the nature of the requested information, particularly in relation to the degree to which it is strictly personal information concerning Lord Ashcroft's private life, as opposed to personal information concerning Lord Ashcroft's public life.

37. He is mindful of the Information Tribunal's decision in *House of Commons v ICO & Norman Baker MP (EA/2006/0015 and 0016).* In that case the Tribunal considered whether further details of the travel allowances claimed by MPs should be disclosed, with particular reference to the fairness requirement of the first data protection principle. The Tribunal considered that there were three matters which needed to be considered in order to determine whether the processing was fair (para 74);

    1. Whether MPs were provided with the necessary information as to how the information they had supplied about their travel arrangements would be processed.
    2. Whether the first and paramount consideration is the interests of the data subject i.e. the MPs.
    3. Whether there is any distinction between the personal data relating to an individual's public and his private life.

38. The Commissioner is unable to determine what information Lord Ashcroft was given regarding the future processing of his undertaking. He does however acknowledge that Lord Ashcroft would have *some* expectation of confidentiality based on his knowledge of the way in which the Political Honours Scrutiny Committee worked. Nevertheless, given the controversial nature of *his* nomination, the Commissioner believes that this 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.

39. The Commissioner believes it is fair to assume that Lord Ashcroft's domiciliary arrangements were a significant concern of the Political Honours Scrutiny Committee and this provided the motivation or need for Lord Ashcroft to give his

undertaking. It is also reasonable to conclude that without giving his undertaking it would have been less likely that Lord Ashcroft's second nomination would have been recommended to The Queen.

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

42. For the reasons outlined above, the Commissioner considers that it would not be unfair to Lord Ashcroft for the Cabinet Office to disclose the identity of the recipient of his undertaking and the form in which he gave it.

Schedule 2 of Data Protection Act 1998 - Condition 6

43. The Cabinet Office asserts that disclosing the information requested by the complainant would be unwarranted and prejudicial to the rights and legitimate interests of Lord Ashcroft.

44. The Cabinet Office also asserts that none of the conditions relevant for the purposes of the first principle protection principle in Schedule 2 of the DPA are satisfied.

45. The Commissioner accepts that conditions 1 to 5 of Schedule 2 are not relevant for processing the requested information in this case. Rather, he agrees with the Cabinet Office that its processing might fall within condition 6 and he must therefore determine whether or not this condition is relevant.

46. Condition 6(1) states:

> *'(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by third party or parties to who the data are disclosed, except where the process is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'*

47. In *House of Commons v ICO & Leapman, Brooke Thomas (EA/2007/0060),* the Information Tribunal determined that for condition 6 to be satisfied consideration should be given to:

a) Whether the disclosure of the requested information was necessary for the legitimate interests of the recipient (the general public), and,
b) Whether, even if the disclosure was necessary, it would nevertheless cause unwarranted prejudice to the rights and freedoms of the data subject

48. The Commissioner would point out that a person entering the House of Lords via the political nomination route has done so outside of the election process. The electoral process is to a large extent well understood, is reasonably transparent and allows for the scrutiny of candidates by electors. None of this was the case for the system for nominating working peers operating at the time of Lord Ashcroft's ennoblement.

49. The Commissioner accepts that the system for nominating peers relied, and still relies, on the provision of candid information about nominees to allow for appropriate scrutiny. It is clear to the Commissioner that these arrangements underpin the section 37(1)(b) exemption of this Act, i.e. 'Conferring by the Crown of any honour or dignity'. It must be noted however that section 37(1)(b) is a qualified exemption and the requested information is subject to a determination of whether the public interest in disclosing it is greater than the public interest favouring its withholding it. An analysis of the public interest in relation to section 37(1)(b) is set out below.

50. At the time of Lord Ashcroft's ennoblement the honours system lacked transparency and afforded the public little information about the process itself or those persons recommended for ennoblement. Nevertheless, the majority of political nominations were considered to be uncontroversial and few, if any, questions were raised about them.

51. This was not the case concerning Lord Ashcroft's nomination. Lord Ashcroft's domiciliary arrangements were clearly seen as important, not least by the Political Honours Scrutiny Committee. This fact, coupled with the rejection of Lord Ashcroft's initial nomination has generated and fuelled continuing controversy surrounding it.

52. Since Lord Ashcroft's ennoblement, the question of where he lives has continued to be raised leading to speculation that Lord Ashcroft has not satisfied the undertaking he gave. Statements by senior politicians concerning Lord Ashcroft's undertaking have been evasive and obfuscatory and have served to compound this speculation.

53. Lord Ashcroft could have ended the speculation about his residency by making a public statement to that effect. He has chosen not to do this. He has furthered the speculation by stating that it is a private matter and, as stated on his website, *'If home is where the heart is Belize is my home*[5]*'*.

54. In the Commissioner's view there is a legitimate interest for the public to know more about Lord Ashcroft's undertaking. This flows from the legitimate public

[5] http://www.lordashcroft.com/belize/index.html

interest in understanding the process by which Lord Ashcroft's peerage was awarded, knowing the details of any conditions placed upon that award and knowing whether Lord Ashcroft has met what appears to have been a condition to his award. This includes the form of Lord Ashcroft's undertaking and its recipient. The Commissioner believes that this information is integral to the undertaking itself. He has taken this view because of the combined effect of the following considerations:

- The conferring of a working peerage carries with it significant rights, responsibilities and privileges.
- Very little official information was placed into the public domain about the award of Lord Ashcroft's peerage or the honours system in general.
- The conferring of a working peerage to Lord Ashcroft' was and continues to be controversial. This is not the case in the majority cases involving the conferring of working peerages.
- There has been very little official information made available to the public concerning Lord Ashcroft's peerage.
- No attempt has been made by senior politicians or by officials in government or parliament to bring an end to the speculation about Lord Ashcroft's domiciliary arrangements.
- The information sought by the complainant is not sufficiently available to the public so as to satisfy its legitimate interests otherwise than by disclosure under this Act.

55. The Commissioner believes that legitimate interests of the public identified above cannot be met without the disclosure of the requested information. Disclosure is therefore necessary for the purpose of those legitimate interests pursued by the public. Having concluded that disclosure of the requested information would be fair to Lord Ashcroft, the Commissioner also concludes that its disclosure would not cause unwarranted prejudice to Lord Ashcroft. This is because the fact of the undertaking together with a statement as to its contents is already in the public domain; the Commissioner therefore concludes that condition 6 would be satisfied by the disclosure of the form of Lord Ashcroft's undertaking and its recipient.

56. Since the requested information does not constitute Lord Ashcroft's sensitive personal data, there is no need for the Commissioner to consider any of the conditions of Schedule 3 of the Data Protection Act.

57. The Commissioner has considered whether disclosure of the requested information would be lawful in relation to the first data protection principle. He has considered this in respect of whether disclosure would breach any duty of confidence owed to Lord Ashcroft and has concluded that there would be no breach of confidence. The Commissioner's considerations are detailed in this Notice in his analysis of section 41 below.

Section 40(4)

58. The Commissioner notes that the Cabinet Office did not apply this exemption when it initially refused the complainant's request or at the conclusion of its internal review. It was only in its letter dated 23 October 2009 following representations by Lord Ashcroft's solicitors that the Cabinet Office confirmed to the Commissioner that section 40(4) also applied to the requested information.

59. Section 40(4) provides that information that is the personal information of an individual other than the requestor is exempt under the Freedom of Information Act, if it is also exempt from the requirement of section 7(1)(c) of the Data Protection Act 1998, which provides a right for individuals to access their own personal data. The effect of this exemption is that any information that constitutes personal data, but is not available to the data subject via section 7(1)(c) of the DPA, is also not available to any other person via the Freedom of Information Act.

60. Consideration of this exemption is a three stage process.

- Firstly, the Commissioner must determine whether the information in question constitutes personal data.
- Secondly, this information must be subject to an exemption from 7(1)(c) of the DPA.
- Thirdly, because section 40(4) is not an absolute exemption, the information must by subject to an analysis of whether the public interest favours its disclosure or withholding.

61. The analysis of the public interest requires the Commissioner to consider the specific interest which the exemption in the DPA is designed to protect, the conferring by the Crown of any honour or dignity, against the consequences of allowing access to personal information, which the data subject may not be able to obtain through his right of subject access. In this case it is necessary to consider whether disclosure of the requested information would be an intrusion into Lord Ashcroft's privacy and whether such an intrusion would result in Lord Ashcroft being disadvantaged as a consequence of that disclosure.

62. The Commissioner has already determined (at paragraph 19 above) that the requested information constitutes the personal data of Lord Ashcroft. His attention is now turned to whether this personal data is exempt from the provisions of section 7(1)(c) of the DPA – Lord Ashcroft's right to have his personal data communicated to him.

63. Paragraph 3(b) of Schedule 7 of the DPA provides that -

> *3. 'Personal data processed for the purpose of –*
>
> *(b) the conferring by the Crown of any honour, are exempt from the subject information provisions.'*[6]

[6] Amended by paragraph 6 of Schedule 6 of this Act to include "or dignity" after "honour".

64. Lord Ashcroft's solicitors wrote to the Cabinet Office on his behalf on 23 July 2009 asking for information concerning correspondence between the Cabinet Office and the Information Commissioner's Office, sent in relation to this case and one of a related and similar nature; and for information relating to Lord Ashcroft's undertaking. The letter pointed out that some of the questions should be treated as subject access requests under the Data Protection Act.

65. The Commissioner is aware that the requests made by Lord Ashcroft's solicitors were much broader in scope that the request under consideration by this Notice. He is also aware that parts of the request were refused in reliance of the exemption provided by Schedule 7(3)(b) DPA above.

66. The Cabinet Office informed the Commissioner that it had supplied Lord Ashcroft with the information requested by the complainant in this case on 2 July 2009 and provided the Commissioner with the following clarification concerning its citation of section 40(4):

> *'… in principle, were Lord Ashcroft to make a subject access request, the scope of which included the undertaking, that request could be refused under section 7(1)(c) of the Data Protection Act 1998 ('DPA') (i.e. the right of the subject to access their personal data) because of the exemption for honours and dignities. To do this we can see that section 40(4) could be relevant as Lord Ashcroft's solicitors suggested.'*

67. The Commissioner accepts that the requested information does concern the conferring by the Crown of a dignity in March 2000 and therefore it is exempt from the provisions of section 7(1)(c) of the DPA by virtue of the exemption provided by Schedule 7(3)(b). The attraction of the Schedule 7(3)(b) exemption is not dependant on whether the Cabinet Office chose to exercise its discretion to provide Lord Ashcroft with information within the scope of this case. The Commissioner therefore concludes that the second stage of the test for section 40(4) is met.

68. Information is exempt from the provisions of section 1(1)(b) of the Act, if or to the extent that, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.

Public interest arguments in favour of disclosing the requested information

69. Section 40(4) is considered here by virtue of the Cabinet Office's application of Schedule 7(3)(b) of the DPA, to information requested by Lord Ashcroft in his subject access request. Schedule 7(3)(b) is designed to provide appropriate protection to information relating to the conferring by the Crown of any honour. The Commissioner considers that there is a greater public interest in placing the requested information into the public domain than, in respect of the specific circumstances of this case, to the public interest in protecting the interest which the honours and dignities exemption of the DPA is designed to protect. This is because there is a strong public interest flowing from the need for greater transparency in Lord Ashcroft's controversial ennoblement. The Commissioner

has set out his considerations and conclusions relating to the public interest below in his analysis of section 37(1)(b).

Public interest arguments in favour of maintaining the exemption

70. The Commissioner considers that there is an inherent public interest consideration in maintaining the section 40(4) exemption; that personal data that cannot be accessed by the data subject should not be accessible to a wider audience through the provisions of the Freedom of Information Act. He has gone on to consider further public interest arguments favouring the maintenance of this exemption in his analysis of section 37(1)(b) below.

Balance of the public interest arguments

71. The Commissioner finds that, in the particular circumstances of this case, disclosure of the requested information would serve the public interest in providing a necessary degree of openness and transparency of the honours system generally, but more importantly in relation to this case in particular. The controversial nature of Lord Ashcroft's nomination and subsequent award of his peerage provide sufficient weight to favour disclosure when balanced against any detriment or harm to Lord Ashcroft or to the honours system (which had changed by the time of the complainant's request) that would flow from such disclosure.

72. The Commissioner has already noted that the complainant's request relates to the form of Lord Ashcroft's undertaking and to the recipient of that undertaking. It does not relate to its content. The content is not a question here as it is clearly alluded to by the press release and by its accompanying note for editors. The Commissioner considers that this considerably reduces any damage which may flow from the disclosure of the requested information.

73. The Cabinet Office chose not to rely on the exemption provided by paragraph 3(b) of Schedule 7 DPA and instead decided to supply Lord Ashcroft with information from which the information sought by the complainant could be ascertained. The Cabinet Office chose to provide this information to Lord Ashcroft by its own volition, before his solicitors made their combined freedom of information / subject access request. In supplying to Lord Ashcroft the information sought by the complainant in this case, the Cabinet Office took a pragmatic approach. It recognised that Lord Ashcroft is already privy to that information. Nevertheless that information could have been withheld from him in reliance of the honours and dignities exemption in the DPA. In this respect the Commissioner considers that the disclosure of the limited information sought by the complainant under this Act cannot be seen to disadvantage Lord Ashcroft.

Section 37(1)(b)

74. The Cabinet Office refused to disclose the requested information in reliance of section 37(1)(b) of the Act. It confirmed that the information engaged this exemption when it concluded its internal review and again in its response to the Commissioner's enquiries.

75. Section 37(1)(b) provides an exemption which is class based. This means that any information falling within its ambit is automatically exempt and there is no requirement for the public authority to demonstrate any level of prejudice that might occur if the information was disclosed. In this case the Cabinet Office asserts that the requested information falls within the class of information described by the exemption; that is, information relating to the conferring by the Crown of any honour or dignity.

76. The Commissioner has examined the requested information and considers that it engages the exemption provided by section 37(1)(b): The information does relate to the conferring of an honour by the Crown.

77. Information which engages this exemption may be withheld only where, in all 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 disclosing the requested information

78. The Commissioner considers that disclosure of the requested information is in the public interest on the grounds that it would provide a degree of necessary transparency and accountability in the honours system in general and in this particular case. This in turn would increase public confidence in the honours system. He believes that significant weight should be given to these factors on the basis that working peers have a public role, enjoy privileged positions and cannot be removed by virtue of the process of election.

79 He also considers that disclosure of the requested information would allow the public to have greater understanding of the award of Lord Ashcroft's peerage in particular and of the honours system operating at the time of that award.

80. Questions about Lord Ashcroft's undertaking and whether or not he had satisfied the apparent condition associated with the award of his peerage have been asked before the complainant's request and have continued to be asked. Indeed, recently there have been a number of statements by prominent members of the major UK political parties concerning the domiciliary requirements of peers and MPs. Disclosure of the requested information would not only enable the public to have greater understanding of the award of Lord Ashcroft's peerage, it would also allow the public to participate in the wider debate in an informed way.

PIT favouring the Maintenance of the exemption

81. The Cabinet Office asserts that all those who contribute to the Honour process, do so in the expectation that the content of their communications were and would remain confidential and it is a long standing expectation that those communications and the discussions of the respective committees would not be revealed. The Commissioner accepts this argument in so far as it relates to the honours system in general. The point made by the Cabinet Office fails to take into account the specific circumstances of each case. Furthermore, the Commissioner believes that a 'long standing expectation' is qualitatively different to an explicit assurance.

82. The Cabinet Office also asserts that Parliament considered it important to identify section 37(1)(b) as a specific exemption; therefore it should be seen as an exemption where there is an assumption of a good reason against disclosure and why the public interest favours confidentiality under this section of the Act. The Commissioner rejects this assertion. In doing so he is minded of the Information Tribunal's decision in *DfES v the Commissioner & the Evening Standard* [EA/2006/0006], where the Tribunal found that there was no inherent damage caused by disclosing information covered by such a class based exemption, that is to say, there is no inherent public interest in withholding information of the specified class.

83. Moreover, the Cabinet Office points out that the Honours system is dependent on the sharing of data. This data may be highly personal and is provided with the expectation of confidentiality in respect of its form and content.

Balance of PIT arguments

84. The Cabinet Office asked the Commissioner not to consider this case in isolation, but to consider it in the wider context of honours in general. It then points out that, as part of the honours system, nominations and enquiries are made in respect of individuals on a confidential basis regarding the suitability of those individuals to receive an honour. In this respect the Cabinet Office asserts that disclosure of information may erode trust in the honours system, were it to become apparent that occasionally the undertaking that information would be kept confidential system might be set aside and made public.

85. The Commissioner agrees with the Cabinet Office's suggestion that he should not consider this case in isolation, only to the extent that it should not be considered solely in isolation.

86. The Commissioner accepts that the honours system relies to a large extent on the provision of confidential information about nominees. In consequence very little information about those nominees enters the public domain. The Commissioner considers that the maintenance of confidentiality and the trust in the honours system which flows from it, underpins the exemption provided by section 37(1)(b) of this Act.

87. Nevertheless Parliament determined that this section should be a qualified exemption and subject to a weighing of the public interest: It chose not to make section 37(1)(b) an absolute exemption. In most cases, awards of honours or dignities are not controversial and there will be a greater likelihood that where this exemption is applied it will be strongly engaged. This case is clearly distinguishable from the majority of awards or working peerages. Here, the initial nomination was rejected. Moreover, there was a requirement by the Political Honours Scrutiny Committee for the nominee, not only to give an undertaking concerning his residency in the United Kingdom, but also to have the fact of that undertaking placed into the public domain.

88. In this case the circumstances of the nomination and of the nominee were seen as being of a controversial nature. In the Commissioner's opinion Parliament is

likely to have considered instances such as this one when it determined that this exemption should be qualified so that all relevant public interest factors could be taken into account in each particular case.

89. The Commissioner has considered the undertaking given by Lord Ashcroft. He notes that the Office of The Prime Minister authorised the release of the note to editors thereby disclosing the fact that the undertaking was given, and to a large extent, and its contents.

90. The arguments advanced by the Cabinet Office in support of its application of section 37(1)(b) are to a large extent general in nature. They are not focussed on the information requested by the complainant. That information is limited to the form of the undertaking and its recipient. The Commissioner considers that the disclosure of this limited (additional) information would not be prejudicial Lord Ashcroft or detrimental to the honours system. The Commissioner would point out that both Lord Ashcroft and the Government have already placed into the public domain information about the undertaking. These disclosures have had the effect of limiting the prejudice which would occur through the disclosure of the requested information in this case. The Commissioner is not convinced that any prejudice of substance would be caused by the disclosure of the remaining aspects of the undertaking i.e. the info requested in this case.

91. The Commissioner has concluded that the public interest favouring the disclosure of the requested information is a greater than the public interest favouring withholding it. The Commissioner finds that disclosure of the requested information would not result in harm to the honours system, nor is he persuaded that it would result in any real prejudice to Lord Ashcroft. He has determined that the considerations of transparency, accountability and greater understanding overwhelmingly support the public interest in disclosure of the form and recipient of Lord Ashcroft's undertaking.

Section 41

92. This section states that:

> '41-(1) 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.'

93. 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.

94. The Cabinet Office provided the Commissioner with a detailed submission in support of its position that the withheld information is exempt from disclosure on the basis of section 41 of the Act.

95. The Commissioner is satisfied that the first limb of section 41 is met.

The position of the Cabinet Office on an actionable breach of confidence

96. The Cabinet Office provided the Commissioner with detailed submissions to support its position that the disclosure of the withheld information would constitute an actionable breach and thus meet the requirements of section 41(1)(b). The Commissioner has summarised these submissions below and then gone on to explain his view as to whether they apply to the information which has been withheld in this case.

97. In most cases involving the application of section 41 which the Commissioner has previously considered, the requested information has been of a commercial nature rather than the more personal information which is the focus of this case. The approach usually adopted by the Commissioner in assessing whether disclosure commercial information would constitute an actionable breach is to follow the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415 (the *Coco* test).

98. 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.

99. In its submissions the Cabinet Office explained that it considered the test in *Coco v A N Clark* no longer represented the law in respect of information of the type requested by the complainant. In particular, it referenced the only High Court case to date which deals with the application of section 41 of the Act. This case involved a request submitted to the Home Office by the British Union for Abolition of Vivisection (BUAV) for applications for licenses to conduct animal experimentation. The Cabinet Office stated that it principally relied on the comments made by Eady J at [27] – [36], under the heading, "The Tribunal's flawed interpretation of the law of confidence"[7].

100. The Cabinet Office noted that the *Coco* test involved a claim in relation to commercially confidential information whereas the information which was the focus of this case, the form of Lord Ashcroft's undertaking, was essentially personal information. The Cabinet Office explained that more recent cases than

[7] Secretary of State for the Home Office v British Union for the Abolition of Vivisection and the ICO {2008] EWCH 892

Coco v Clark had considered the law of confidence and/or misuse of personal or private information in the context of Article 8 of the European Convention of Human Rights (ECHR). Such cases included *Campbell v MGN* and *HRH The Prince of Wales v Associated Newspapers Ltd*.[8] The Cabinet Office argued that it was the approach to the law of confidence set out in these cases, rather than in *Coco v Clark* that should be considered in the circumstances of this case.

101. The Cabinet Office highlighted the fact that in his judgment in this case Eady J confirmed that the *Coco* test was not the only test of confidence that existed and that recognition had to be given to how misuse of private information may give rise to an actionable breach of confidence and furthermore any assessment of confidence had to take into account the impact of the Human Rights Act.[9]

102. The Cabinet Office drew the Commissioner's attention to a number of sections of Eady J's judgment, including:

> '[28] It is clear, for example, that the law of confidence is not confined to the principles governing the circumstances in which an equitable duty of confidence will arise; nor to the specialist field of commercial secrets. An obligation of confidence can arise by reason of an agreement, express or implied, and presumably also by the imposition of a statutory duty. Nowadays, in addition, it is recognized that there is a distinction to be drawn between "old-fashioned breach of confidence" and the tort law now characterized as "misuse of private information": see e.g. per Lord Nicholls in *Campbell v MGN Ltd* [2004] 2 AC 457 at [14] and the discussion by Buxton LJ in *McKennitt v Ash* [2008] QB 73, at 80 et seq., under the heading "A taxonomy of the law of privacy and confidence".
>
> [29] [Counsel for the requester] described *Coco v Clark* as being "then and now the leading authority on breach of confidence". But there would seem to be traps for the unwary in placing unqualified reliance upon the case without paying due regard to what Lord Nicholls had to say about it in *Campbell v MGN Ltd* in the section of his speech entitled "Breach of confidence: misuse of private information'.

And:

> '[32]It is thus important to bear in mind, for the present case, the broad principle, stated by Buxton LJ in *McKennitt* at [11], that "…in order to find the rule of the English law of breach of confidence we now have to look in the jurisprudence of articles 8 and 10." The Tribunal did not address these developments at all and thus proceeded on the basis of an incomplete understanding of the present law.'

103. The Cabinet Office also noted the fact that Eady J doubted that the first bullet point of the *Coco* test was still applicable to the modern of law of confidence:

[8] Full citation: *HRH The Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 (Ch), [2006] EWCA Civ 1776 [2008] Ch 57.
[9] *The Home Office v British Union for the Abolition of Vivisection and Information Commissioner* [2008] EWCH 892 (QB) 25 April 2008.

> '[33]It is also beyond question that some information, especially in the context of personal matters, may be treated as private, even though it is quite trivial in nature and not such as to have about it any inherent "quality of confidence": see e.g. *Browne v Associated Newspapers Ltd* [2008] QB 103, 113-114…*McKennitt v Ash*…and the remarks of Lord Nicholls in *Campbell v MGN Ltd*…Thus, an obligation of confidentiality may sometimes arise in respect of such information merely because it is imparted as being confidential, either expressly or impliedly. Also, the law may imply an obligation on the basis that a communication has taken place in the context of an established relationship, which would itself give rise to such a duty.'

And

> '[34] he recognized that "the language and concepts used in *Coco v Clark* may still be apt in the context of commercial secrets and a duty of confidence owed in respect of them", but acknowledged that "… this is not the only form of confidence". He then considered the use of the phrase "given in confidence" in the specific context of the case before him. The Court of Appeal subsequently took the view that the section under consideration did not necessarily have the same meaning as in section 41, nut nonetheless, it may be relevant to record that Eady J in the context of s 24 of the Animals (Scientific Procedures) Act 1986 "It would be inconsistent to argue everything must be available for public inspection unless it can be restrictively defined as having about it the "quality of confidence". I would thus reject [Counsel for the requester's] submission that one cannot give "in confidence" information which does not have the quality of confidence about it". It is too broadly stated."

104. The Cabinet Office then highlighted the fact that in his conclusion Eady J suggested that the only limb of the *Coco* test that may be relevant was the second:

> '[35] Another way of putting the point would be to say that the law will afford protection, sometimes, where only the second of the *Coco v Clark* tests is satisfied: that is to say, the right to protection arises because it is clear to those concerned that the circumstances in which the information was imparted themselves give rise to a reasonable expectation of privacy. I would prefer, however, not to be tied to *Coco v Clark* where it simply has no application. (It was not even cited in the Court of Appeal in *McKennitt, Browne* or *HRH The Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57).
>
> [36]…in the light of the modern authorities there is no reason to suppose that even an "actionable" breach of confidence, where sued upon, must inevitably be founded on the formulation of Sir Robert Megarry.'

105. The Cabinet Office asserted that the test of confidence described in *Coco v Clark* is still relevant and that all the elements of the test are met in this case. Nevertheless it also provided the Commissioner with what it considers to be the

current test that should be applied. The Cabinet Office began by citing Lord Nicholls' comments in *Douglas v Hello*:[10]

> 'As the law has developed breach of confidence, or misuse of confidential information, now covers two distinct causes of action, protecting two different interests: privacy, and secret ("confidential") information. It is important to keep these two distinct. In some instances information may qualify for protection both on grounds of privacy and confidentiality. In other instances information may be in the public domain, and not qualify for protection as confidential, and yet qualify for protection on the grounds of privacy.'

106. The Cabinet Office explained that the tort of confidence has developed to include not only "traditional" breach of confidence claims, as in Coco v Clark, but also claims to prevent misuse of information entitled to protection under Article 8 ECHR. English courts have been required to extend the tort of breach of confidence to cover private information within the ambit or Article 8, in order so far as possible to develop the common law in a way which gives effect to Convention rights. Lord Woolf CJ expressed this matter in A v B plc [2003] QB 195 at paragraph [4]:

> 'Under section 6 of the [Human Rights Act 1998] the court, as a public authority, is required not to act "in any way which is incompatible with a Convention right". The court is able to achieve this by absorbing the rights which articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving new strength and breadth to the action so that it accommodates the requirements of those articles.'

107. Article 8 provides that -

> '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society for the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

108. The Cabinet Office highlighted the fact that the concept of 'private life' within Article 8(1) is a broad one, based upon the need to protect a person's autonomy and relationships with others from outside interference. The Cabinet Office argued that the right is not confined to activities which are personal in the sense of being intimate or domestic but can be extended to business or professional activities. To support this broad interpretation the Cabinet Office quoted the European Court of Human Rights case of *Niemietz v Germany* and also noted that this judgment confirmed that Article 8(1) was intended to protect correspondence, (i.e. the type of information which is the focus of this case):

10 Douglas v Hello (No 3) [2008] 1 AC 1

> '[29]The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which an individual may choose to live his personal life as he chooses at to exclude entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.
>
> There appears, furthermore, to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world…'

And:

> '[32] In this connection, it is sufficient to note that the provision does not use, as it does for the word "life", any adjective to qualify the word "correspondence". And, indeed, the Court has already held that, in the context of correspondence in the form of telephone calls, no such qualification is to be made…in a number of cases relating to correspondence with a lawyer…the Court did not even advert to the possibility that Article 8 might be inapplicable on the ground that the correspondence was of a professional nature.'[11]

109. Consequently, the Cabinet Office suggested that a number of different circumstances may arise in which a breach of confidence could exist:

- Some claims for the misuse of private information will cover information which has the quality of confidence, and which was imparted in circumstances inconsistent with a pre-existing relationship of confidence, but which is not entitled to protection under Article 8, e.g. trade secrets. Such claims would fall within the ambit of the traditional test set out in *Coco v Clark.*
- Some claims will cover private information which is disclosed in breach of Article 8 ECHR, but which was not imparted in circumstances importing an obligation of confidence.
- Further claims will concern information which was both confidential information in the sense that it was imparted in circumstances importing an obligation of confidence, and information entitled to protection under Article 8 ECHR, for example, many claims in respect private information of the type which is the focus of this present case.

110. In consideration of each of these circumstances the Cabinet Office noted that it was not necessary for any particular detriment to be demonstrated in order for a duty of confidence to be actionable. The Cabinet Office explained that this position was supported by the judge in *Coco v Clark* who questioned whether in

[11] *Niemietz v Germany* (1993) 16 EHRR 97

fact detriment would always be a necessary ingredient of an actionable breach (para 421) and furthermore by the fact that in order for Article 8(1) to be engaged it was not necessary to demonstrate any detriment.

111. In the Cabinet Office's view the withheld information in this case was confidential information within the sense of the traditional *Coco* test (albeit that for the reasons set out above it believed that this was incorrect test to apply) and also constituted confidential information because it attracted the protection of Article 8(1).

112. 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 public interest defence.

The Public Interest Defence

113. The Cabinet Office argues that in the circumstances of this case there is no effective public interest defence. In support of this position the Cabinet Office made the following arguments:

- Firstly, there is an inherent public interest in the preservation of confidences and their protection by law, which in itself is a weighty factor in favour of maintaining confidentiality.

- Secondly, the relevant question is not whether the information is a matter of public interest, but rather whether in all circumstances it is in the public interest that the duty of confidence should be breached. This is highlighted by the Court of Appeal in *Associated Newspapers Ltd v HRH The Prince of Wales* to illustrate this point:

  '[68] But a significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence that are created between individuals. It is not enough to justify publication that the information in question is a matter of public interest. To take an extreme example, the content of a budget speech is a matter of great public interest. But if a disloyal typist were to sell as copy to a newspaper in advance of the delivery of the speech in Parliament, there can surely be no doubt that the newspaper would be in breach of duty if it purchased and published the speech.'

- Thirdly, to justify disclosure of otherwise confidential information on grounds of public interest, it is not sufficient that the information is merely interesting to the public. The public interest must be of considerable significance, whether related to the proper conduct of public affairs, public health the prevention of crime, or any other matter. Disclosure must be "necessary" in the public interest to override obligations of confidentiality.

- Fourthly, even where the public interest in overriding confidentiality is weighty, it does not necessarily follow that it would be proper to disclose the relevant material. The Court is required to consider all the relevant factors, including any harm that might arise from disclosure in the particular case and more generally.

'I would nevertheless accept that Mr Browne is broadly correct when he submits that for a claimant's conduct to "trigger the public interest defence" a very high degree of misbehaviour must be demonstrated'.

The Commissioner's position on an actionable breach of confidence

114. The Commissioner agrees with the Cabinet Office that a strict and rigid following of the *Coco* test is not an appropriate approach to the test of confidence in this case. The Commissioner's reasoning for this mirrors the arguments advanced by the Cabinet Office above, not least by the recent developments in case law which it referenced, most notably *BUAV*, but also the impact of the ECHR. Therefore when considering whether personal and private information is confidential, the Commissioner agrees that consideration of Article 8 ECHR should be given.

115. However, the Commissioner does not believe that some of the concepts raised in *Coco v Clark* should be abandoned completely as they can still be useful in determining whether information of a personal and private nature is confidential. Indeed as Eady J noted in his conclusion at [35] whether information was imparted in circumstances where there was an expectation of confidence can be relevant to determining whether there would be an actionable breach if information of a private and personal nature was disclosed.

116. Therefore for personal information, such as the information being sought in this case, rather than use the three limbed test employed by *Coco v Clark*, the Commissioner will consider:

- Whether information was imparted with an expectation that it would be kept confidential (be that an explicit or implicit expectation); and
- Whether disclosure of the information would infringe the confider's right of privacy as protected by Article 8(1) ECHR.

117. The Commissioner has not been provided with any evidence to the effect that Lord Ashcroft was given an explicit assurance that the form or recipient of his undertaking would be kept confidential. He does however accept that the closed nature of the honours system, operating at the time when Lord Ashcroft gave his undertaking, would have provided him with *some* expectation that his undertaking would be kept confidential. He accepts that the undertaking was given for a particular and restricted purpose and that there was an expectation that it would be circulated among a limited (though undefined) number of persons. Nevertheless, the Commissioner must stress that the information requested by the complainant is not 'private' personal data; rather it is personal data which has been created out of necessity and necessarily imparted for public purposes (the purposes of the Political Honours Scrutiny Committee) and ultimately for the acquisition of the public role of a working peer. For the reasons stated at paragraphs 34 to 42 above, the Commissioner considers that Lord Ashcroft would have had some expectation that the requested information would be kept confidential, however he also considers that this would not be a reasonable expectation. In the context of this case and generally, the Commissioner considers a reasonable expectation of confidentiality rests on the objective

examination of all the circumstances of the case rather than a subjective assessment of the data subject's expectations.

118 In relation to the second criteria, the Commissioner agrees with the Cabinet Office that in respect of Article 8(1) the term 'private' should be interpreted broadly to ensure that a person's relationships with others are free from interference. The Commissioner also accepts that matters relating to identifiable individuals and of a business and professional nature can be covered by the protection afforded by Article 8(1).

119. In light of this broad reading of Article 8(1) the Commissioner accepts that disclosure of information which is the focus of this case would place in the public domain further details of Lord Ashcroft's undertaking and such an action would lead to a limited invasion of his privacy. Thus the Commissioner accepts that disclosure of the information would constitute an infringement of Article 8(1) and would constitute an actionable breach of confidence. The Commissioner must however emphasise that the requested information was created by Lord Ashcroft solely in connection with his nomination for a working peerage, not in connection with his private and personal interests.

120. However, before it can be concluded that this information is exempt from disclosure by virtue of section 41, the Commissioner has to consider whether there is a public interest defence to disclosing the requested information which would result in the failure of an action for breach of confidence was brought before a court. To do this he must make an assessment of the weight that should be attributed to Article 10 ECHR – the right to freedom of expression.

121. In the Commissioner's opinion there are a number of further public interest arguments in favour of disclosing the requested information. The Commissioner has then gone on to consider whether such arguments provide a sufficient public interest defence.

Additional arguments in favour of disclosing the information

122. Disclosure of the requested information is necessary to ensure that the official body responsible for determining who may or may not sit in the House of Lords is accountable for, and transparent about, its decision making processes. Membership of the House of Lords confers important rights, responsibilities and privileges and is an important element of the constitutional arrangements of the United Kingdom. Once a person has been ennobled he or she may not be removed.

123. Moreover, there is a specific public interest in disclosure of information that would increase the public's understanding of how political nominations were made, both in general and in relation to the specific details of this case.

124. These two arguments could be seen as being particularly relevant given the controversial nature of Lord Ashcroft's two nominations and the on-going speculation concerning whether he fulfilled the assurance he made concerning his permanent residence in the UK.

125. Disclosure of the requested information is especially important in light of the questions concerning Lord Ashcroft's assurance at the time of the complainant's request and in the light of the recent media stories focussed on Lord Ashcroft's domiciliary arrangements and the statements made by senior politicians concerning what is likely to be a necessary requirement for all peers and MPs to be resident in the UK for tax purposes.

Can disclosure of the information be justified on public interest grounds?

126. Before turning to the balance of the public interest in respect of this case, the Commissioner wishes to highlight that the public interest test inherent within section 41 differs from the public interest test contained in the qualified exemptions contained within the Act; the default position for the public interest test in the qualified exemption is that the information should be disclosed unless the public interest in withholding the information outweighs the public interest in disclosing the information. With regard to the public interest test inherent within section 41, this position is reversed; the default position being that information should not be disclosed because of the duty of confidence unless the public interest in disclosure outweighs the interest in maintaining the confidence.

. In the Commissioner's opinion the introduction of the concept of privacy and the impact of ECHR into the law of confidence has not affected this balancing exercise; Sedley L J expressed such a view in *LRT v Mayor of London:* 'the human rights highway leads to exactly the same outcome as the older road of equity and common law'.[12]

127. Therefore in conducting this balancing exercise as well as taking into account the protection afforded by Article 8(1), consideration must also be given to Article 10 ECHR which provides that:

> '1.Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…
> 2.The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

128. The Commissioner notes that recent European Court of Human Rights judgments have highlighted the relationship between Article 10 and access to public information. In particular, the Court has recognised that individuals involved in the legitimate process of gathering information on a matter of public importance can

[12] Quote by the Information Tribunal in Derry City Council v Information Commissioner, (EA/2006/0014).

rely on Article 10(1) as a basis upon which to argue that public authorities interfered with this process by restricting access to information.[13]

129. Turning to the various factors identified by the Cabinet Office, the Commissioner does not entirely accept the argument that for there to be a successful public interest defence against a breach of confidence there would always have to be an exceptional public interest in disclosure. The Commissioner's reasoning is as follows: The Information Tribunal in *Derry City Council v Information* Commissioner in discussing the case of *LRT v The Mayor of London* noted that in the first instance the judge said that an exceptional case had to be shown to justify a disclosure which would otherwise breach a contractual obligation of confidence. When hearing the case, the Court of Appeal although not expressly overturning this view, did leave this question open and its final decision was that the information should be disclosed. The Tribunal in *Derry* interpreted this to mean that:

- No exceptional case has to be made to override the duty of confidence that would otherwise exist;
- All that was required is balancing of the public interest in putting the information into the public domain and the public interest in maintaining the confidence.

130. Consequently in cases where the information is of a commercial nature, the Commissioner's approach is to follow the lead of the Tribunal in that no exceptional case has to be made for disclosure, albeit the balancing exercise will still be of an inverse nature.

131. However, in cases where the information is of a private and personal nature, the Commissioner accepts that in light of the case law referenced by the Cabinet Office, disclosure of such information require a very strong set of public interest arguments. The difference in the Commissioner's approach to such cases can be explained by the weighty protection that Article 8 offers to private information; in other words the Commissioner accepts that there will always be an inherent and strong public interest in protecting an individual's privacy. The Commissioner believes that a potential deviation to this approach may be appropriate where the personal information relates to the individual's public and professional life, as opposed to their intimate personal or family life, and in such a scenario such a strong set of public interest arguments may not be needed because the interests of the individual may not be paramount.

132. The Commissioner has determined that the requested information relates to Lord Ashcroft's public life, rather than to his private life. Therefore for the purposes of this case, and the consideration of Article 8, the Commissioner believes that he has to adopt the position that the information which is the focus of this case, taking into account the reason for which it was created and imparted, can be said to more public in nature than private and given the public interest which would be served by its disclosure, this reduces the weight of public interest arguments needed for there to be a valid public interest defence.

[13] See Kenedi v Hungary 37374/05.

133. The Commissioner accepts the argument 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 the public interest would be better served by knowing that the Political Honours Scrutiny Committee had carried out its functions vigorously and had been satisfied that the nominee had given an assurance regarding his residency in the United Kingdom. In this respect the Commissioner considers that disclosure of the requested information would not result in the undermining of this important process. The Commissioner would also stress that disclosure of the requested information would not result in the greater disclosure of the committee's frank and free discussions and opinions about this particular nominee.

134. The Commissioner of course agrees with the Cabinet Office that there is a clear and important distinction between disclosure of information which the public would be interested in and disclosure of information which is genuinely in the public interest.

135. However, given the number of public interest arguments in favour of disclosure that the Commissioner has identified in this Decision Notice, his opinion is that the benefit of disclosing the requested information should not be summarily dismissed in the fashion implied by the Cabinet Office. Rather the arguments identified by the Commissioner touch directly on many, if not all, of the central public interest arguments underpinning the Act, namely ensuring that public authorities are accountable for and transparent in their decision-making; furthering public debate; improving confidence in decisions taken by public authorities. Furthermore, the specific arguments put forward in relation to Lord Ashcroft and the specific circumstances of this case deserve to be given particular weight.

136. Nevertheless, the Commissioner has to remember that disclosure of such information would require sufficient public interest arguments and disclosure would have to be justified by the content of the withheld information itself not simply on the basis of generic or abstract public interest arguments.

137. The Commissioner has carefully considered the nature of the withheld information and he has reached the conclusion that despite the weight of the public interest arguments in favour of withholding it, the nature of the information and the circumstances surrounding it are sufficiently important and significant that it should be disclosed. Consequently, the Commissioner has concluded that there would be a public interest defence if the requested information was disclosed.

Procedural Requirements

138. Section 17 of the Act provides that -

(1) A public authority, which in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

139. The Commission finds that the Cabinet office breached the requirements of section 17(1) of the Act by exceeding the time for complying with the complainant's request. This is because it failed to provide him with a notice within the time for complying which specified the exemptions on which it later relied.

The Decision

140. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

141. The Commissioner has determined that the Cabinet Office was wrong to rely on the provisions of sections 37(1)(b), 40(2), 40(4) and 41 of the Act for the reasons outlined in this Notice. In consequence of these breaches, the Cabinet also breached section 1(1)(b) of the Act.

142. The Cabinet Office breached section 17(1) of the Act by its failure to give the complainant a refusal notice in line with the provisions of this section within the time for complying with a request for information.

Steps Required

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

The Cabinet Office is required to provide to the complainant information concerning the form in which Lord Ashcroft gave his undertaking concerning his intention to permanently reside in the United Kingdom and to inform the complainant of the identity of the recipient of this undertaking.

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

Failure to comply

145. Failure to comply with the steps described above 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.

Other matters

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

147. There is no timescale laid down in the Act for a public authority to complete an internal review. However, as he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. In the absence of exceptional circumstances, 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 the total time taken should not exceed 40 working days, and as a matter of good practice the public authority should explain to the requester why more time is needed.

148. In this case the complainant's internal review request was made on 15 January 2008 and the Cabinet Office issued its decision on 27 March 2008. The Cabinet Office therefore took 50 working days to complete the review. The Commissioner does not believe that any exceptional circumstances existed in this case to justify that delay, and he therefore wishes to register his view that the Cabinet Office fell short of the standards of good practice in failing to complete its internal review within a reasonable timescale.

Right of Appeal

149. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 28th day of January 2010

Signed ……

Christopher Graham
Information 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."

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."

Section 10(2) provides that –
"Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt."

Section 10(3) provides that –
"If, and to the extent that –

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given."

Refusal of Request

Section 17(1) provides that -
"A public authority which … is to any extent relying:

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or
- on a claim that information is exempt information

must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

Communications with Her Majesty.

Section 37(1) provides that –
"Information is exempt information if it relates to-

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

Personal information.

Section 40(1) provides that –
"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

Section 40(2) provides that –
"Any information to which a request for information relates is also exempt information if-

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

Section 40(3) provides that –
"The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles, or
(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

Section 40(4) provides that –

"The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)."

Information provided in confidence.

Section 41(1) provides that –
"Information is exempt information if-

(a) it was obtained by the public authority from any other person (including another public authority), and
(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

Section 41(2) provides that –
"The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence."

Code of Practice

Part IV

Consultation with Third Parties

25. There are many circumstances in which:

- requests for information may relate to persons other than the applicant and the authority; or
- disclosure of information is likely to affect the interests of persons other than the applicant or the authority.

26. It is highly recommended that public authorities take appropriate steps to ensure that such third parties, and those who supply public authorities with information, are aware of the public authority's duty to comply with the Freedom of Information Act, and that therefore information will have to be disclosed upon request unless an exemption applies.

27. In some cases is will be necessary to consult, directly and individually, with such persons in order to determine whether or not an exemption applies to the information requested, or in order to reach a view on whether the obligations in section 1 of the Act arise in relation to that information. But in a range of other circumstances it will be good practice to do so; for example where a public authority proposes to disclose information relating to third parties, or information which is likely to affect their interests, reasonable steps should, where appropriate, be taken to give them advance notice, or failing that, to draw it to their attention afterwards.

28. In some cases, it may also be appropriate to consult such third parties about such matters as whether any further explanatory material or advice should be given to the applicant together with the information in question. Such advice may, for example, refer to any restrictions (including copyright restrictions) which may exist as to the subsequent use which may be made of such information.

29. No decision to release information which has been supplied by one government department to another should be taken without first notifying, and where appropriate consulting, the department from which the information originated.

30. Where information to be disclosed relates to a number of third parties, or the interests of a number of third parties may be affected by a disclosure, and those parties have a representative organisation which can express views on behalf of those parties, the authority may consider whether it would be sufficient to notify or consult with that representative organisation. If there is no representative organisation, the authority may consider that it would be sufficient to notify or consult with a representative sample of the third parties in question.

Data Protection Act 1998

Sensitive personal data
(2) In this Act "sensitive personal data" means personal data consisting of information as to—

(a) the racial or ethnic origin of the data subject,

(b) his political opinions,

(c) his religious beliefs or other beliefs of a similar nature,

(d) whether he is a member of a trade union (within the meaning of the [1992 c. 52.] Trade Union and Labour Relations (Consolidation) Act 1992),

(e) his physical or mental health or condition,

(f) his sexual life,

(g) the commission or alleged commission by him of any offence, or

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

7 Right of access to personal data

(1) Subject to the following provisions of this section and to sections 8 and 9, an individual is entitled—

(a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller,

(b) if that is the case, to be given by the data controller a description of—

(i) the personal data of which that individual is the data subject,

(ii) the purposes for which they are being or are to be processed, and

(iii) the recipients or classes of recipients to whom they are or may be disclosed,

(c) to have communicated to him in an intelligible form—

(i) the information constituting any personal data of which that individual is the data subject, and

(ii) any information available to the data controller as to the source of those data, and

(d) where the processing by automatic means of personal data of which that individual is the data subject for the purpose of evaluating matters relating to him such as, for example, his performance at work, his creditworthiness, his reliability or his conduct, has constituted or is likely to constitute the sole basis for any decision significantly affecting him, to be informed by the data controller of the logic involved in that decision-taking.

SCHEDULE 1

The data protection principles

1 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.

2 Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

3 Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

4 Personal data shall be accurate and, where necessary, kept up to date.

5 Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

6 Personal data shall be processed in accordance with the rights of data subjects under this Act.

7 Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

8 Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

SCHEDULE 2

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

1 The data subject has given his consent to the processing.

2 The processing is necessary—

(a) for the performance of a contract to which the data subject is a party, or

(b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3 The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4 The processing is necessary in order to protect the vital interests of the data subject.

5 The processing is necessary—

(a) for the administration of justice,

(b) for the exercise of any functions conferred on any person by or under any enactment,

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or

(d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

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

SCHEDULE 7

Miscellaneous exemptions
Judicial appointments and honours

3 Personal data processed for the purposes of—

(a) assessing any person's suitability for judicial office or the office of Queen's Counsel, or

(b) the conferring by the Crown of any honour,

are exempt from the subject information provisions.