

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 January 2014

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

Decision (including any steps ordered)

1. The complainant has requested information about the possible forfeiture of Jimmy Savile's knighthood. The Cabinet Office confirmed that it held information falling within the scope of this request, albeit that it was exempt from disclosure on the basis of the exemptions provided by the following sections of FOIA: 35(1)(a) (formulation and development of government policy); 37(1)(a) (communications with the Sovereign); 37(1)(b) (honours); and 40(2) (personal data). The Commissioner has concluded that the requested information is exempt from disclosure on the basis of sections 37(1)(a) and 37(1)(b).

Request and response

2. On 18 April 2013 the complainant submitted a number of requests to the Cabinet Office for information about the awarding of honours to Jimmy Savile. This complaint focuses on the seventh request which sought the following information:

'7...All information held by the Forfeiture Committee which relates to Sir Jimmy Savile. This information will include but will not be limited including to [sic] any recent complaints, minutes of meetings and communications with Ministers.'

3. The Cabinet Office contacted the complainant on 17 May 2013 and again on 25 June 2013 and explained that it needed further time to consider the balance of the public interest test.
4. The Cabinet Office provided him with a substantive response to his requests on 12 July 2013. With regard to the seventh request, the Cabinet Office confirmed that it held information falling within the scope of this request but considered it to be exempt from disclosure on the basis of section 35(1)(a) (formulation and development of government policy).
5. The complainant contacted the Cabinet Office on 23 July 2013 in order to ask for an internal review of this decision.
6. The Cabinet Office informed him of the outcome of the internal review on 16 August 2013. The review concluded that section 35(1)(a) had been applied correctly. It also found that the information was exempt from disclosure on the basis of section 37(1)(b) (honours), that some of the information was exempt from disclosure on the basis of section 40(2) (personal data) and finally that three press articles were exempt from disclosure on the basis of section 21 (reasonably accessible by other means).

Scope of the case

7. The complainant contacted the Commissioner on 20 August 2013 in order to complain about the Cabinet Office's application of sections 35(1)(a), 37(1)(b) and 40(2). The complainant did not seek to dispute the application of section 21(1).
8. During the course of the Commissioner's investigation the Cabinet Office explained that it also considered some of the information in two documents to be exempt from disclosure on the basis of section 37(1)(a) (communications with the Sovereign).
9. The Cabinet Office also explained that it had approached this request as a request for information relating to the forfeiture of Jimmy Savile's knighthood held by the Cabinet Office, not just information relating to Jimmy Savile held by the Forfeiture Committee, as the complainant had specified. The Commissioner welcomes this broader approach.
10. The Commissioner has therefore considered whether the withheld information is exempt from disclosure on the basis of the exemptions contained at the following sections of FOIA: 35(1)(a), 37(1)(a), 37(1)(b) and 40(2).

Reasons for decision

Section 37(1)(a) – communications with the Sovereign

11. Section 37(1)(a) states:

'Information is exempt information if it relates to communications with the Sovereign.'

12. It is a classed based exemption which means that information falling within the description in section 37(1)(a) automatically engages the exemption regardless of whether there would be any harm in disclosure. The Commissioner recognises that this exemption will include communications with representatives of Her Majesty acting on her behalf. The Commissioner also interprets the phrase 'relates to' broadly. This means information does not have to be 'communication' to fall within the scope of the exemption; it can be information that simply relates to a communication with the Sovereign.
13. Following changes made by the Constitutional Reform and Governance Act 2010, the exemption is an absolute exemption, which means that it is not subject to the public interest test.
14. The Cabinet Office has explained that two withheld documents include information which is exempt from disclosure on the basis of section 37(1)(a). This is because the information refers to the views expressed by representatives of Her Majesty on a subject with which The Queen would have had engagement by virtue of Her Majesty's role as Fount of Honour. (As the 'fountain of honour' in the United Kingdom, The Queen has the sole right of conferring all titles of honour, including life peerages, knighthoods and gallantry awards.)
15. Having considered the content of information withheld on the basis of section 37(1)(a) the Commissioner is satisfied that it is exempt from disclosure for the reasons set out by the Cabinet Office. The Commissioner has not therefore gone on to consider whether this particular information is also exempt from disclosure on the basis of any other exemptions.

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

16. Section 37(1)(b) of FOIA states that information is exempt if it relates to the conferring by the Crown of any honour or dignity.
17. Having considered the content of the withheld information the Commissioner is satisfied that it clearly falls within the scope of this

exemption. This is because it concerns discussions regarding the possible forfeiture of Jimmy Savile's knighthood and broader discussions surrounding the posthumous forfeiture of honours in general. The Commissioner accepts that information on the potential forfeiture of honours is information relating to the conferring of honours for the purposes of section 37(1)(b).

18. However, section 37(1)(b) is a qualified exemption and therefore the Commissioner must consider the public interest test at section 2 of the FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

19. The Cabinet Office explained that the honours system relies on the principle of confidentiality with regard to both particular cases and to the formulation of policy at all stages of the honours process, including forfeiture. It argued that the failure to maintain that confidentiality would have a significant effect on the operation of the honours system.
20. This is because parties who are asked for information or views in relation to the conferment or forfeiture of honours give this information in confidence and would justifiably expect their communications in relation to specific cases to remain so. Such confidentiality allows those involved to have the freedom to discuss and deliberate upon honours cases. Those involved in the discussions require a safe space to consider and deliberate both at the time of the discussion and for some time subsequently.
21. The Cabinet Office acknowledged that Savile was deceased. However, it explained that the issues under consideration in the withheld information extended beyond that specific case. Rather it prompted a wider consideration of the validity of posthumous forfeiture, a consideration which the Cabinet Office say remained ongoing at the time of the request.. The Cabinet Office argued that this consideration requires a safe space for those involved to consider what, if any, change should be made to the existing system. The Cabinet Office was firmly of the view that such policy papers should remain confidential, with no possibility of them being disclosed so soon, otherwise the consequent chilling effect would threaten the proper operation of the honours system and discussion of future forfeiture policy and, potentially, even individual cases.

Public interest arguments in favour of disclosing the information

22. The Cabinet Office acknowledged that there was a general public interest in openness in government to enable the public to understand the way in which important decisions are reached. Transparency improves government accountability and simultaneously encourages informed and constructive public debate with important topical issues, while increasing public confidence and trust. The Cabinet Office explained that it also recognised the significant public concerns in relation to the honours received by Jimmy Savile and the consequent public interest in relation to forfeiture.
23. The complainant argued that there were strong public interest grounds for releasing the withheld information. He noted that there had been several high profile calls for Jimmy Savile to be stripped of his knighthood and that in his opinion the public had a right to know if such concerns were taken seriously or acted on. He also argued that the public had a right to know when the Forfeiture Committee first became aware of concerns surrounding Savile. The complainant noted that information previously disclosed by the Cabinet Office showed that Margaret Thatcher, when she Prime Minister, was instrumental in securing a knighthood for Savile despite concerns expressed about his suitability for an honour. The complainant argued that the public was entitled to know what – if any – political pressure had been brought to bare on whether Savile should continue to hold a knighthood.

Balance of the public interest arguments

24. The Commissioner recognises that there are two distinct arguments advanced by the Cabinet Office with regard to the public interest in maintaining this exemption. Firstly, the need to protect the confidentiality of the discussions surrounding individual honours cases and secondly, the need to protect the confidentiality of policy discussions concerning the honours system. Having considered the content of the information the Commissioner accepts that there is a significant overlap between the two types of information in this case. That is to say, it would be difficult to isolate information concerning the Savile case from the broader policy discussions about posthumous forfeiture. However, in the Commissioner's opinion it is important to recognise the different weight that should be attributed to the public interest arguments associated with each line of argument.
25. With regard to protecting the confidentiality of the discussions which focus on the Savile case, as a general principle the Commissioner accepts the Cabinet Office's fundamental argument that for the honours system to operate efficiently and effectively there needs to be a level of confidentiality which allows those involved in the system to freely and

frankly discuss specific cases. The Commissioner also accepts that disclosure of information that would erode this confidentiality would be likely to result in the two effects that the Cabinet Office has identified, i.e. an encroachment on the safe space of current discussions and a potential chilling effect on future discussions. The Commissioner accepts that it would clearly not be in the public interest if the effectiveness of the honours system was undermined in this way. In general then the Commissioner believes that some significant weight should be given to information falling within the scope of 37(1)(b) that concerns discussions of specific cases.

26. In reaching this conclusion the Commissioner wishes to emphasise that he is not suggesting that there is an inherent public interest in non-disclosure of information which falls within the scope of section 37(1)(b). Indeed a number of Information Tribunal decisions have indicated that there is no inherent public interest in withholding information simply because it falls within the scope of a class based exemption. This approach was supported by the High Court in the case *OGC v The Information Commissioner*.¹ However, a significant amount of information which falls within the scope of section 37(1)(b) is likely to include candid discussions about nominations for honours, and in cases concerning forfeiture, and for the reasons outlined above in the vast majority of cases there is likely to be a significant public interest in the confidentiality of such discussions being preserved.
27. Similarly, while the Commissioner accepts that weight should be given to the generic arguments in favour of maintaining the exemption, he believes that notable weight should also be given to the public interest in disclosing information concerning the honours system. In his opinion the public interest is clearly served by having an honours system that is objective, accountable and transparent.
28. With regard to the specifics of this case, the Commissioner recognises that the views expressed in relation to the Savile case were clearly expressed in confidence. In the Commissioner's view it would appear that at the time of the request in April 2013 considerations around the potential forfeiture of Savile's knighthood had been completed.²

¹ See *Office of Government Commerce v Information Commissioner & the Attorney General* [2008] EWHC 737 (Admin) (11 April 2008), in particular paragraph 79.

² <http://www.independent.co.uk/news/uk/home-news/sir-jimmy-savile-cannot-be-posthumously-stripped-of-knighthood-in-the-wake-of-sexual-abuse-allegations-despite-hints-from-prime-minister-david-cameron-8203131.html>

29. Therefore, the Commissioner would not accept that in terms of the Savile case a safe space was still needed. Nevertheless, the Commissioner is satisfied that if this information had been disclosed, at the time of the request in April 2013, it is reasonable to envisage that this would have impinged upon the discussion of any future forfeiture cases. The Commissioner maintains this view even though it was ultimately concluded that Savile's knighthood could not actually be forfeited as he was no longer alive. The discussions on this particular case are specific and frank in nature. Furthermore, the discussions were still relatively recent and those involved would have not expected details of their views on this specific case to be disclosed so soon. There is therefore a weighty and significant public interest in maintaining the exemption for the parts of the withheld information that specifically discuss the Savile case.
30. With regard to the arguments in the favour of disclosure, the Commissioner fully recognises the level of public concern, in light of the details of abuse that have emerged since his death, that Savile had been awarded a knighthood. Moreover, there is also considerable and understandable public interest as to whether, in light of such details, this honour would (or indeed could) be forfeited. However, to a large extent the Cabinet Office's position in relation to the case of Savile is effectively in the public domain. That is to say, irrespective of the circumstances of this case, honours cannot be posthumous forfeited, the rationale being that an appointment as a Knight Bachelor would always cease upon death. In the Commissioner's opinion disclosure of the withheld information would not add materially to the public's understanding regarding the specific case of Savile. With regard to the policy discussions concerning the posthumous forfeiture of honours, the Commissioner also recognises the importance of confidentiality in policy discussions about the honours system. The Commissioner accepts that disclosure of information about particular policy discussions could both encroach on the safe space for current discussions and potentially have a chilling effect on future discussions, which would be contrary to the public interest.
31. The Commissioner understands that the Cabinet Office considers the policy regarding posthumous forfeiture of honours to have been ongoing at the time of the request. Having considered the content of the information the Commissioner is not persuaded that this is in fact the case. He has elaborated on his reasoning for reaching this conclusion in a confidential annex provided to the Cabinet Office only. Therefore, as the Commissioner considers that the policy discussions on this issue were not live at the time of the request there was no need for a safe space in which to protect such general discussions.

32. Nevertheless, the Commissioner accepts that disclosure of such policy discussions represents a real risk of having a chilling effect on the candour of future discussions concerning honours issues. This is because having considered the content of the withheld information the Commissioner is satisfied that the views and opinions of individuals regarding the issue of forfeiture of honours were expressed with the expectation that they would remain confidential. Furthermore, although in the Commissioner's opinion the policy discussions were complete at the time of the request, he accepts that they had only been completed relatively recently. The Commissioner accepts that disclosure of policy discussions so soon after the completion of the process increases the risk of a chilling effect on future honours related discussions.
33. With regard to the public interest in disclosure, in the Commissioner's view, the withheld information could add considerably to the public's understanding of the broader policy discussions concerning the posthumous forfeiture of honours. In the Commissioner's opinion this public interest should not be underestimated given the level of interest and genuine public concern in this matter, emanating from specific cases such as that of Savile. Nevertheless, the Commissioner would add the caveat that the overall outcome of such discussions, including the overarching rationale, is in the public domain. That is to say, honours cannot be forfeited posthumously because they only apply during the lifetime of the person upon whom they were bestowed.
34. In conclusion, the Commissioner has found that the public interest favours maintaining the exemption with regard to all of the withheld information. Firstly, this is because disclosure of the information would provide only a limited insight into discussions concerning the Savile case itself. However, disclosure of such information presents a real risk of infringing the frankness of discussions in future forfeiture cases to the significant detriment of the integrity of the honours system. Secondly, although the Commissioner accepts that disclosure would provide a genuine insight into the policy discussions concerning this particular aspect of the honours system, he believes that the benefits of this are outweighed by the broader negative consequences of disclosure. Undermining future discussions on a range of honours issues, not just posthumous forfeiture, represents a significant and detrimental risk to the operation of the honours system itself.
35. In light of the Commissioner's findings in respect of section 37(1)(b) he has not gone on to consider the Cabinet Office's reliance on sections 35(1)(a) and 40(2) of FOIA.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. 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.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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