

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 October 2015

Public Authority: Cabinet Office

Address: 70 Whitehall

London

SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the public authority for information relating to the award of honours to the late Sir Cyril Smith, former MP for Rochdale. The public authority disclosed the vast majority of the information held within the scope of the request. The remaining information was withheld by the authority on the basis of the exemptions at sections 37(1)(b) and 40(2) FOIA. It also relied on the provisions in sections 23(5) and 24(2) FOIA as the basis for neither confirming nor denying whether the public authority held any information in scope subject to the exemptions at sections 23(1) and 24(1) FOIA.
2. The Commissioner's decision is that:
 - The public authority was entitled to rely on the exemption at section 37(1)(b), and
 - The public authority was entitled to rely on sections 23(5) and 24(2).
3. No steps are required.

Request and response

4. On 28 April 2014 the complainant submitted a request for information to the public authority in the following terms:

'...honours awarded to and or presented to the late Sir Cyril Smith and I am interested in material which relates to the period 1965 to the present day.

Some of this material will have been generated after Sir Cyril's death.

Please note that I am interested in receiving information about honours which were actually awarded and or honours which were either refused or not awarded.

Please note that the reference to Cabinet Office below should be taken to mean the Cabinet Office and or Downing Street and or appropriate honours committees.

Please note that the Information Commission has advised that the Freedom of Information Act does guarantee access to copies of actual documentation and not just the information contained within.

1...Can you please supply copies of all correspondence between the Cabinet Office and the late Sir Cyril Smith which in any way relates to the issue of honours and or titles. The correspondence could relate to an honour (s) or title (s) which was actually awarded or it could relate to honours and titles which were either refused or not awarded. Please do include all correspondence and communications including emails.

2...Can you please supply copies of all correspondence between the Cabinet Office/Downing Street and any of Sir Cyril Smith's representatives and or employees which relates to the issues of honours and titles. This correspondence could relate to an honour (s) or title (s) which was actually awarded or it could relate to honours and titles which were either refused or not awarded. Please do include all correspondence and communications including emails.

3...Can you please supply copies of all correspondence sent by and or on behalf of a Prime Minister or Cabinet Minister which in any way relates to the subject of honours and or titles for Sir Cyril. This documentation will include but will not be limited to correspondence with the honours committee as well as correspondence with civil servants.

4...Can you please provide a list of government departments and or public bodies which have recommended Sir Cyril Smith for an honour. I am interested in receiving information even if the honour was refused or not awarded. In the case of each department, each public body and each documentation, can you please supply copies of all correspondence with the Cabinet Office. I am interested in receiving both sides of the correspondence.

5...Did the Cabinet Office carry out a research of any kind and or seek the advice of any third party about the suitability of Sir Cyril Smith for an honour. If so can you provide copies of this correspondence and associated documentation held by the Cabinet Office.

6...Can you please supply copies of any complaints received and or held by the Cabinet Office which relate to a decision to award an honour to Sir Cyril Smith. Please feel free to redact the name of any complainant if that complainant is a member of the public. Please do include those complaints received after Sir Cyril's death and or in the light of recent allegations. The complaints could relate to honours that were actually awarded or to honours that were turned down or refused.'

5. The public authority did not provide a response to the request until it was ordered to do by the Commissioner on 25 February 2015.¹ The authority subsequently issued its response on 6 March 2015. It explained that it did not hold information within the scope of items 1-4 and 6 of the request. It further advised that it could disclose most of the information held within the scope of item 5 of the request, and the relevant information was provided to the complainant.
6. The public authority however withheld the remaining information held within the scope of item 5 on the basis of the exemption at section 40(2) FOIA. Furthermore, in reliance on the provisions in sections 23(5) and 24(2) FOIA, the authority neither confirmed nor denied holding information (within the scope of the request) engaging the exemptions at sections 23 or 24 FOIA. Although the public authority explained to the complainant that it considered all of the information held exempt on the basis of section 37(1)(b) FOIA, it was not clear from its letter whether it still considered this exemption engaged following the disclosures made to the complainant.
7. On 9 March 2015 the complainant requested an internal review. He asked the public authority to review its response to items 1-4 and 6 of his request. He also asked the public authority to reconsider its response to item 5 of his request and disclose the information held in full.
8. The public authority wrote back to the complainant on 11 May 2015 with details of the outcome of the internal review. The review upheld the original position.

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1043421/fs_50559560.pdf

Scope of the case

9. The complainant contacted the Commissioner on 21 April 2015 to complain about the public authority's handling of his request. He focused primarily on the authority's refusal to disclose the withheld information (ie item 5).
10. The Commissioner set out the substantive scope of his investigation to the complainant on 18 June 2015, which was to consider the application of sections 40(2), 23(5) and 24(2). The complainant did not disagree with the scope of the investigation.
11. However, the public authority subsequently clarified that it was still relying on the exemption at section 37(1)(b) in addition to sections 40(2), 23(5) and 24(2).
12. Therefore, the scope of the Commissioner's investigation was:
 - To determine whether the public authority was entitled to withhold the remaining information within the scope of item 5 (the disputed information) on the basis of the exemptions at sections 37(1)(b) and 40(2), and
 - To determine whether the public authority was entitled to rely on sections 23(5) and 24(2).

Reasons for decision

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

13. All of the disputed information was withheld on the basis of section 37(1)(b).
14. Section 37(1)(b) states that information is exempt if it relates to the conferring by the Crown of any honour or dignity.
15. Given that the request specifically seeks information concerning the honours awarded to late Sir Cyril Smith, the Commissioner is satisfied that the disputed information clearly falls within the scope of the exemption contained at section 37(1)(b). The information is therefore exempt on the basis of section 37(1)(b).

Public interest test

16. 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.
17. The complainant submitted that there were strong public interest grounds for disclosing the disputed information due to the several allegations of historic child abuse made against Cyril Smith.
18. The public authority explained that it had carefully considered the strong public interest in disclosing information relating to honours received by Cyril Smith. In view of the circumstances of the case, it wanted to be as transparent as possible about the process leading up to the award of honours to Cyril Smith. With this in mind, it decided to disclose the vast majority of information held within the scope of the request. The public authority explained that the disclosed information includes manuscript notes of meetings, letters from the then Political Honours Scrutiny Committee to the Prime Minister, and correspondence between the then Ceremonial Secretariat and 10 Downing Street, all of which clearly set out the thinking behind the approval given to the recommendation of a Knighthood for Cyril Smith. According to the authority, the information disclosed was unprecedented.
19. However, the public authority submitted that there was a stronger public interest in not disclosing the remaining information for reasons explained to the Commissioner in confidence.

Balance of the public interest

20. The Commissioner acknowledges and welcomes the fact that a significant amount of the information held in this case has been disclosed to the complainant. This properly reflects the considerable public interest arising from the specific circumstances.
21. With regard to the weight that should be attributed to maintaining the exemption at section 37(1)(b) in respect of the remainder, the Commissioner accepts as a general principle the argument that for the honours system to operate efficiently and effectively there needs to be a level of confidentiality which allows those involved in the system to comment on and discuss nominations freely and frankly. Furthermore, the Commissioner accepts that if views and opinions, provided in confidence, were subsequently disclosed then it is likely that those asked to make similar contributions in the future may be reluctant to do so or would make a less candid contribution. Moreover, the

Commissioner also accepts that disclosure of information that would erode this confidentiality, and thus damage the effectiveness of the system, would not be in the public interest.

22. Additional reasons specific to the circumstances of this case are explained in the confidential annex. These cannot be included in the published notice (and have not been revealed to the complainant), as to do so would disclose exempt information. Taking everything into account, the Commissioner finds that, in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the disputed information.
23. In light of his decision the Commissioner did not consider the public authority's reliance on the exemption at section 40(2).

Section 23 – security bodies and Section 24 – national security

24. Information relating to security bodies specified in section 23(3) is exempt information by virtue of section 23(1). Information which does not fall under section 23(1) is exempt from disclosure under section 24(1), if it is required for the purpose of safeguarding national security.
25. Sections 23(5) and 24(2) exclude the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under section 23(1) or 24(1) respectively.
26. By virtue of section 23(5) the duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in section 23(3).
27. By virtue of section 24(2) the duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.
28. The Commissioner does not consider the exemptions at sections 23(5) and 24(2) to be mutually exclusive and he accepts that they can be relied on independently or jointly in order to conceal whether or not one or more of the security bodies has been involved in an issue which might impact on national security. However, each exemption must be applied independently on its own merits. In addition, the section 24 exemption is qualified and is therefore subject to the public interest test.
29. The test as to whether a disclosure would relate to a security body is decided on the normal standard of proof, that is, the balance of probabilities. In other words, if it is more likely than not that the

disclosure would relate to a security body then the exemption would be engaged.

30. From the above it can be seen that section 23(5) has a very wide application. If the information requested is within what could be described as the ambit of security bodies' operations, section 23(5) is likely to apply. This is consistent with the scheme of FOIA because the security bodies themselves are not subject to its provisions. Factors indicating whether a request is of this nature will include the functions of the public authority receiving the request, the subject area to which the request relates and the actual wording of the request.
31. The Commissioner finds that on the balance of probabilities, information about the award of honours to the late Cyril Smith, if held, could be related to one or more bodies identified in section 23(3).
32. With regard to section 24(2), the Commissioner again considers that this exemption should be interpreted so that it is only necessary for a public authority to show either a confirmation or a denial of whether requested information is held would be likely to harm national security. The Commissioner interprets the phrase '*required*' in the context of this exemption '*reasonably necessary*'. In effect this means that there has to be a risk of harm to national security for the exemption to be relied upon, but there is no need for a public authority to prove that there is a specific, direct or imminent threat.
33. In relation to the application of section 24(2) the Commissioner notes that the First Tier Tribunal (Information Rights) has indicated that only a consistent use of a '*neither confirm nor deny*' (NCND) response on matters of national security can secure its proper purpose. Therefore, in considering whether the exemption is engaged, and the balance of the public interest, regard has to be given to the need to adopt a consistent NCND position and not simply to the consequences of confirming whether the specific requested information in this case is held or not.
34. In the context of section 24, Commissioner accepts that withholding information in order to ensure the protection of national security can extend to ensuring that matters which are of interest to the security bodies are not revealed. Moreover, it is not simply the consequences of revealing whether such information is held in respect of a particular request that is relevant to the assessment as to whether the application of the exemption is required for the purposes of safeguarding national security, but the need to maintain a consistent approach to the application of section 24(2).
35. On this occasion the Commissioner is satisfied that complying with the requirements of section 1(1)(a) would be likely to reveal whether or not

the security bodies were in any way involved in the subject matter which is the focus of these requests. The need for a public authority to adopt a position on a consistent basis is of vital importance in considering the application of an NCND exemption.

36. The Commissioner is satisfied that the public authority was entitled to rely on sections 23(5) and 24(2) in the circumstances of this case. He accepts that revealing whether or not information about the award of honours to the late Cyril Smith which relates to security bodies is held by the authority would reveal information relating to the role of the security bodies. It would also undermine national security and for that reason section 24(2) also applies because neither confirming nor denying if additional information is held is required for the purpose of safeguarding national security.

Public interest test

37. Section 23(5) is an absolute exemption and no public interest is required once it is found to be engaged. However, this is not the case for section 24(2).
38. In light of the allegations of historic child abuse which have since come to light following the death of Cyril Smith, the Commissioner acknowledges the strong public interest in the public authority confirming or denying whether it holds information within the scope of the request which would engage sections 23(1) or 24(1).
39. However, in all the circumstances of this case, especially in light of the considerable amount of information disclosed by the public authority in response to the request, the Commissioner considers that the significant public interest in protecting information required for the purposes of safeguarding national security outweighs the public interest in confirmation or denial.
40. The Commissioner therefore finds that on balance, the public interest in maintaining the exemption at section 24(2) outweighs the public interest in complying with the duty imposed by section 1(1)(a).

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

42. 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.
43. 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