

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 December 2020

Public Authority: Cabinet Office

Address: 70 Whitehall
London SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information relating to the awarding of a knighthood to Sir Geoffrey Boycott OBE. The Cabinet Office refused to provide this citing sections 37 (honours), 41 (confidentiality) and 40 (personal data) as its reasons for doing so. It upheld this at internal review although it made a further disclosure during the Commissioner's investigation.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 37 in respect of some of the information but is not entitled to rely on sections 37, 40 and 41 in respect of the remainder.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information listed in the Conclusion section of the Confidential Annex to this notice.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 11 September 2019 the complainant requested information of the following description:

"Please provide copies of all information held relating to the nomination for a knighthood for Geoffrey Boycott;

This includes, but is not limited to, copies of all information showing the nomination form and discussions about a knighthood for Geoffrey Boycott. This includes copies of all discussions/consideration by the honours committee.

Please send the information to: [address provided] within the statutory time limit."
6. On 9 October 2019, the Cabinet Office responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:
 - section 37(1)(b) (Honours information)
 - section 40(2) (Unfair disclosure of personal data)
 - section 41 (Information provided in confidence)
7. The complainant requested an internal review on 9 October 2019. The Cabinet Office sent him the outcome of its internal review on 22 November 2019. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 29 November 2019 to complain about the way his request for information had been handled.
9. During correspondence with the Commissioner, a small amount of information was disclosed. The Commissioner has therefore considered whether the cited exemptions apply to the information which remains withheld.

Reasons for decision

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

10. Section 37(1)(b) of the Act states that information is exempt if it relates to the conferring by the Crown of any honour or dignity.

11. The Commissioner is satisfied, having seen the withheld information, that it clearly falls within the scope of the exemption at section 37(1)(b).
12. However, section 37(1)(b) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of the Act. The Commissioner will therefore consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Public interest in disclosure

13. The complainant, in his correspondence directly with the Cabinet Office, drew attention to Sir Geoffrey's conviction for domestic violence. This, he argued, added to the public interest in disclosing information about the decision making process in this case.
14. The Cabinet Office noted a general public interest in transparency. It said that "the reason for the honour in question has been published and [the complainant] has been provided with a summary explanation regarding the processes involved in resignation lists. The Cabinet Office argues that much of the public interest in disclosure of the remaining information is reduced in the light of this."

Public interest in maintaining the exemption

15. The complainant did not submit any arguments in favour of maintaining the exemption in respect of this information nor did the Commissioner require him to.
16. The Cabinet Office stressed the general importance of protecting the honours system generally. It emphasised that discussions about whether to award a living person an honour have never been disclosed. It argued that confidentiality for those involved in the discussions was in the public interest – it should be noted that it also cited section 40 (personal data) for some of the withheld information.
17. It acknowledged that the resignation list of honours were not considered by the independent committees that otherwise deal with honours matters¹, but that it, the Cabinet Office, still conducted propriety checks

¹ It explained "The independent Parliamentary and Political Service Honours Committee and Main Honours Committee play no role in the process for exceptional political honours,

and made submissions to the Prime Minister. It stressed the importance of protecting a "safe space" for "important pieces" of this process. It further argued "Disclosure would clearly set a worrying precedent for an area that requires a significantly safe space to properly consider the matters related to conferring honours".

18. Information about how the honours system works when the committees are involved can be found here.
<https://www.gov.uk/government/publications/how-the-honours-system-works>. This includes links to the Memorandums of Understanding with certain bodies regarding propriety checks. The Cabinet Office explained to the Commissioner that "The independent Parliamentary and Political Service Honours Committee play no role in the process for exceptional political honours, including Resignation Lists".
19. It said that "Disclosing information regarding issues of propriety would, in our view, inhibit the ability to discuss and deliberate honours cases with freedom and may stop those involved from expressing their views frankly in the future. Disclosure of personal information may also increase the chances of people confirming they would not be agreeable to receiving an honour [it explained that this was called the 'sounding out' phase] – clearly harming the honours process."
20. Finally, it argued that where propriety checks were provided by third party vetting agencies, disclosure would "undermine the agreements in place for protecting this information. This could jeopardise their ability to provide this information in the future for other nominations and would harm the operation and robustness of the honours system overall".

The Commissioner's position

21. The Commissioner acknowledges that there is a public interest in transparency regarding the honours system and she also recognises that there is a public interest in maintaining a safe space in which honours matters can be discussed. She also recognises that honours awards may, from time to time, be controversial as was the case here.
22. Noting that the honour in question did not involve the normal committee process – it was awarded as a resignation honour - the Commissioner considers there is much greater public interest in understanding the process for awarding resignation honours. While she accepts that there is a public interest in protecting the safe space in which honours

including Resignation Lists. Therefore, the nominations do not go through the same processes as the honours awarded at New Year and for HM the Queen's Birthday"

nominations are discussed, she considers this does not outweigh the public interest in transparency in this case.

23. The Commissioner has set out further analysis in a confidential annex to this notice which makes specific reference to the withheld information.
24. There is a small portion of the withheld information which, in the Commissioner's view, was rightly withheld under section 37(1)(b), namely the input from third parties recorded on one of the documents containing withheld information. There is a stronger public interest in protecting that safe space for such input. That said, the Commissioner does not consider that the identity of those third party organisations should be withheld in this case; simply their input. The Commissioner does not give great weight to the argument that the organisations would be deterred from contributing in the future given that their actual submissions are rightly withheld even though their identity is not. Such organisations would be expected to contribute to this process and, indeed are subject to Memorandums of Understanding as noted above.
25. There is also personal contact information collected directly from Sir Geoffrey and one paragraph in one of the documents containing withheld information which refers directly to individuals. The Commissioner has concluded that this information can rightly be withheld under section 37(1)(b) because there is a stronger public interest in protecting the safe space in which such interactions are conducted with those nominated for honours. Disclosure of nominees' personal information such as their contact information would inevitably damage the confidentiality of the process contrary to the public interest.
26. Having concluded that a section of the withheld information is not exempt under section 37(1)(b), the Commissioner has gone on to consider whether it is exempt under section 41. This information is identified in the confidential annex referred to above.
27. Section 41 sets out an exemption from the right to know where the information was provided to the public authority in confidence.
28. Section 41 of the FOIA states that:
 - (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.'

29. 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 must constitute an actionable breach of confidence.
30. In her guidance on section 41, the Commissioner acknowledges: “[Section 41] is designed to give those who provide confidential information to public authorities, a degree of assurance that their confidences will continue to be respected, should the information fall within the scope of an FOIA request”.

Was the information obtained by the Cabinet Office from another party?

31. In her guidance on section 41, the Commissioner also acknowledges that, in this context, the term ‘person’ means a ‘legal person’. This could be an individual, a company, another public authority or any other type of legal entity.
32. Her guidance also states:

“It follows that the exemption won’t cover information the authority has generated itself, although it may cover documents (or parts of documents) generated by the public authority if these record information provided in confidence by another person, ..”.
33. In its submission, the Cabinet Office explained that information was supplied by HMRC and the Police, for example, via Memorandums of Understanding. However, the information supplied by these bodies is in the Commissioner’s view already exempt under section 37 for reasons set out above. The provenance of some of the information identified as having been provided by a third party is not entirely clear. It is not entirely clear, for example, if it was produced by a third party or by the Cabinet Office itself. The Cabinet Office’s submissions to the Commissioner referred to information from vetting agencies but did not identify who they were. The Commissioner has therefore taken it on this narrow point that the information in question was collected and submitted to the Cabinet Office by an unnamed third party vetting agency. The Commissioner is unable to add further weight to this point without evidence of what was agreed contractually between the Cabinet Office and the third party vetting agency.
34. The Commissioner would add that some of the withheld information in question was clearly generated by the Cabinet Office and does not refer to information provided by third parties so therefore cannot be exempt under section 41.

Would disclosure of the information constitute an actionable breach of confidence?

35. In considering whether disclosure would constitute an actionable breach of confidence, the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. That 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 disclosure would be an unauthorised use of the information to the detriment of the confider.
36. Further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

Does the information have the necessary quality of confidence?

37. For the information to have the necessary quality of confidence it must not be trivial and not otherwise available to the public. Information which is of a trivial nature or already available to the public cannot be regarded as having the necessary quality of confidence.
38. The Commissioner recognises that information should be worthy of protection in the sense that someone has a genuine interest in the contents remaining confidential. She also acknowledges that information will be in the public domain if it is realistically accessible to the general public at the time of the request.
39. The Commissioner has identified in the Confidential Annex that information which fails this test and does not have the necessary quality of confidence. The reason why it fails that test is explained in the Confidential Annex. This information is therefore not exempt under section 41.

Was the information imparted in circumstances importing an obligation of confidence?

40. There is a document in the withheld information which clearly includes information by four parties with whom there is an agreement regarding the imparting of such information. The Commissioner is already satisfied that this has been properly withheld under section 37 – the information they submitted; not the identity of the parties themselves. However, this does not apply to the remainder of the information in that document (the “remainder”). The Cabinet Office has asserted but not evidenced that the information was supplied by a third party vetting agency. Beyond the Cabinet Office’s assertion that the remainder was imparted

in circumstances importing an obligation of confidence, the Commissioner is unable to conclude that this is the case without evidence of what was contractually agreed between itself and the third party vetting agency with respect to confidentiality.

41. The Commissioner is satisfied that information which is not already exempt under section 37(1)(b) is not exempt under section 41.

Section 40

42. The Cabinet Office argued that all the withheld information was Sir Geoffrey's personal data because he was the subject of the request and the withheld information is all about him. The Commissioner has identified information which cannot be withheld under section 37(1)(b) nor can it be withheld under section 41. The Cabinet Office asserted that this is exempt under section 40 (unlawful and unfair disclosure of personal data). The remainder is not exempt under section 40 for reasons set out in the Confidential annex to this notice. To summarise, the Commissioner has concluded that there is, in the circumstances of this case, a legitimate interest in adding to the transparency of the process of awarding honours. Disclosure is necessary for that legitimate interest. The reason why the legitimate interest in non-disclosure is not as strong in this case is set out in the Confidential Annex.

Conclusion

43. The Commissioner has concluded that the information identified in the confidential annex to this notice is not exempt under section 37, section 41 or section 40. It should therefore be disclosed.

Right of appeal

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

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

Tel: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. 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

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