

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 January 2014

Public Authority: Cabinet Office

Address: 70 Whitehall

London

SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested information concerning the awarding of honours to the former MP Cyril Smith. The only information held by the Cabinet Office within the scope of this request was a nomination form for a knighthood. This was disclosed, but with the name of the individual who nominated Cyril Smith for a knighthood withheld under the exemption provided by section 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that the exemption provided by section 40(2) is not engaged and so the withheld content must now be disclosed.
3. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.
 - Disclose a full copy of the nomination form, without redactions.
4. The Cabinet Office must take this step 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 13 June 2013, the complainant wrote to the Cabinet Office and requested information in the following terms:

"Please disclose whether any correspondence exists between either civil servants or ministers discussing the award of an MBE to Cyril Smith in 1966, prior to the award being made. If it exists please provide copies of any and all correspondence, both ministerial and civil service, in relation to this.

Separately, please disclose whether any correspondence exists between either civil servants or ministers discussing the award of a knighthood to Cyril Smith prior to the award being made. He was awarded a knighthood in the 1988 Queen's Birthday Honours. If it exists please provide copies of any and all correspondence, both ministerial and civil service, in relation to this."

6. The Cabinet Office responded on 18 July 2013, outside 20 working days from receipt of the request. A single document was disclosed, which appeared to be a pro-forma for the nomination of honours. Content identifying the individual who nominated Cyril Smith for a knighthood was redacted from this document under section 40(2) (personal information) of the FOIA. The complainant was informed that this document was the only information falling within the scope of his request held by the Cabinet Office.
7. The complainant responded on 3 August 2013 and requested an internal review in relation to the citing of section 40(2). The Cabinet Office responded with the outcome of the internal review on 16 August 2013 and stated that the decision to redact some information under section 40(2) was upheld.

Scope of the case

8. The complainant contacted the Commissioner on 28 August 2013 to complain about the part refusal of his information request. The complainant indicated at this stage that he was dissatisfied with the citing of section 40(2) and contrasted this with a previous decision by the Commissioner that information relating to the awarding of an honour to Jimmy Savile should be disclosed.

Reasons for decision

Section 40

9. Section 40(2) / 40(3)(a)(i) provides an exemption for information that is the personal data of an individual aside from the requester and where the disclosure of that personal data would be contrary to any of the data protection principles.
10. Covering first whether the information constitutes the personal data of any individual, the definition of personal data is given in section 1(1) of the Data Protection Act 1998 (DPA):

"personal data' means 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".*
11. The withheld information in this case consists of the name of the individual who nominated Cyril Smith for an honour. Clearly this information would both relate to and identify that individual and so it is personal data according to the definition in section 1(1) of the DPA.
12. Turning to whether disclosure of this information would be in breach of any of the data protection principles, the Commissioner has focussed here on the first principle, which requires that personal data be processed fairly and lawfully. In forming a view on whether disclosure would be fair, the Commissioner has taken into account the reasonable expectations of the data subject, the consequences of disclosure upon the data subject and whether there is legitimate public interest in the disclosure of the information in question.
13. On the issue of the reasonable expectations of the data subject, the Cabinet Office stated that the data subject would have "*a very reasonable expectation*" that their personal data would not be disclosed. It stated that the honours process is conducted on a confidential basis and that the data subject "*would have assumed*" that their involvement was in confidence.
14. Whilst the Cabinet Office has not supplied to the ICO evidence of a specific guarantee of confidentiality, he is aware from previous cases that the honours system does in general operate confidentially. On the basis of this experience from previous cases and the representations

from the Cabinet Office in this case, the Commissioner accepts that the data subject would have expected their contribution to this process to remain confidential.

15. However, in the circumstances of this case it does not necessarily follow that this would have been a reasonable expectation at the time that the request was made. On this point, the Commissioner notes first the passage of time since the information was recorded; approximately 25 years by the date of the request. His view is that the reasonable expectation of privacy that applied at the time of the nomination would have eroded somewhat over time.
16. Secondly, he notes that the data subject was a senior public figure at the time of the nomination and that this nomination was made in the course of fulfilling that role. Had it been the case that the nomination had been made by an individual who did not hold a public role and was acting in a purely private capacity when making this nomination, a stronger argument could be made about a continuing expectation of privacy.
17. The general approach of the Commissioner is that it will be less likely to be unfair to disclose information relating to an individual in a professional capacity than it would be in relation to information concerning an individual's private life. The likelihood of disclosure will generally increase with the professional seniority of the data subject, and where the relevant information relates to a public role they fulfilled at the time.
18. In this case the view of the Commissioner is that the data subject would hold some reasonable expectation that this information would not be disclosed owing to their understanding of the confidentiality of the honours process. However, this expectation will have been eroded with the passage of time since the information originated and due to this nomination having been made in the course of their senior public role. Therefore, any expectation of non-disclosure held by the data subject carries less weight here than it would if these factors did not apply.
19. As to the consequences of disclosure upon the data subject, the question here is whether disclosure would be likely to result in damage and distress to that individual. As the Commissioner has accepted that the data subject would hold some expectation of privacy, he also accepts that disclosure counter to that expectation might cause some mild distress to the data subject. However, as the Commissioner has found that there would be only a limited reasonable expectation of privacy due to the factors identified, the level of any distress which might result, viewed objectively, will be significantly reduced.

20. What is now known about the crimes committed by Cyril Smith is also relevant here. Greater Manchester Police has stated:

"The Force is now publicly acknowledging that young boys were victims of physical and sexual abuse committed by Smith."¹

21. In this context, the Commissioner is of the view that identifying the individual who put forward Cyril Smith's nomination for a knighthood would be more likely to result in a degree of distress to that individual. However, the Commissioner is also of the view that the level of any such distress would be reduced due to the following factors.
22. First, that the data subject had a professional connection to Cyril Smith is already a matter of public record; therefore, disclosure of the information in question would not be the first time that the connection between Cyril Smith and the data subject has been made publicly known. Secondly, as the Cabinet Office stated to the ICO, this nomination was made in good faith; the public awareness that there is now about Cyril Smith's crimes did not exist at that time the nomination was made.
23. The Commissioner has found that the data subject would hold an expectation of privacy and could be distressed as a result of disclosure, albeit that the weight of both of these factors is significantly reduced due to the public role of the data subject and the circumstances of the nomination. The next step is to consider whether there would be any legitimate public interest in the disclosure of this information. Whilst section 40(2) is an absolute exemption and not qualified by the public interest, the public interest is relevant here as it is necessary for there to be a legitimate public interest in order for disclosure to be compliant with the DPA, and a sufficiently strong interest may outweigh the factors against disclosure described above.
24. The view of the Commissioner is that there is a legitimate public interest in the disclosure of this information. As well as a general public interest in transparency in relation to the awarding of honours, the Commissioner believes that there is a specific public interest in the circumstances surrounding the awarding of an honour to Cyril Smith. It is clear now that Cyril Smith may well not have been a suitable recipient

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<http://www.gmp.police.uk/Content/WebsitePages/A22934C753EF3F0380257AC300607543?OpenDocument>

for a knighthood, and there is a public interest in full disclosure of information as to how that honour came to be awarded.

25. Whilst the Commissioner has stated above at paragraph 22 that the level of awareness that now exists about Cyril Smith's crimes was not present at the time that this information originated, there was quite widespread knowledge at that time that he was the subject of allegations. The statement made by Greater Manchester Police from which the quote above is taken refers to Cyril Smith having been the subject of multiple police investigations. Brief online research reveals that allegations of crimes committed by Cyril Smith had also been the subject of media coverage by that time.
26. The Commissioner believes it reasonable to conclude that the data subject will have been aware at the time the nomination was made of allegations about Cyril Smith, albeit that the degree and certainty of knowledge about his behaviour which is available today was not available at that time. That the decision to nominate was made by the data subject in those circumstances adds to the public interest in disclosure of the nominator's identity.
27. Part of the concern of the Cabinet Office was the impact that it believed disclosure would have on the honours process. It believed that disclosure in this case could discourage individuals from contributing to this process fully in future and it was in part this concern that led it to withhold the name of the nominator in this case.
28. However, the Commissioner's comments at paragraph 16 above regarding the capacity in which the nominator put forward the nomination are relevant here. Furthermore, the Commissioner notes that the content of the information that was disclosed by the Cabinet Office does not support the "wider impact" argument. This contains no expression of opinion on the merits of this bid to secure a knighthood for Cyril Smith; instead it only consists of a factual description of Smith's political career. The Cabinet Office has also stated that the name of the nominator is the only information it has withheld that falls within the scope of the request.
29. As the information already disclosed does not include any content recording opinion, the Commissioner does not accept that any argument about inhibition to the provision of frank views by future participants in the honours process is relevant here. This means that he does not accept that the legitimate public interest in disclosure in this case is limited by a counter public interest in ensuring that the honours process functions effectively.

30. In order for disclosure to be in line with the first data protection principle, disclosure must be *necessary* in order for the legitimate interests identified above to be satisfied. This is required by Schedule 2 Condition 6 of the DPA. The Commissioner's published guidance² on this matter states that disclosure should be necessary in order to satisfy a pressing social need. It also states that:

"...the general need for transparency regarding public bodies may constitute a sufficiently 'pressing social need'."

31. In this case, as well as the general need for transparency, the Commissioner is of the view that there is a specific need for transparency in relation to the awarding of a knighthood to Cyril Smith, given the information about his conduct which has now emerged.

32. A second issue that must be addressed when considering necessity is whether the information may already be available elsewhere. In this case the Commissioner relies on the refusal of the Cabinet Office to disclose this information as evidence that it is not available elsewhere.

33. In conclusion, whilst the Commissioner has found that the data subject would hold an expectation of confidentiality and arguably might possibly suffer mild distress or embarrassment through the disclosure of this information, he has also found that the weight of these factors is reduced due to the position held by the data subject at the time that the nomination was made and due to the circumstances surrounding the nomination. He has also found that there is a legitimate public interest in the disclosure of the name of the nominator and that disclosure would be necessary in order to satisfy that public interest. For these reasons, the Commissioner finds that disclosure would not be unfair to the data subject.

34. For the first data protection principle to be satisfied, disclosure must be lawful, as well as fair. The approach of the Commissioner to the issue of lawfulness under the first data protection principle is that he will find that disclosure would be lawful unless the public authority has advanced convincing arguments as to why disclosure would be unlawful. In this case the Cabinet Office has advanced no arguments on the issue of

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf

lawfulness and the Commissioner has no reason to believe that disclosure would not be lawful.

35. The Commissioner has found that disclosure would be both fair and lawful and, therefore, would satisfy the first data protection principle. As there would be no breach of the first data protection principle through the disclosure of this information, the overall conclusion of the Commissioner is that the exemption provided by section 40(2) is not engaged. At paragraph 3 above the Cabinet Office is now required to disclose this information.

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: <http://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
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