

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 August 2016

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office for a copy of the letter proposing that Paul Scriven be made a life peer and the letter in which this proposal was accepted. The Cabinet Office refused to disclose the requested information on the basis of sections 37(1)(a) (communications with the Sovereign), 37(1)(b) (conferring of honours) and 40(2) (personal data) of FOIA. The Commissioner is satisfied that some of the information is exempt from disclosure on the basis of section 37(1)(a) or section 37(1)(b). However, the Commissioner has also concluded that the remainder of the withheld information is not exempt from disclosure on the basis of the exemptions cited by the Cabinet Office.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the information that is identified in the confidential annex.
3. 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

4. In March 2015 the complainant submitted a request to the Cabinet Office for information relating to the decision to confirm the proposal of Robert Kerslake for a life peerage. The Cabinet Office sought to withhold the requested information on the basis of section 37(1)(b) of FOIA. The complainant referred this decision to the Commissioner. The Commissioner issued a decision notice on 26 May 2016 which concluded that the requested information was exempt from disclosure on the basis of section 37(1)(b) but that in all the circumstances of the case the public interest in maintaining the exemption did not outweigh the public interest in disclosure of the information.¹
5. The complainant submitted the following request to the Cabinet Office on 17 November 2015:

'For clarification, whilst the original request applied to one Lord [Kerslake], the FoI request has been amended to include three lords, Lord Paul Scriven, Lord Kerslake, and Lord Blunkett.

The metadata request can be similarly expanded.

I hope this now clarifies the request.'
6. The Cabinet Office acknowledged receipt of this request, in respect of the part of it which sought the information concerning Lord Paul Scriven, on 18 November 2015.
7. The Cabinet Office provided the complainant with a substantive response to this request on 10 December 2015. The Cabinet Office confirmed that it held information falling within the scope of his request but was seeking to withhold this on the basis of sections 37(1)(a), 37(1)(b) and 40(2) of FOIA.
8. The complainant contacted the Cabinet Office on the same day and asked it to undertake an internal review of this decision.

¹ https://ico.org.uk/media/action-weve-taken/decision-notice/2016/1624277/fs_50597373.pdf

9. The Cabinet Office informed him of the outcome of the internal review on 4 January 2016; the review upheld the application of the various exemptions cited in the refusal notice.

Scope of the case

10. The complainant contacted the Commissioner on 5 January 2016 in order to complain about the handling of the request he submitted to the Cabinet Office on 17 November 2015. The Commissioner explained to the complainant that it was her understanding that the only information which fell within the scope of this request was the information regarding Lord Scriven, namely the letter proposing him for a life peerage and the reply saying that proposal had been accepted. The complainant did not dispute this position. Therefore, the focus of this complaint is solely to consider whether such information should be disclosed.

Reasons for decision

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

11. Section 37(1)(a) states that information is exempt if it relates to communications with the Sovereign. It is a class based and absolute exemption. This means that if the information in question falls within the class of information described in the exemption in question, it is exempt from disclosure under FOIA. It is not subject to a public interest test.
12. The Cabinet Office sought to withhold one document (and an attachment to that document) on the basis of section 37(1)(a) of FOIA. Having examined the document, and the attachment in question, the Commissioner is satisfied that this information clearly falls within the scope of the exemption. The information is therefore exempt from disclosure on the basis of section 37(1)(a).

Section 37(1)(b) – conferring of an honour or dignity

13. The Cabinet Office argued that the remaining information was exempt from disclosure on the basis of section 37(1)(b). This remaining information consists of two documents which for the purpose of this decision notice the Commissioner has referred to as documents A and B. The Commissioner has specified which documents are which in a confidential annex which will be provided to the Cabinet Office only. This annex also includes further details as to the basis of the Commissioner's findings in respect of sections 37(1)(b) and 40(2).

14. Section 37(1)(b) of FOIA provides that information is exempt if it relates to the conferring by the Crown of any honour or dignity.
15. Given the nature of the information requested by the complainant the Commissioner is satisfied that documents A and B clearly fall within this description and thus are exempt from disclosure on the basis of section 37(1)(b) of FOIA. However, section 37(1)(b) is a qualified exemption. Therefore, the Commissioner must consider the public interest test set out at section 2(2)(b) of 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. When the public interest factors are equally balanced in any case this presumption in disclosure set out at section 2(2)(b) operates to require that the information must be disclosed.

Public interest arguments in favour of maintaining the exemption

16. The Cabinet Office argued that the principle of confidentiality is central to the functioning of the appointments system and that it did not believe that there was a public interest in the disclosure of information which would damage the integrity of the system. The Cabinet Office argued that those involved in discussions about individual cases require a safe space to discuss and deliberate on cases. Such a safe space allows those involved in a case to engage in frank discussions without external comment, speculation or enquiries. The Cabinet Office suggested that pressure or hindrance arising from such external speculation and comment may distort the integrity of the process and divert resources from the task in hand. Furthermore, the Cabinet Office argued that disclosure of information relating to specific appointments cases would have a negative impact on future discussions because those participating in the appointments process might be reluctant to do so if they thought that their views, given in confidence, were likely to be published.

Public interest in the disclosure of the withheld information

17. The complainant argued that there was a clear public interest in the disclosure of information regarding the appointment of life peers; he emphasised that Lords have a high public profile. He also refused to accept, *'that those who publicly ascribe to openness, honesty, transparency and accountability could be dissuaded from engaging in the process unless they are guaranteed secrecy, absolute discretion, and zero accountability.'*

Balance of the public interest

18. With regard to the safe space arguments advanced by the Cabinet Office, the Commissioner notes that at the point the complainant submitted his request, ie 17 November 2015, the decision making process in respect of this particular life peerage had already been concluded. That is to say, confirmation of the life peerage granted to Lord Scriven had been announced in August 2014.² Therefore, in the Commissioner's opinion the safe space arguments do not attract any particular weight. In other words, the Commissioner does not accept that the Cabinet Office needed a safe space, free from interference and distraction, to discuss Lord Scriven's nomination.
19. With regard to attributing weight to the chilling effect arguments in respect of document A, the Commissioner adopts the same reasoning as that set out at paragraph 21 of the decision notice FS50597373 (see the link at footnote 1). Namely that in the Commissioner's opinion document A does not contain any information which could be accurately described as candid or frank in nature. Nor does it contain any detailed discussions regarding the merits of Lord Scriven's nomination. However, the Commissioner does acknowledge that the withheld information is relatively recent. Taking these factors into account, the Commissioner considers that only a relatively limited amount of weight should be given to the chilling effect arguments. Whilst it is the case that the information is recent, given its contents the Commissioner considers that even if document A were disclosed those involved in contributing to discussions about future honours nominations would still have the expectation that their contributions would be treated confidentially.
20. The Commissioner agrees with the complainant that there is a clear public interest in ensuring that the honours system is transparent and accountable. That said, as with her findings in the aforementioned case, given the nature of document A, in the Commissioner's opinion the degree to which disclosure of this information would contribute towards these aims is somewhat limited.
21. Consequently, as with her findings in FS50597373, the Commissioner has concluded that the public interest factors on both sides are equally balanced in respect of document A. In her opinion there is limited weight that should be attributed to the public interest in disclosing this information. However, for the reasons explained above, the Commissioner considers that no weight should be attributed to the safe space arguments and only limited weight should be attributed to the

² <http://www.bbc.co.uk/news/uk-politics-28703150>

chilling effect arguments. Consequently, taking into account the assumption in favour of disclosure as set out section 2(2)(b) of FOIA, the Commissioner has concluded that the public interest favours disclosing document A. In reaching this conclusion, the Commissioner wishes to emphasise that she 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 nominations. However, for the reasons discussed, she does not accept that disclosure of document A in this case would erode this confidentiality.

22. With regard to attributing weight to the chilling effect arguments in respect of document B, the Commissioner recognises that the situation is somewhat more complex. The Commissioner accepts that disclosure of certain portions of document B do refer to specific appointments nominations (not simply Lord Scriven's) and moreover that such comments are reasonably frank and, given the context of the communication, the author would have expected it to be treated confidentially. The Commissioner accepts that disclosure of these portions of document B, which she has identified in the confidential annex, would significantly undermine the confidentiality of the honours process. It follows that the Commissioner accepts that there is a significant public interest in withholding this information. Whilst the Commissioner recognises that there is a public interest in the disclosure of information which would allow the public to understand how nominations for peerages are considered, in the circumstances of this case she is of the view that this is outweighed by the public interest in protecting the confidentiality of the honours process. She has therefore has concluded that the public interest favours maintaining section 37(1)(b) in respect of certain portions of document B.
23. However, in the Commissioner's opinion the remaining portions of document B could be disclosed without any significant infringement on the confidentiality of the honours process. Whilst this information is perhaps not as anodyne as that contained in document A, in the Commissioner's opinion it is nevertheless sufficiently focused on the administrative and procedural arrangements around such appointments that it is difficult to accept that its disclosure would genuinely have a chilling effect on contributions by those involved in future honours discussions. Consequently, given the effect of section 2(2)(b) discussed above, the Commissioner has also concluded that for such information the public interest favours disclosure.

Section 40 – personal data

24. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA).

25. Personal data is defined in section (1)(a) of the DPA as:

'.....data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.'

26. The Cabinet Office argued that the individuals named in the documents would have no expectation that this information would be made public and it would not be fair to disclose this information. The Cabinet Office was therefore seeking to argue that disclosure of the names of the individuals would breach the first data protection principle which states that:

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.'

27. In deciding whether the disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - any particular circumstances of the case, eg established custom or practice within the public authority; and

- whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
28. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.
29. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.
30. The Commissioner accepts that given the confidential nature of the honours process, she can understand the Cabinet Office's suggestion that the named individuals would not expect to have their personal data disclosed. However, once the information contained in document B which the Commissioner accepts is exempt from disclosure on the basis of section 37(1)(b) is redacted, there is, in her opinion, minimal information about the named individuals left in the document. In the Commissioner's opinion such information could be disclosed without any damage or distress to the individuals concerned. The Commissioner has explained why she has reached this view in the confidential annex.
31. Furthermore, as well as considering the fairness of disclosure the Commissioner has also considered whether schedule 2 condition 6 of the DPA is met. As noted at paragraph 26 in order for information to be disclosed under FOIA one of the DPA conditions has to be met. Schedule 2 condition 6 states that:

'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.'

32. The Commissioner accepts that it is difficult to argue that there is a strong or compelling legitimate interest in disclosure of the remaining information contained in document B. However, as indicated above, she believes that disclosure would not infringe the rights and freedoms of the individuals in question. Therefore, in light of this limited prejudice, and taking into account the broad general principles of accountability and transparency, the Commissioner is satisfied that condition 6 is met.
33. In conclusion, the Commissioner has found that disclosure of the remaining information contained in document B would not breach the first data protection principle – disclosure would be fair and meet schedule 2 condition 6 of the DPA. The remaining information contained in document B is therefore not exempt from disclosure on the basis of section 40(2) of FOIA.

Right of appeal

34. 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

35. 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.
36. 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

Jonathan Slee
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