

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 December 2018

Public Authority: Foreign and Commonwealth Office

Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) seeking information about the decision to award Harvey Weinstein an honorary CBE in 2014. The FCO sought to withhold all of the information falling within the scope of the request on the basis of section 37(1)(b) (information relating to the conferring of an honour) and the majority of this information also on the basis of section 40(2) (personal data) of FOIA. The Commissioner has concluded that although section 37(1)(b) is engaged, for the majority of the information the public interest favours disclosure of this information. However, in relation to the name of the individual who nominated Mr Weinstein and the information relating to other nominees referred to in the withheld information, the public interest favours maintaining the exemption. In respect of section 40(2), the only information which the Commissioner accepts is exempt on the basis of this exemption consists of the names of FCO and other government officials and also Mr Weinstein's home address.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:

- Provide the complainant with a copy of the information it holds falling within the scope of his request.¹ However, in providing this information the FCO can redact:
 - the names of any individuals, other than Mr Weinstein, whose nominations are also referred to in the information, along with any comments about the merits or progress of their nominations;
 - the names of any FCO or other government officials²; and
 - Mr Weinstein's home address.³
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. The complainant submitted the following request to the FCO on 31 October 2017:
- *Please provide copies of all nomination forms for Harvey Weinstein's CBE.*
 - *Please provide copies of all information surrounding the awarding of a CBE to Harvey Weinstein;*
 - *Please provide copies of all correspondence, both ministerial and civil service, relating to the awarding of a CBE for Harvey Weinstein.*
5. The FCO responded on 28 December 2017 and provided the complainant with a copy of a press release announcing Mr Weinstein's CBE award and a redacted copy of an invitation to the event where he was presented

¹ The exception to this is document 1 because the Commissioner accepts that this is exempt from disclosure on the basis of section 37(1)(b) and the public interest favours maintaining the entirety of this document. However, the Commissioner has determined that citation for Mr Weinstein needs to be disclosed.

² Given their seniority and public profile this does not extend to redacting the individual to who is named in document 15 nor the official to whom documents 9 and 10 are addressed.

³ If the FCO requires any clarification from the Commissioner regarding how these redactions should be applied, it should contact her.

with the award. However, the FCO explained that it was seeking to withhold the further information it held on the basis of section 37(1)(b) (information relating to the conferring by the Crown of any honour or dignity) and section 40(2) (personal data) of FOIA.

6. The complainant contacted the FCO on 18 January 2018 and asked it to conduct an internal review of this decision.
7. The FCO informed him of the outcome of the review on 13 June 2018. The review upheld the application of the exemptions cited in the refusal notice.

Scope of the case

8. The complainant contacted the Commissioner on 20 June 2018 in order to complain about the FCO's handling of his request.

Reasons for decision

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

9. 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.
10. Given that the request specifically seeks information about the awarding of an honorary CBE to Harvey Weinstein, the Commissioner is satisfied that the withheld information clearly falls within the scope of the exemption at section 37(1)(b).
11. 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 FOIA. The Commissioner has therefore considered 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 arguments in favour of disclosing the withheld information

12. The complainant noted that the Commissioner has been clear that providing officials and ministers are acting in a fair, impartial and professional manner then they have nothing to fear from disclosure of their discussions. He emphasised that transparency is capable of demonstrating how robust, or otherwise, the nomination process and discussions about the particular nominations are. In the circumstances of this case the complainant emphasised that the case relates to the awarding of a CBE to a man who has been accused of sexual misconduct

against multiple women. He noted that it had led to discussions about forfeiture of the award and has also led other organisations to withdraw previous awards. Consequently the complainant argued that there is a compelling public interest in disclosure of information showing why Mr Weinstein was nominated and what discussions were had about giving him the award. The complainant noted that in its response to his request the FCO stated that it is given full and honest information about individuals prior to making awards and it follows that there is a compelling and significant public interest in disclosure of information capable of showing what the FCO knew and was told about Mr Weinstein. Confidence in the honours system will only be increased by transparency. Moreover, the complainant argued that withholding the information leads to suggestions that the FCO wants to hide something about Mr Weinstein's award. The complainant also noted that such discussions surrounding awards given to other high-profile figures have been released in the interests of transparency.

Public interest arguments in favour of maintaining the exemption

13. The FCO argued that non-disclosure of information relating to individual honours cases ensures that those involved in the honours system can take part on the understanding that their confidence will be honoured and that decisions about honours are taken on the basis of full and honest information about the individual concerned. The FCO argued that the integrity and effectiveness of the system would be undermined if the details of individual nominations were disclosed. The FCO also noted that the exemption relating to honours information does not expire until sixty years after the date of its creation.
14. The FCO did acknowledge that the exemption was not an absolute one and it did consider the merits of each individual case. It explained that in balancing the public interest in the circumstances of this case it had taken into account the debate that had been prompted, both nationally and internationally, by the allegations made in respect of Mr Weinstein. However, it was of the view that disclosing the withheld information would result in anyone who was considering making, or supporting, a nomination in the future may be dissuaded from doing so. The FCO suggested that such people might well be concerned that, for reasons unknown to them at that time, their correspondence might be released years later, exposing them to embarrassment, ridicule or worse. Furthermore, the FCO argued that people might be interested in knowing who nominated a celebrity for an honour, but it considered a general interest in that information to be significantly different from the public interest. The FCO also argued that there was no public interest to be served in releasing the name of the individual who nominated Mr Weinstein. Therefore, the FCO concluded that the public interest favoured withholding the information given the confidentiality of the information is ongoing and because disclosure may affect the future

behaviour of those nominating, those nominated and those whose opinions are sought as part of the honours process.

Balance of the public interest arguments

15. With regard to the weight that should be attributed to maintaining the section 37(1)(b) exemption, as a general principle the Commissioner accepts the FCO'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. 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.
16. Given that the withheld information relates to a nomination for a specific individual, Mr Weinstein, the Commissioner accepts that the disclosure of all the requested information would directly impact on the confidentiality of the honours system as disclosure of the withheld information would reveal which individual, or individuals, had nominated him and reveal the basis for the nomination. Furthermore, the Commissioner acknowledges that disclosure of the withheld information in the scope of the request would also result in the disclosure of information about individuals who were also being considered for nominations at the same time.
17. However, in the Commissioner's opinion it should be noted that Mr Weinstein was awarded his CBE in 2004, some 13 years before this request and the information falling within the scope of this request predates the award. In the Commissioner's view this passage of time arguably reduces, to some degree, the confidentiality of the information. In making this point, the Commissioner notes the FCO's reference to the exemption contained at section 37(1)(b) of FOIA applying for 60 years. In the Commissioner's view this does not however mean that the public interest in maintaining the exemption will be as consistently strong at each and every point until the end of those 60 years. Rather, in the Commissioner's view there must be a recognition that the confidentiality of the information is likely to decrease slowly over that 60 year period. Furthermore, the Commissioner would also note that some, albeit by no means all, of the withheld information is arguably somewhat administrative in nature and as a result in her opinion the degree to which disclosure of such information would undermine the confidentiality of the honours process is limited.

18. With regard to the public interest arguments put forward by the complainant, it is clearly not for the Commissioner to comment on the validity or otherwise of these allegations made against Mr Weinstein. However, she acknowledges that such allegations have resulted in Mr Weinstein having a number of awards rescinded and his expulsion from a number of major industry bodies.⁴ Set against this backdrop the Commissioner accepts that the complainant raises valid points with regard to whether the allegations concerning Mr Weinstein's conduct were referenced or considered as part of the process of awarding him a CBE. In such circumstances the Commissioner disagrees with the FCO's suggestion that there is no public interest in knowing who nominated Mr Weinstein; rather the Commissioner considers there to be a legitimate public interest in knowing who nominated him. Moreover, for similar reasons she also considers there to be a significant and genuine public interest in the disclosure of information about the basis of the nomination and the process by which it nomination was approved. Disclosure of the withheld information would directly address all of these points and as a result in the Commissioner's opinion there is very clear and indeed weighty public interest in the disclosure of the parts of the withheld information directly concerned with Mr Weinstein's nomination. It follows that the Commissioner does not consider there to be such a public interest in the disclosure of the parts of the withheld that discuss the nominations of other individuals.
19. Taking all of the above into account, the Commissioner has concluded that the public interest in respect of section 37(1)(b) favours disclosure of the majority withheld information. In reaching this conclusion the Commissioner fully acknowledges that its disclosure will undermine the confidentiality of the honours process. However, in her view given the age of the information and the administrative nature of some of the information the extent of this such an effect is, to some degree, limited. Furthermore, in the Commissioner's opinion there is a strong and ultimately compelling public interest in the disclosure of the withheld information concerning Mr Weinstein given the high profile and widespread nature of the allegations made against him and the fact that a number of industry bodies have taken action against him in light of these allegations.
20. There are however two caveats to this conclusion. Firstly, the Commissioner is satisfied that by a very narrow margin the public interest in disclosing the name of the individual who nominated Mr Weinstein is exempt from disclosure on the basis of section 37(1)(b). In

⁴ <https://www.theguardian.com/film/2017/oct/19/harvey-weinstein-loses-bfi-fellowship-oscars-baftas>

reaching this particular finding the Commissioner has been persuaded by the FCO's argument that disclosure of the name of the individual who nominated Mr Weinstein may result in people being concerned that for reasons unknown to them at that time, the fact that they nominated someone might be released years later, exposing them to embarrassment, ridicule or worse. The Commissioner is also of the view that disclosure of the remainder of the information about Mr Weinstein's nomination, with the exception of the name of the nominee, would provide a considerable insight into the process of his nomination to the extent that in her view disclosure of the nominee's name would not add greatly to the transparency around this process. Moreover, the Commissioner takes the view that the responsibility and accountability for awarding an individual with an honour rests with branches of government who deal with the honours system rather than with the individual who made a particular nomination.

21. Secondly, the Commissioner is satisfied that the public interest favours withholding the names of the other individuals named in the withheld information who were also considered for an honour as well as any information which discusses the particular circumstances of those individuals' nominations. This is essentially on the basis that for such nominees there is an absence of a compelling public interest in disclosure in contrast to the information relating Mr Weinstein's nomination.

Section 40(2) – personal data

22. 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).⁵
23. 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.'

⁵ On 25 May 2018 the General Data Protection Regulation and Data Protection Act 2018 came into force. However, in line with the provisions contained within the Data Protection Act 2018 under FOIA for any request where a public authority has responded before 25 May 2018 the DPA 1998 applies.

24. The FCO argued that much of the withheld information consists of the personal data of Mr Weinstein and those involved in his nomination. The Commissioner is satisfied that the withheld information does indeed largely consist of the personal data of Mr Weinstein. Furthermore, the Commissioner accepts that the names of FCO and other departments' officials, as well as their contact details, where they are mentioned in the withheld information, also constitute their personal data.⁶
25. The FCO argued that disclosure of this information would breach the first data protection principle. This 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.'

26. The relevant condition in this case is the sixth condition in schedule 2 of the DPA which 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'.

27. In deciding whether 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;

⁶ The Commissioner notes that the withheld information also consists of the personal data of other individuals whose nominations are discussed in the information and also the personal data of the individual who nominated Mr Weinstein. However, for the reasons discussed about the Commissioner has already concluded that such information is exempt from disclosure on the basis of section 37(1)(b). Consequently, she not considered whether such information is also exempt from disclosure on the basis of section 40(2) of FOIA.

- 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 FCO did not advance any specific arguments to support its reliance on section 40(2) of FOIA beyond noting that disclosure of the personal data caught by the request would be unfair and that the sixth condition was not met.
31. With regard to Mr Weinstein's personal data, the Commissioner accepts that given the confidential nature of the honours process those individuals who are nominated would have a reasonable expectation that information concerning their nominations would not be routinely disclosed. However, having taken into account the content of the

withheld information in the Commissioner's opinion disclosure of this information would be unlikely to infringe to any particular degree Mr Weinstein's privacy. Indeed, given the detailed nature of the allegations made against him which have been aired extensively both nationally and internationally, it could well be argued that disclosure of the withheld information would not have any infringement into Mr Weinstein's privacy. The only exception to this is the information detailing Mr Weinstein's home address. Furthermore, in the Commissioner's view for the reasons set out above there is a clear and compelling legitimate interest in the disclosure of information relating to Mr Weinstein's nomination. Moreover, given the limited infringement into his privacy, the Commissioner is satisfied that the disclosure of Mr Weinstein's personal data is necessary for the purposes of legitimate interests and that this disclosure outweighs any prejudice to the rights and freedoms or legitimate interests of Mr Weinstein. Disclosure of the personal data of Mr Weinstein, with the exception of his home address, is therefore fair and lawful and meets the sixth condition. It is not therefore exempt from disclosure on the basis section 40(2) of FOIA.

32. In relation to the names of the various officials contained in the withheld information the Commissioner accepts that it is established custom and practice for the FCO, and other public authorities, to redact the names and contact details of junior staff and non-front line staff from any disclosures under FOIA. In light of this, she accepts that disclosure of such information would be against the reasonable expectations of these individuals. Furthermore, the Commissioner is not persuaded that there is a particularly strong or compelling legitimate interest in the disclosure of these names. Disclosure of this category of information would therefore breach the first data protection principle and such information is therefore exempt from disclosure on the basis of section 40(2) of FOIA.

Right of appeal

33. 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

34. 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.
35. 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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