

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 17 April 2024

**Public Authority:** Cabinet Office

**Address:** 70 Whitehall  
London  
SW1A 2AS

#### **Decision (including any steps ordered)**

---

1. The complainant has requested information relating to the potential awarding of a peerage to Alister Jack MP.
2. The Commissioner's decision is that the Cabinet office was not entitled to rely on section 37(2), read together with section 37(1), to neither confirm nor deny that it held the requested information as the public interest did not favour maintaining the exemption.
3. The Commissioner further decided that the Cabinet Office was also not entitled to rely on section 40(5B)(a)(i) to neither confirm nor deny the requested information is held.
4. The Commissioner's decision is therefore that the Cabinet Office has breached section 1(1)(a) of FOIA in that it failed to confirm nor deny whether it held information within the scope of the request.
5. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.
  - The Cabinet Office must confirm or deny that it holds the requested information;

and

- if it does hold the information, disclose it, or provide a refusal notice in accordance with its obligations under section 17 of FOIA.

## Background

---

6. Alister Jack is the Member of Parliament for Dumfries and Galloway. He is also the Secretary of State for Scotland.
7. Life peers are appointed to the House of Lords by His Majesty the King on the advice of the Prime Minister. Life peers are created under the Life Peerages Act 1958<sup>1</sup>.

## Request and response

---

8. On 17 May 2023, the complainant wrote to the Cabinet Office and requested information by saying as follows:

“Please provide all communications relating to Alister Jack and the potential for him to receive a peerage or otherwise gain a seat in the House of Lords made within the last week. Please include all methods of communication, including apps like Whatsapp, include all digital media, and all attachments.”
9. The Cabinet Office responded on 15 June 2023. Relying on section 37(2), it neither confirmed nor denied that it held the requested information. Following an internal review the Cabinet Office wrote to the complainant on 6 July 2023. It stated that it upheld its original decision.

## Scope of the case

---

10. The complainant contacted the Commissioner on 6 July 2023 to complain about the way his request for information had been handled.
- 

<sup>1</sup> [Life Peerages Act 1958 \(legislation.gov.uk\)](https://legislation.gov.uk)

11. On 12 December 2023, the Cabinet Office provided the Commissioner with its submissions in support of its use of section 37(2). The Cabinet Office also informed the Commissioner that it also relied on section 40(5B)(a)(i) to neither confirm or deny it held the requested information.
12. The Commissioner has fully considered the Cabinet Office's correspondence with the complainant and its submissions to him in reaching his decision.
13. The Commissioner considers he has to determine if the Cabinet Office was entitled to rely on section 37(2) or section 40(5B)(a)(i) to neither confirm or deny it held the requested information.

### **Reasons for decision**

---

14. Section 37(1)(b) of FOIA states information is exempt information if it relates to "the conferring by the Crown of any honour or dignity".
15. Section 37(2) states that the duty to confirm or deny whether requested information is held does not arise in relation to information which is (or if the public authority held it would be) exempt information by virtue of section 37(1).
16. The Cabinet Office considers that confirming whether or not it holds the requested information would in itself disclose information that would otherwise be exempt under section 37. If a confirmation or denial were given under FOIA, this would reveal that information relating to the request does or does not exist, which could enable an inference to be drawn regarding House of Lords peerages that may or may not be granted in the future.
17. Given that the request specifically seeks (if it is held) information relating to the awarding of an honour (a peerage) to a named individual, the Commissioner is satisfied that the requested information clearly falls within the scope of the exemption at section 37(1)(b). Therefore by virtue of section 37(2), the Cabinet Office need neither confirm nor deny the requested information is held. However the application of section 37(2) is subject to the public interest test.

#### The Cabinet Office's View

18. In all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.
19. The Cabinet Office recognises that there is a public interest in having a transparent system so that the public can understand the decisions made to appoint politicians to the House of Lords, especially those within the public eye. It also understands that allowing the public to see how the process works means they are more likely to have confidence that the process of award of honours and dignities is accountable and transparent. There is a general public interest in openness, which may increase public trust in and engagement with the government.
20. However, section 37(1)(b) works to protect and preserve the integrity and robustness of the Honours and Peerage system. It understands that this section is not an absolute exemption and it does not impose the neither confirm or deny aspect of this exemption without considering the merits of each case and the information which may or may not be held by the Cabinet Office.
21. The process by which peerage applications and nominations are considered - including, should it exist, correspondence regarding a specific nomination - needs to remain confidential in order to maintain the integrity of the system and to ensure that recommendations about peerages may continue to be offered on the basis of full and honest information; and that those who offer opinions may do so freely and honestly, in confidence, on the understanding that their confidence will be honoured.
22. The confidentiality of the proceedings also permits those who assess nominations to do so free from lobbying on behalf of potential or actual candidates. Confidentiality, therefore, ensures that decisions about the awards of honours and dignities continue to be taken on the basis of full and honest information about the nominee. If views and opinions which were provided in confidence, should they exist, 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.
23. Erosion of confidentiality and damage to the effectiveness of the system would not be in the public interest. It added the Information Commissioner's Office has provided clear direction that the

interpretation of section 37<sup>2</sup> includes the policies and procedures that underpin the process for conferring honours and dignities.

24. In his request for an internal review of 15 June 2023, the complainant commented that:

'Alister Jack has recently decided to stand down as the MP for Dumfries and Galloway at the next election, which follows previous reporting that he was offered a peerage but did not want to bring an early by-election. The Scottish public would have the right to know whether the Secretary of State for Scotland chose to stand down in order to take up an arranged peerage in the next parliamentary term. Moreover, Alister Jack's Dumfries and Galloway constituents have a right to know about their MP's commitment to them.'

25. On the part of its website concerning vetting and propriety checks, House of Lords Appointment Committee<sup>3</sup> ("HOLAC") notes that:

Vetting checks are deemed by [HOLAC] to have expired after a period of six months, and therefore vetting advice based on these checks is only valid for that period.' HOLAC also refers to the scope for peerages to be deferred. It states that: '[It] recognises that there may be circumstances, on a case-by-case basis, whereby individuals may find it appropriate to defer their entry to the Lords. However, as a general policy position, [HOLAC] expects that the nominees it vets will complete the formalities relating to the conferral of their peerage and their introduction to the House of Lords within a short time following [HOLAC]'s clearance. In circumstances where the announcement of a peerage list or the introduction of a nominee is subsequently delayed for an extended period, it may be appropriate for [HOLAC] to review and update its vetting advice.'

26. It follows that it would not be possible for a person to be nominated for a life peerage and to assume such a peerage in the timeframe that the requester imagines (i.e. between May 2023 and the latest date of the next general election, January 2025) on the basis that it greatly exceeds

---

<sup>2</sup> [Communications with His Majesty and the awarding of honours \(section 37\) | ICO](#)

<sup>3</sup> [House of Lords Appointments Commission \(independent.gov.uk\)](#)

the six month period over which the checks carried out by HOLAC remain valid.

27. Therefore, in all the circumstances of the case the public interest in not confirming whether the information is held outweighs the public interest in confirming or denying whether the Cabinet Office holds the information. Even if the information were held, it would most likely be subject to one or more additional FOIA exemptions.

#### Complainant's View

28. He believes "that information surrounding how decisions are made to appoint politicians to vet the lawmaking process in the House of Lords are indeed in the public interest. Given suggestions that the decision to appoint Alister Jack as a Lord may have been deferred in order to avoid a potential by-election defeat, there is increased interest to the public in this decision".

#### Commissioner's Reasonings

29. The Commissioner has to determine whether the public interest in neither confirming nor denying outweighs the public interest in confirming whether the requested information is held.
30. The Commissioner for reasons that follow, is not persuaded that the exemption from the duty to confirm whether the requested information is held, outweighs the public interest in confirming whether the requested information is held.
31. The Commissioner concurs with the Cabinet Office's views on the public interest factors that support the public interest in confirming whether the requested information is held. However he stresses that inherent factors about transparency and enabling scrutiny of government actions have actual weight and gravitas.
32. The Commissioner does take issue with the weight of public interest factors identified by the Cabinet Office as regards maintaining the exemption.
33. Namely, the Cabinet Office largely fixates on contributors or potential contributors to the honours system being deterred from participating in the process if withheld information was released. These arguments would have considerable weight if what were being considered is whether requested information (if held) should be released.

34. However, we are not at that stage, we are considering whether it should be confirmed or denied that the requested information is held. The Commissioner is not persuaded that merely confirming or denying that the requested information is held, would deter the contributors as the Cabinet Office argues.
35. There may be some traction in the public interest argument that confirming or denying that the requested information is held may inhibit those who have to make determinations but there is a complete lack of evidence to support this thesis and the arguments put forward by the Cabinet Office are therefore not compelling.
36. Having noted that the public interest factors for not maintaining the exemption are real, and in themselves have considerable weight, the Commissioner is not persuaded that the public interest favours maintaining the exemption.
37. Having found that the Cabinet Office was not entitled to rely on section 37(2) he next considered the applicability of section 40(5B)(a)(i) to neither confirm or deny the requested information was held.

#### Section 40 – Personal information

38. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
39. Therefore, for the Cabinet Office to be entitled to rely on section 40(5B)(a)(i) of FOIA to refuse to confirm or deny whether it holds the requested information the following two criteria must be met:
  - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data;  
and
  - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held, constitute the disclosure of a third party's personal data?

Cabinet Office's Submissions

40. It is satisfied that a confirmation or denial by the Cabinet Office that it holds the requested information would contravene any of the data protection principles contained in Article 5 of the UK General Data Protection Regulation (UK GDPR) under section 40(5B)(a)(i) of the Act.
41. The Cabinet Office contends that the requested information (if held, which is neither confirmed nor denied) would contain personal data the disclosure of which would contravene any of the data protection principles.
42. It refers to the view of the Commissioner in a previous case (FS50194701<sup>4</sup>) in respect of a request put to HOLAC that: '...whether an individual proposed, nominated, seconded and/or supported somebody for the peerage falls under the definition of personal data'.
43. It considers that it would follow that whether or not a person had been nominated for a peerage also comes within that definition. Information that relates to whether an individual has been nominated for a life peerage concerns how that person is potentially to be employed and is therefore evidently personal data for the purposes of the Act.
44. It is acknowledged that there is a legitimate interest in requesting information about whether an individual has been nominated for a life peerage. The role of a peer is one of importance and entails influence over legislation in the revising chamber. It follows that there is legitimacy in the disclosure of information as to who is considered for such responsibility, together with who has input into such considerations and the factors which they take into account.
45. It acknowledges that a confirmation or denial would be necessary in pursuit of the legitimate interest of establishing more information as to whether an individual had been nominated for a life peerage.
46. It considers that the confirmation or denial whether the information is held has the potential to cause harm or distress to the data subject. If it were confirmed that information was held about whether the data subject was considered for a life peerage (which is neither confirmed nor denied) then it would lead to uncertainty on the part of the data subject to whether he would or would not be appointed. It considers that this would not be fair on him. If it were denied that information was held

---

<sup>4</sup> [Freedom of Information Act 2000 \(Section 50\) \(ico.org.uk\)](https://ico.org.uk/for-the-public/transparency/foia-requests/)



about whether the data subject was considered for a life peerage (which is also neither confirmed nor denied) then it would potentially be a source of disappointment to the data subject.

47. The information is not already in the public domain and the data subject has not been contacted about this matter.
48. The expectation of the data subject is that the Cabinet Office will continue to neither confirm nor deny whether the information is held. It has had regard to a number of relevant factors in reaching that view.
49. One such factor relates to whether information relates to the data subject's public life or private life. It is apparent that should the data subject be nominated for a life peerage (information on which it neither confirms nor denies it holds) it would relate to his public life: his service in Parliament and in the Cabinet. Inevitably, those nominated for life peerages will owe such a distinction to their record in public life. However, irrespective of whether or not the requested information were to relate to the data subject's public or private life, it considers that there is a clear and unambiguous expectation built up over centuries of convention that matters concerning the nomination of peerages are kept confidential. It is not at all apparent why the Cabinet Office should confirm or deny why it holds information in relation to a life peerage for the data subject when it would not do so for any other individual. The BBC reported an interview the data subject gave with ITV Border in May 2023: 'When asked if he would go to the Lords after the next election, he replied: "Who knows?"'
50. The data subject evidently considers that the Cabinet Office will uphold the long-maintained confidentiality that surrounds the nomination process for peerages.
51. In relation to the applicant's assertion on a 'right to know about their MP's commitment', it observes that Members of Parliament are elected to office only for the duration of a single Parliament. It is for individual MPs to decide whether to present themselves for re-election, and whether or not to make a statement on their intention to do so in advance of the dissolution of Parliament.
52. On 17 May 2023, the data subject publicly confirmed that he was not seeking to run for election again: thus, this element of the applicant's request was in the public domain and already accessible to the applicant when the request was made.

#### Commissioner's Reasonings

53. Section 3(2) of the DPA 2018 defines personal data as: - "any information relating to an identified or identifiable living individual".
54. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
55. In the circumstances of this case the Commissioner is satisfied that "whether potential for him to receive a peerage or otherwise gain a seat in the House of Lords" quoted within the request are sufficient information linked to and have biographical significance about the data subject. Therefore, if held, any information within the scope of the request would clearly be the personal information of the data subject.
56. The Commissioner is further satisfied that if the Cabinet Office were to confirm or deny whether it holds the requested information, this would in turn be disclosing information relating to the data subject – information which is not already available to the world at large in recorded form via any official sources.
57. The fact that confirmation or denial constitutes the disclosure of personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether confirmation or denial would contravene any of the DP principles. The most relevant DP principle in this case is principle (a).
58. Article 5(1)(a) of the UK GDPR states that: "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
59. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed – or as in this case, the public authority can only confirm or deny holding the requested information – if to do so would be lawful, fair and transparent.
60. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that processing shall be lawful only if and to the extent that at least one of the lawful bases for processing listed in the Article applies.

61. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states: "processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"
62. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:
- i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
  - ii) Necessity test: Whether confirmation or denial that the information is held is necessary to meet the legitimate interest in question;
  - iii) Balancing test: Whether the above legitimate interests override the interests and fundamental rights and freedoms of the data subject.
63. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

#### Legitimate interest test

64. In considering any legitimate interest(s) in providing confirmation or denial that the requested information is held under FOIA, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
65. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test. If the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted confirmation or denial to the general public is unlikely to be proportionate.
66. In this case the Commissioner considers that the broad general principles of accountability and transparency of, and connected to, the

data subject's public life are sufficient to foster a legitimate interest in disclosing whether the requested information is held.

Necessity test

67. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures; so, confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA, as to whether the requested information is held, must therefore be the least intrusive means of achieving the legitimate aim in question.
68. The Commissioner is satisfied that providing confirmation or denial that the requested information is held is the least intrusive means of meeting the identified legitimate interest in this case, and therefore the necessity test has been met.

Balancing test:

69. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
70. The Commissioner considers that on balance the competing interests of the data subject are outweighed by the legitimate interest in confirming whether the requested information is held.
71. The information sought goes primarily to the data subject's public not private life. There is no indication from him (as none was sought by the public authority) that he would (reasonably) object to public confirmation whether the requested information is held.
72. The Commissioner does not agree or foresee that releasing the information would cause significant potential harm or distress to the data subject. The data subject being a high profile politician of many years standing and the information being connected to the public life he has pursued.

73. He also does not consider that confirmation or denial in this case would result in any significant harm or distress to the individual. There is therefore an Article 6 basis for processing this personal data and it would thus be lawful.
74. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under principle (a).
75. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
76. The requirement for transparency is met because as a public authority, the Cabinet Office is subject to the FOIA. The Commissioner has, therefore, decided that the Cabinet Office wrongly refused to confirm or deny whether the information was held under section 40(5B) as that exclusion does not apply.
77. Whilst the Commissioner is not persuaded that the public authority was entitled to rely on section 40(5B)(a)(i) to neither confirm nor deny the requested information is held, it does not necessarily mean it should be (if held) released to the complainant. The public authority may come to correctly rely on an exemption not to release any (if) held information to the complainant.

## Right of appeal

---

78. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

79. 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.
80. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Gerrard Tracey**  
**Principal Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**