

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 13 December 2011

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

Summary

The complainant asked the Cabinet Office for the names of individuals, who were now dead, who had refused an honour in the period 1949 to the present day. The complainant also asked the Cabinet Office to specify the nature of each honour. The Cabinet Office provided the complainant with the information for the years 1949 and 1950 but refused to provide the information for 1951 to 2010 on the basis that some of it was in the public domain – and thus exempt from disclosure of the basis of section 21 of the Act – with the remainder being withheld on the basis of sections 37(1)(b) and section 41(1). The complainant asked the Commissioner to consider the application of the latter two exemptions. Having done so the Commissioner has concluded that section 41(1) does not provide a basis to withhold any of the information. He has also concluded that all of the information is exempt from disclosure on the basis of section 37(1)(b). For the information concerning the years 1951 to 1989 the public interest favours disclosing the information. For the information concerning the years 1990 to 2010 the public interest favours maintaining the exemption.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant submitted the following request to the Cabinet Office on 4 November 2010:

'For each case since 1 Jan 1949 when someone who is now dead refused an honour, please supply the following information:

(a) the name of the individual, (b) the type of honour and (c) the year in which the honour was refused.

I accept that in some cases it may be excessively time-consuming to establish whether the individual is deceased and in these cases I am happy for you to act on the assumption that the individual is still alive. However in other cases it will be immediately apparent or established relatively quickly that the person involved is dead. In line with the ICO decision FS50266931, please supply the requested data for these individuals, notwithstanding the fact that for other individuals it may be very difficult to determine whether they are still alive.

Please send me the information by email to [email address of complainant]. Given the ICO decision FS50266931 I anticipate you will be able to release the above information without the need to consider the public interest test or rely on any exemptions, except for section 40 when considering whether the individuals are dead or alive.'

3. The Cabinet Office responded on 30 November 2010 and provided the information for the years 1949 and 1950 for the individuals it could ascertain were dead. In respect of the information for the years 1951 to 2010 some of this was withheld on the basis of section 21 of the Act as it was in the public domain. The remaining information withheld on the basis of sections 37(1)(b), 40(2) and 41(1).
4. The complainant contacted the Cabinet Office on 2 December 2010 in order to ask for an internal review of this decision. In doing so she emphasised that she was only interested in details of individuals who were deceased and thus section 40(2) of the Act did not provide a basis to withhold any information.
5. The Cabinet Office informed the complainant of the outcome of the review on 18 January 2011. At this point the Cabinet Office provided a list of websites by which the information withheld on the basis of section 21 could be accessed; withdrew its reliance on section 40(2) but maintained its reliance on the basis of sections 37(1)(b) and 41(1).

The Investigation

Scope of the case

6. On 24 January 2011 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant asked the Commissioner to consider the Cabinet Office's application of sections 37(1)(b) and 41; she did not dispute its reliance on section 21 of the Act.

Chronology

7. The Commissioner contacted the Cabinet Office on 29 July 2011 and asked to be provided with a copy of the withheld information and any further submissions it wished to make to support its reliance on sections 37(1)(b) and 41.
8. The Cabinet Office provided the Commissioner with a copy of the withheld information on 9 September 2011.

Analysis

Exemptions

Section 41 – Information provided in confidence

9. Section 41(1) states that:

'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.'
10. 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 has to constitute an actionable breach of confidence.
 11. With regard to section 41(1)(b), in most cases the approach adopted by the Commissioner in assessing whether disclosure would constitute an actionable breach of confidence is to follow the test of confidence

set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415 (the *Coco* test).

12. This 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 an unauthorised use of the information would result in detriment to the confider.
13. However, 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.
14. As the complainant referenced in her request, the Commissioner has previously issued a decision notice, reference number FS50266931, which dealt with a very similar request. In that case the applicant had asked the Cabinet Office for information relating to those individuals who were offered but refused an honour in the period 1935-1948.¹ In considering the Cabinet Office's application of section 41(1) to withhold this information the Commissioner accepted that it had received the information from a third party and that it had the necessary quality of confidence. However, the Commissioner did not accept that the obligation of confidence owed to the individuals who refused the honours survived their deaths. In light of this the Commissioner therefore concluded that section 41(1) was not engaged.
15. Having considered the very similar circumstances of this case, and indeed the similarity of the Cabinet Office's submissions to support its reliance on the application of section 41(1), the Commissioner does not see any reason to reach a different conclusion. Therefore the Commissioner finds that the Cabinet Office is not entitled to rely on section 41(1) for the reasons set out in detail at paragraphs 34 to 46 in decision notice FS50266931.

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

16. Section 37 is a class based exemption, that is to say if information falls within the scope of the section it is automatically exempt; there is no need for the public authority to demonstrate any level of prejudice that may occur if the information was disclosed in order for the exemption to be engaged.

¹ http://www.ico.gov.uk/~media/documents/decisionnotices/2010/fs_50266931.ashx

17. Section 37(1)(b) of the Act provides a specific exemption for information that relates to the conferring by the Crown of any honour or dignity.
18. The Commissioner is satisfied that all of the withheld information clearly relates to the conferring by the Crown of honours and thus the information falls within the scope of section 37(1)(b).
19. 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 the Act and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

20. The Cabinet Office accepted that there were general arguments in favour of disclosing for information which may promote transparency, accountability, and participation in government processes. It recognised that the honours and appointments process was one in which there is a public interest and it agreed that there was a public interest in knowing that the honours process is transparent and that the process of awarding honours and dignities is clear.

Public interest arguments in favour of maintaining the exemption

21. The Cabinet Office argued that there was a strong public interest in protecting the specific circumstances and content of individual nominations. This was in order to protect the integrity of the honours system and moreover to uphold the confidentiality of all cases so that those under consideration and those who have received or declined an honour can remain in no doubt that their confidences will be honoured.
22. The Cabinet Office also argued that it had to consider the impact of disclosure on the people concerned; it may be hurtful or embarrassing to disclose the names of those who declined honours and it serves no useful purpose to break those confidences.
23. The Cabinet Office also noted that the effect of section 63 of the Act, i.e. that information relating to honours does not become 'historical' until 60 years after its creation. The Cabinet Office argued that Parliament therefore clearly recognised that there was a public interest in not disclosing information of this nature which is less than 60 years old. The Cabinet Office also noted that the Act did not distinguish between information relating to the living or the dead in the context of section 37(1)(b).

Balance of the public interest arguments

24. Beyond the generic arguments concerning accountability and transparency of how the honours system operates, the Commissioner does not consider there to be any real or weighty public interest in disclosure of the requested information in this case. This point is recognised, albeit in the context of section 40, in the Commissioner's earlier decision notice FS50266931 at paragraph 28:

'...the Commissioner is of the view that there is no strong public interest in disclosure, notwithstanding the general public interest in promoting transparency. It is useful here to make the distinction between what is in the public interest and what is merely of interest to the public. The Commissioner's view is that any public interest lies in promoting openness and aiding public understanding of the process by which honours are awarded. However, in this case the only information held is the names of the individuals who refused an honour and the particular honour that was offered. No doubt the public may be excited or interested to learn the names of public figures who refused an honour but it is difficult to see what public interest this would serve.'

25. The Commissioner also notes that the complainant did not identify any specific public interest arguments concerning the disclosure of the information. Rather her submissions focused on emphasising the lack of weight the Cabinet Office's arguments for maintaining the exemption should actually attract.
26. Indeed, the Commissioner has some sympathy with complainant in this regard and, in general, he does not believe that the Cabinet Office's arguments for maintaining this exemption should be given any notable weight. In respect of its argument which focuses on the fact that disclosure would undermine the confidentiality of each individual honour and could be harmful to the individuals' families, the Commissioner does not believe that this argument can attract any weight given that in the context of section 41 he has concluded that the obligation of confidence does not extend beyond the death of the individual.
27. In terms of the Cabinet Office's broader argument that disclosure would undermine the integrity of the honours system, the Commissioner does accept that the more information which is disclosed about the system, including information about individual refusals, the more the system loses its 'integrity'. This is because the general assumption that decisions about individual honours would be kept 'secret' is eroded if the requested information is disclosed. Disclosure

of the requested information could therefore be seen as some sort of 'thin end of wedge' as it slowly starts to unpick the veil of secrecy surrounding the honours system. The Commissioner does accept that for honours system to operate effectively, it has to maintain some level of confidentiality.

28. However, the Commissioner believes that the weight that should be attributed to this argument is limited. This is because a clear distinction can be drawn between disclosure of the withheld information and disclosure of information about honours conferred on individuals who are still alive or indeed disclosure of more detailed information about **why** deceased individuals refused their honours. Moreover, despite the Cabinet Office's eagerness to point towards the intentions of Parliament in respect of section 63 of the Act, the Commissioner notes the fact that Parliament created a qualified, not an absolute, exemption for information about individual honours decisions. Thus it envisaged that there may be circumstances where it would be in the public interest for information about individual honours decisions to be disclosed.
29. Having taken all these points into account the Commissioner considers that for the information relating to 1951 to 1999 the public interest in maintaining the exemption is equally balanced with the public interest in disclosing the information. Therefore, given the formulation of the public interest test at section 2 of the Act, the outcome is an order for the disclosure of this information. With regard to the information relating to 2000 to 2010, the Commissioner recognises that the disclosure of this more recent information could undermine the integrity of the honours system to a greater extent. For the information from that period the balance of public interest tips in favour maintaining the exemption. The Commissioner recognises that wherever the line is drawn, there will always be a valid argument that it is arbitrary. However, he considers that ten years prior to the date of the request is a reasonable and appropriate cut off point in all the circumstances.
30. The Commissioner further recognises that it would be unreasonable to expect the Cabinet Office to take steps to establish whether the relevant individuals to whom the information relates has in fact died. For some of them it will be immediately apparent that they are deceased and it may be a matter of common knowledge. This decision only takes effect in respect of such individuals. The Commissioner notes that such a common sense approach accords with the complainant's own suggestion when the request was made. She said that if it would be excessively time consuming to establish whether an individual has deceased, she is happy for the Cabinet Office to assume that an individual is still alive. The Commissioner commends this approach and has adopted it for the purposes of his decision.

The Decision

31. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- The information relating to the years 2000 to 2010 is exempt from disclosure on the basis of section 37(1)(b) of the Act and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing that information.

32. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- Section 41(1) does not provide a basis to withhold any of the withheld information.
- Although the information relating to the years 1951 to 1999 is exempt from disclosure on the basis of section 37(1)(b) of the Act, in all the circumstances of the case the public interest in maintaining the exemption does not outweigh the public interest in disclosing that information.

Steps Required

33. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- Provide the complainant with the information she requested for the years 1951 to 1999. For clarity this information consists of the name of the individual, the type of honour and the year in which the honour was refused.

34. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

35. In undertaking this step, the Commissioner does not expect the Cabinet Office to undertake any specific enquires in order to establish whether an individual has in fact died; rather it only needs to decide whether it is immediately apparent as a matter of fact that a relevant individual is dead.

Failure to comply

36. Failure to comply with the steps described above 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.

Right of Appeal

37. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

38. 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.
39. 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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