



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50757813**

Appeal Reference: EA/2019/0031

**Heard at Field House, London
On 7 January 2020 (deliberations 21 January)**

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

NIGEL WATSON & ANDREW WHETNALL

Between

FOREIGN AND COMMONWEALTH OFFICE

Appellant

and

INFORMATION COMMISSIONER

First Respondent

JONATHAN CORKE

Second Respondent

Appearances: -

Appellant: Rory Dunlop QC

First Respondent: Leo Davidson

Second Respondent: did not appear

Cases

Ranger v House of Lords Appointments Commission [2015] EWHC 45

DECISION AND REASONS

1. On 5 October 2017 the New York Times published a major story which alleged decades of sexual misconduct by Harvey Weinstein and how he enforced a code of silence to protect himself from public criticism. These revelations produced a major impact and energised a global movement against such coercion and control "MeToo". The story noted that Mr Weinstein had been given an honour by Her Majesty who had made him an honorary Commander of the British Empire (CBE).
2. On 31 October Mr Corke made a request under FOIA to the Appellant (the FCO) for: -

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.

3. The FCO provided him with the press release which had announced the award but declined to provide the information requested relying on two exemptions under FOIA s40 (2) and (3) which protects personal data from being disclosed if to do so would be unfair and s37(1)(b) which protects from disclosure information related to the conferring by the Crown of any honour where the public interest is better served by withholding rather than disclosing the information. Mr Corke complained to the Information Commissioner who investigated.
4. In her decision notice the IC accepted that: -

"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.

5. However, the fact that the nomination had been made 13 years before in her view weakened the confidentiality argument. She found that: -

“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.”

6. With respect to Mr Weinstein’s personal data she accepted that he had a reasonable expectation that it would not be disclosed, however she did not view this disclosure as serious given that the detailed allegations had been made against him *“it could well be argued that disclosure of the withheld information would not have any infringement into Mr Weinstein’s privacy”*.
7. In appealing against the decision the FCO argued that with respect to the s40 exemption the IC had erred in focusing on the infringement of Mr Weinstein’s privacy, whereas she should have considered the unfairness of the disclosure as he had not agreed to disclosure, he had not chosen to apply for an honour, he could have had no expectation that the FCO might disclose his personal data at the time when he agreed to accept the honour and he would not have been able to obtain the same data if he had asked for it.
8. The FCO submitted that with respect to the s37 exemption the IC had acknowledged that the exemption was engaged and that some of the information was administrative in nature, while there was some interest in disclosure of the other information that was true in any such request and disclosure would undermine the confidentiality of the honours system. It relied on a case related to the proceedings of the House of Lords

Appointments Committee Ranger v House of Lords Appointments Commission
[2015] EWHC 45:-

"29 More broadly, because at least some information will only be provided if its source or content is kept confidential, the measure also serves the objective of helping ensure the protection of the rights of all members of the public to have the fullest information provided, with full candour, to the Commission in its work in connection with appointments to the House of Lords. I emphasise that in this latter situation the rights are those of all members of the public..."

9. The FCO argued that the public interest argument advanced by the ICO of revealing whether allegations against Mr Weinstein were referenced or considered in the nomination process was flawed because disclosure could not prove the negative since it would merely record that no information was held in recorded form rather than that no consideration was given. If there was disclosure that allegations of misconduct were discussed it would undermine the expectations of those participating in the process from making nominations or raising or discussing allegations of misconduct. There would be concern of giving a poisoned chalice which could lead to discussions of an individual's conduct which were then disclosed in response to a FOIA request, and those consulted should feel free to discuss candidly allegations without fear that the allegations would later be disclosed exposing the subject and the maker of the allegations to negative media attention and intrusions into their privacy.
10. In resisting the appeal, the ICO argued that there was public interest in the disclosure because Mr Weinstein had accepted the honour. Fairness depended on the circumstances of the case including what was already in the public domain. With respect to the s37 exemption the public interest lay not in knowing how the honour's system worked, but in how it had worked in Mr Weinstein's case. The non-disclosure of the name of the nominator meant that the "poisoned chalice" effect would not arise.
11. Mr Holland Director of Protocol and Vice-Marshall of the Diplomatic Corps, who co-ordinates the work of the FCO with respect to the awarding of honours gave evidence as to the role of the honours team of the FCO with respect to foreign nationals who are nominated for an honorary award. He described the various checking procedures in place to assess the merits of potential recipients of honorary awards. He stated (witness statement paragraphs 25,28,29): -

"25 A nominee's personal integrity is crucial to the recommendation to award an honour and also central to consideration of forfeiture of an honour. If during the consideration process information of concern, such as allegations of rumours concerning a nominee's integrity, was brought to the committee's attention, the nomination might be deferred to allow for further information to be gathered through our own investigations or via official investigations. This might include additional internet checks, checking with a) the relevant post overseas, b) the desk in London c)

the relevant government department. If the allegations were serious enough and our additional investigations did not resolve concerns, it is likely the nomination would not go forward.

...

28 An honours recipient will not be informed who has nominated them, and will likely not have been told anything regarding their or the nominator's personal data. It is the standard practice within HM Government not to disclose any personal data held in relation to the nomination/conferral or an honour to people who have been nominated for, or awarded, an honour. Should a nominee or an honours recipient request such personal data, we should refuse to disclose this information...to date the FCO have never received a data subject access request from a nominee or honours recipient, which is likely to reflect the confidential nature of the honours system and that such persons would very likely have an expectation that their personal information would be held securely and protected during the nomination process and beyond.

29 I understand from the CO [Cabinet Office] that the CO has a record of one subject access request from a nominee. The CO refused to disclose this information...."

12. In submissions Mr Davidson for the ICO emphasised that with respect to s37 the ICO was not relying on generic public interest, but the highly specific (and rare) circumstances which give rise to a particular public interest in respect of this information which included the large scale public discussion about Mr Weinstein and the MeToo movement's response to the allegations made in his case. There was a serious issue of public scrutiny about the way a public authority rewards effort while ensuring probity.
13. Mr Dunlop for the FCO expanded on the implications of whether information about allegations was contained in the disputed material. If there were no such information this would not show any deficiencies in the system as there was no evidence to suggest that officials should have known of the allegations against Mr Weinstein in 2003/2004, when they were considering him for an honour.
14. If there were such information then disclosure would still affect the expectations of the nominator and others involved in the process including those consulted about the nomination who are aware of unpublished rumours of uncertain veracity who might not reveal the issue to the honours committee for fear it would enter the public domain through a FOIA request.
15. In closed session Mr Dunlop QC explained which of the two hypotheses, discussed in his open submissions, applied. Mr Davidson agreed this was the correct hypothesis. Submissions were made on the basis of this.

Consideration

16. Both Counsel agreed that the New York Times article was the original source of public knowledge and concern about allegations of sexual misconduct by

Mr Weinstein. Both Counsel also agreed on the importance of maintaining an effective honours system.

17. The tribunal was taken to two specific decisions made by the ICO with respect to disclosure around the honours process. These were: -

- FS50798936 which raised similar issues of allegations of sexual misconduct to this case and the ICO upheld the FCO decision not to disclose information relating to Arthur C Clarke.
- FS50197952 where the ICO overturned a decision of the Cabinet Office not to disclose the specific undertakings with respect to becoming a UK resident which Lord Ashcroft made when he became a working peer: *He therefore considers that the requested information can be properly characterised as being Lord Ashcroft's personal data but fundamentally relating to his public role.*

18. In addition, the tribunal was referred to the High Court decision in *Ranger* and the ICO decision notice FS50318448 which related to the award of a CBE and the ICO ordered the disclosure of the long citation from the document titled 'Honours Citation Form' relating to the particular named individual. That decision was the subject of appeal by the complainant seeking more information than disclosed (*Luder*). The tribunal noted the significant amount of information available about the workings of the honours system and accepted: -

"16...The evidence of Mr Allan, a Permanent Secretary within the Cabinet Office, was that every stage of the honours process was carried out under conditions of confidentiality. Assurance was given to those seeking to nominate people for honours and those writing letters of support that their participation and comments would remain confidential. The traditional confidentiality of the process was maintained at the highest level with the prohibition on Members of Parliament questioning Ministers concerning the grant or refusal of honours. Members of the honours committees, consulted in connection with another FOIA case, indicated that they would not have taken part in the process if they knew that their views were likely to be made public. If confidentiality could no longer be assured there was a risk that people would be reluctant to give their full views and there would not be the frank discussion of candidates within the honours committees and advice given to the committees could be less frank and effective than currently.

17. The tribunal was satisfied that the disclosure of the long citation promoted understanding of the honours system and the merits of Mr Luder which had led to him being awarded a CBE."

19. While the IC's decisions as well as those of this tribunal are not in any way authority for this tribunal they are of some modest use in understanding how such requests for information are handled. In *Ashcroft* the IC ordered disclosure of information about undertakings which had resulted in Lord Ashcroft becoming a member of the legislature. In *Luder* the information

disclosed was in essence the information in the press release accompanying the announcement of Mr Weinstein's honour. The importance of the principle of maintaining the confidentiality in the very similar context of appointments to the House of Lords was clearly set out by the High Court in *Ranger* which is that it protects the interests of all members of the public by ensuring that the system is as well-informed as is possible. The tribunal accepted the evidence of Mr Holland on the detailed working of the honours system.

20. Adopting the two-hypothesis model of the FCO, if there is no evidence of the allegations in the papers from nearly 17 years ago, then all the disclosure achieves is confirming the accuracy of the New York Times article from 2017 that knowledge of the allegations of misconduct was, until that publication published the story, a closely guarded secret. If there is evidence of the allegations then in future cases where individuals are consulted who may know something to the detriment of a nominee which they have not revealed, they may be unwilling to disclose it for fear that it will end up in the public domain whether it is true or false. It is common ground between the parties that there is significant public interest in maintaining an effective honours system. In *Ranger* the High Court acknowledged the damage that disclosure would do to the system and that the public interest was the interest of each and every member of society.
21. The tribunal is satisfied that the FCO is correct to argue that the public interest balance to be struck with respect to the s37 exemption falls decisively in favour of non-disclosure and therefore it is not necessary to explore its other grounds of appeal.
22. The appeal is allowed.

Signed Hughes

Judge of the First-tier Tribunal
Date: 29 January 2020