



Neutral Citation Number: [2024] UKFTT 1132 (GRC)

Case Reference: FT/EA/2024/0108

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

**Heard by Cloud Video Platform  
On: 29 October 2024  
Deliberations on: 11 December 2024  
Decision given on: 18 December 2024**

**Before**

**TRIBUNAL JUDGE HEALD  
MEMBER YATES  
MEMBER COSGRAVE**

**Between**

**MARTIN ROSENBAUM**

**and**

Appellant

**(1) THE INFORMATION COMMISSIONER  
(2) HOUSE OF LORDS APPOINTMENTS COMMISSION**

Respondents

**Representation:**

The Appellant represented himself

For the 1st Respondent: no attendance

For the Second Respondent: Alex Ustych of counsel

**Decision:** The appeal is allowed in part and dismissed in part

**Substituted Decision Notice:**

Within 35 days of being sent this Decision the 2nd Respondent shall disclose a copy of the citations relating to The Rt Hon the Baroness Kettle of Letchworth at part page A26CB – A27CB and the Rt Hon the Baroness Owen of Alderley Edge on part of page A31CB and as regards Baroness Owen this shall include disclosure of parts of pages A31CB A32CB to show who the others were who supported her citation but not what they said.

## REASONS

1. This Decision relates to an Appeal brought by the Appellant pursuant to section 57 Freedom of Information Act 2000. It is in respect of a Decision Notice issued by the Information Commissioner on 6 March 2024 and concerns a request for information made to the House of Lords Appointments Commission on 5 July 2023. The Appellant and the representatives of the parties and the witness are thanked for their attendance and assistance to the Tribunal.
2. What follows is a summary of the submissions, evidence and our view of the law. It does not seek to provide every step of our reasoning. The absence of a reference by us to any specific submission or evidence does not mean it has not been considered. In this Decision the following definitions are used:-

Freedom of Information Act 2000	FOIA
General Data Protection Regulation	GDPR
the Public Interest Balance Test	the PIBT
Mr Martin Rosenbaum	the Appellant
The Appellant's Grounds of Appeal	GoA
The Information Commissioner	the IC
The House of Lords Appointments Commission	HOLAC
The House of Lords	HoL
Decision Notice issued by the IC dated 6 March 2024 ref IC-267640-H9W6	the DN
The Rt Hon Boris Johnson	Boris Johnson
Prime Minister of the United Kingdom	PM
Clare Brunton the witness from HOLAC	Ms Brunton
Alex Ustych counsel for HOLAC	counsel

### **Background**

3. Boris Johnson resigned as PM on 6 September 2022. He nominated a number of people to be considered for appointment as life peers in his resignation honours list. These included Ross Kempell and Charlotte Owen. Both were appointed life peers by His Majesty the King on the advice of the The Rt Hon Rishi Sunak MP as PM and as announced by the Cabinet Office on 9 June 2023. They became The Rt Hon the Baron Kempell of Letchworth and The Rt Hon the Baroness Owen of Alderley Edge.
4. HOLAC was established in 2000 and is an independent, advisory non departmental public body. It is sponsored by the Cabinet Office. It consists of members appointed

by political parties and members independent of political parties and/or Government. Its Chair is an independent member. It is subject to FOIA by section 3(1) and schedule 1 part 6 FOIA. It has two distinct functions which are:-

(a) to recommend individuals for appointment as non party political life peers (cross bench peers)

(b) to vet nominations for life peers nominated by UK political parties "*to ensure the highest standards of propriety*" (political peers).

Relevant only to this Appeal is its role set out at (b) above ie that for political nominations to the HoL where their role is (A25):-

*"...to carry out vetting only on the grounds of probity and propriety. HOLAC's advice did not encompass matters of merit or suitability, which are outside of its remit for political lists and are a matter for the Prime Minister and the nominating parties."*

5. HOLAC and its role and how it interprets its role and its processes are not on a statutory or regulatory footing. Its authority derives from the PM of the day who sets and could change its remit. In effect it operates by convention. The words it uses such as "propriety" or "probity" as opposed to say "merit" or "suitability" have the meanings adopted and defined by HOLAC. HOLAC said that it interprets "propriety" as meaning that:-

*i) the individual should be in good standing in the community in general and with the public regulatory authorities in particular; and*

*ii) the past conduct of the nominee would not reasonably be regarded as bringing the House of Lords into disrepute.*

6. The relevant process from nomination to appointment (if successful) in outline only is as follows:-

(a) a citation is prepared by the PM or other political party leader and sent to HOLAC. It is the PM's written recommendation for an appointment.

(b) the chair of the relevant political party signs a certificate confirming whether the nominee has been involved in a financial transaction with the party.

(c) the prospective nominee completes a HOLAC consent form. This provides the nominee's written consent to HOLAC for them to make further enquiries in relation to their nomination. The form also provides personal information.

(d) HOLAC then vets the nomination checking "propriety" including asking for any relevant information from bodies such as ACRO Criminal Records, HMRC and the electoral commission. HOLAC also carries out online searches against the name of the nominee. In addition to this HOLAC sometimes receives other unsolicited information.

(e) once information is received officials put together a report for HOLAC to consider at a meeting and subsequently HOLAC meets.

(f) HOLAC (for political peers) either advises the PM that it sees no reason not to recommend appointment or draws any concerns to the attention of the PM. It might also highlight "... issues of concern which it judges fall short of probity concerns which might prevent an appointment, but which it considers nonetheless constitute relevant propriety or presentational considerations, were an appointment to be made."

(g) it is then for the PM to decide whether to make a recommendation to the King for the appointment to be made.

7. Ms Brunton in her statement (para 21(f) A61) also said that:-

*"... should the Prime Minister recommend an appointment that HOLAC has indicated it would not support, HOLAC would write to the Public Administration and Constitutional Affairs Select Committee, indicating as much. The purpose of this process is to ensure transparency"*

8. There is widespread interest in the HoL as part of Parliament and this includes interest in the composition of the HoL and with the process of the appointment of peers including HOLAC's role in that process. We were provided, for example, with a copy of extracts from the UK Governance Project report published on 1 February 2024 (and after HOLAC's response to the request in this appeal). This reviewed the work of HOLAC and made a number of recommendations including that HOLAC should be put on a statutory footing, no one should be nominated unless approved by HOLAC and that transparency should be increased by publication of the citations for approved appointments. Evidence provided also showed that there was media and other interest around the appointment of the two life peers in question with a suggestion made that the level of interest was greater than one might normally expect.

### **Role of the Tribunal**

9. The information above is by way of background and for context. Our role does not involve making judgments on the establishment or role of HOLAC, its use of the language it adopts or how peers are appointed to the HoL. Nor is it to question, in any way, the propriety, probity, merit or suitability of the two life peers connected to this Appeal. This Decision does not seek to do this. The Tribunal's role in an Appeal by section 57 FOIA is as set out in section 58 which provides that:-

*(1) If on an appeal under section 57 the Tribunal considers –*

*(a) that the notice against which the appeal is brought is not in accordance with the law, or*

*(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

*(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

10. In:-

(a) *NHS England -v- Information Commissioner and Dean [2019] UKUT 145 (ACC)* the UT said:-

*"10. The First-tier Tribunal 'exercises a full merits appellate jurisdiction and so stands in the shoes of the IC and decides which (if any) exemptions apply..."*

(b) *Peter Wilson -v- The Information Commissioner[2022] UKFTT 0149* it was held that:-  
*"30...the Tribunal's statutory role is to consider whether there is an error of law or inappropriate exercise of discretion in the Decision Notice. The Tribunal may not allow an appeal simply because it disagrees with the Information Commissioner's Decision. It is also not the Tribunal's role to conduct a procedural review of the Information Commissioner's decision making process or to correct the drafting of the Decision Notice."*

### **Evidence and matters considered**

11. We were provided with:-

(a) the Appellant's and HOLAC's skeleton arguments and authorities

(b) the Bundle, Supplementary Bundle, the Closed Bundle and a Supplementary Closed Bundle of 42 pages

(c) the open and closed witness statements of Ms Brunton dated 19 September 2024 with an annex

(d) a section of ICO guidance and copies of various newspaper articles

(e) a 10 page extract from a much longer document called UK Governance Project of 1 February 2024

(f) a document entitled "HOLAC process for vetting party political nominees, a "Guide to Completing the Vetting Process" and The Civil Service Code dated 16 March 2015

12. Ms Brunton was at the Appeal and gave evidence and was cross examined by the Appellant. She also gave evidence in the closed part of the Appeal. We also noted the submissions made by the parties at the Appeal.

### **From Request to Appeal**

13. On 5 July 2023 the Appellant asked HOLAC for (B57):-

*1. Copies of all material created between 6 September 2022 and the date of this request (5 July 2023) which relates to Ross Kempzell*

2. Copies of all material created between 6 September 2022 and the date of this request (5 July 2023) which relates to Charlotte Owen

14. On 2 August 2023 HOLAC replied (B58) indicating it would not provide the information requested in reliance on the exemptions at sections 37, 41 and 40(2) FOIA. On 4 August 2023 the Appellant requested an internal review (B61). The response from HOLAC on 4 September 2024 (B63) was that in their view the exemptions had all been correctly applied. On 11 September 2023 the Appellant complained to the IC by section 50 FOIA (B69-B71). On 6 March 2024 the DN was issued. In summary this said (A5):-

*"The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of section 37(1)(b) and that in all the circumstances of the case the public interest favours maintaining the exemption"*

15. This Appeal from the outcome of the DN was issued on 29 March 2024. The outcome sought (A19) was *"I request that the Tribunal allows my appeal, and that in place of the ICO's decision it substitutes a decision notice which orders HOLAC to send me the information I requested."* Thereafter, in summary, on 16 May 2024 HOLAC responded (A24 -33) and the IC responded (A34-A39) and on 31 May 2024 the Appellant replied (A44-A54).

### **Scope**

16. When HOLAC responded to the request it referred to the exemptions at sections 37(1)(b), 41(1) and 40(2) FOIA. In the DN the IC's conclusions only referred to section 37(1)(b). The question of scope was raised at the Appeal. Having heard from the parties as regards section 37(1)(b) FOIA we noted that there was agreement that the exemption was engaged and thus the issue was limited to whether the PIBT favoured disclosure or not.

17. Having reviewed HOLAC's schedule of withheld material (A5CB) we also concluded that section 40(2) remained in scope because while the Appellant accepted some information would be personal data (and it was accepted by the Appellant that it could be used to protect the identity of "junior officials" (page A53)) he considered disclosure necessary (B61):-

*"...to satisfy the extremely important legitimate interests of the general public to understand fully the processes for appointing people who take decisions and influence debate on behalf of the nation, and for the public to be able to see for themselves whether the processes are adequate and merit reassurance or modification."*

18. We also kept s41 in mind in particular as regards the Appellant's case that *"As to Section 41, in my opinion there would not be an actionable breach of confidence, because the public interest (for the reasons already given above) favours disclosure."*

19. Finally reference was also made to section 23 FOIA which provides an absolute exemption in relation to any information relating to the security services. The

Appellant (para 51 of his skeleton and at the Appeal) accepted that "*any substantive vetting responses from section 23 bodies may therefore be withheld*" and Ms Brunton quite properly would not be drawn on this subject. Section 23 was not part of the scope of this Appeal.

## Law

### **FOIA**

20. FOIA provides that any person making a request for information to a public authority is entitled to be informed in writing if that information is held (section 1(1) (a) FOIA) and if that is the case to be provided with that information (section 1 (1) (b) FOIA). These entitlements are subject to a number of exemptions which can be absolute or subject to the public interest balance test ("the PIBT") in section 2(2)(b) FOIA namely that 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."*

### **Section 37(1)(b) FOIA**

21. Section 37(1)(b) FOIA provides as follows:-

*"Information is exempt information if it relates to – (b)the conferring by the Crown of any honour or dignity."*

22. The exemption at section 37 is subject to the PIBT. When considering this we had regard to authorities such as *Christopher Martin Hogan and Oxford City Council v the Information Commissioner EA/2005/0026&0030*) and *All Party Group on Extraordinary Rendition v IC [2013] UKUT 560*.

23. The time for determining the PIBT is the date the public authority makes its decision on the relevant request (*Montague v ICO and Department for Business and Trade [2022] UKUT 104*). Later material can be relevant when it assists with an understanding of the position as at the date of response (*Rob Evans -v- Information Commissioner [2012] UKUT 313 AAC para 58*)

*"We recognise that in some circumstances it is permissible to have regard to later occurring matters if they cast light on the circumstances at the reference date."*

24. We were referred to a number of authorities specifically concerning section 37 including these that follows.

25. *Ranger v House of Lords Appointments Commission [2015] EWHC 45* related to the unsuccessful self nomination for a non political peerage by the claimant. He sought disclosure of two unsolicited letters sent to HOLAC. In dismissing the claim it was held by Knowles J. that:-

*"38 Generally speaking there is of course force in the point that transparency can provide reassurance. But there is a price to be paid by that approach. As already mentioned the availability of access might inhibit frank contributions of information to the appointments process. It is very much in the public interest that decisions about membership of the legislature should be made with full information"*

*40. Where in the course of the appointments process the Commission receives contributions of information it must be trusted to deal with them appropriately and give them the weight that it judges them to merit. If, using its best judgment, they merit no weight the Commission must be trusted to give them no weight."*

26. *Foreign & Commonwealth Office v the Information Commissioner and Jonathan Corke, EA/2019/0031 (29 January 2020)* involved the granting of a CBE to Harvey Weinstein in 2004. A FOIA request was made for information about his nomination and the award. The FCO, citing sections 37(1)(b) and 40(2), refused to provide all that had been requested. The FtT decided that the FCO were:-

*"...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."*

27. In *Cabinet Office v Information Commissioner and Morland [2018] UKUT 67 (AAC); [2018] AACR 28* a request had been made for minutes of a meeting relating to the proposals for a National Defence Medal for veterans. The request was refused citing section 37(1)(b). The UT at paras 20 and 21 said:-

*" 20... section 37(1)(b) must be read against the backdrop of section 37 as a whole. Thus we agree with the F-tT in Luder v Information Commissioner and the Cabinet Office (EA/2011/0115 at paragraph 16) that the purpose of section 37 itself is to protect the fundamental constitutional principle that communications between the Queen and her ministers are essentially confidential. Section 37(1)(a)-(ad), as noted in the previous paragraph, specifically protects the actual communications with the Sovereign and certain other members of the Royal Family and the Royal Household. Section 37(1)(b) must be concerned with activities other than communications with the Sovereign. The logical purpose of section 37(1)(b) is to ensure candour and protect confidences in the entire process of considering honours, dignities and medals. Colonel Scriven's argument that where a decision is made not to recommend the creation of a particular award or medal then Her Majesty may well not be informed does not avail him once it is recognised that the provision is not confined to communications with the Sovereign. In any event it does not detract from Ms Stout's submission that recommendations would have to be made to the Queen both about proposed new honours as well as the proposed new recipients of existing honours – and information about the decision on the NDM is information which thereby "relates to ... the conferring by the Crown of any honour or dignity".*

21. Any FOIA request in relation to a proposal to award a medal to a particular named individual would in principle inevitably engage section 37(1)(b), but such information would in any event be covered by the absolute exemptions in section 40(1) (personal information) and/or section 41 (confidential information). That suggests section 37(1)(b) must serve some



*wider purpose not limited to the circumstances of identifiable individuals: for example, any discussion in the HDC about a proposal to create a new honour. However, we agree with both Ms Stout and Mr Lockley that there are limits to the breadth of “relates to” and “any” in this context – so information about the venue where the HDC meets could not realistically be said to be information that “relates to ... the conferring by the Crown of any honour or dignity”.*

28. We were also referred to a FtT Decision which involved the Appellant in this Appeal. In *Rosenbaum v Information Commissioner & Cabinet Office*, [2021] UKFTT 2020 0050 Mr Rosenbaum in that Appeal had made a request for information relating to the award of an honour (in that case an OBE, to Vijay Patel). The request was refused in reliance on the exemptions in sections 37 and 41. In giving its Decision the FtT said

*"31... Under normal circumstances the importance of maintaining the confidentiality of the process far outweighs the value of disclosure in one particular case. The tribunal must be alert to ensure that its actions do not undermine public confidence in a process which is generally well regarded as performing a useful function of recognising the myriad various contributions individuals make to the well-being of our society or humanity at large. Ms Ewens evidence provided a clear picture of the systematic way the merits of individuals are assessed and the somewhat cautious and risk-averse way in which nominations are handled in order to ensure that no taint of scandal can attach to the process, a reflection of the perceived importance of the honour system in itself and also its link to the Monarch. In Bagehot's terminology, the honours system is a “dignified” part of the constitution with an “efficient” role in encouraging forms of behaviour.*

*32. Against this background the mismatch between the honour and the controversy concerning Mr Patel's business is stark; the Cabinet Office statement of 7 January 2019 can have done little to assuage that concern.*

*35...The public interest is in the disclosure of information which will go some considerable way to meeting the public interests, however she has identified a specific document which meets that need and has not gone further. FOIA is an information regime, not a documents regime. In order to meet the public interest in disclosure identified by the Information Commissioner to explain how the decision was made while protecting the confidentiality of the voluntary participants in the system (in order to avoid damage to their confidence in the confidentiality of the system) only parts of the document referred to as “the identified information” need to be disclosed. In the closed annex to this decision I identify those parts of “the identified information” whose disclosure is necessary to achieve the public interest in transparency without damaging the public interest in the confidentiality of the volunteers who make the system possible. The disclosure of the rest of that document and of the residual information would, as Mr Rosenbaum argued, increase public understanding of the process, however that benefit is not proportionate to the harm caused to the functioning of the system"*

29. We were also referred to the ICO's Guidance which sets out this rationale for section 37:-

*"The exemption preserves the integrity and robustness of the honours system in order to ensure that awards are conferred solely on merit. Recipients often enjoy privileged positions, and, in some cases are entitled to take up public roles. For example, a working peer can take*

*up a seat in the House of Lords. The exemption is also important in protecting the confidentiality of individuals who have participated in the honours process"*

30. The ICO Guidance also refers to confidentiality and the possible "chilling effect" as factors against disclosure and says:-

*"The honours process relies on the principle of confidentiality, both in terms of the views put forward by the members of the nomination committees and the submissions provided by third parties concerning the suitability of nominees.*

*There is a risk that the routine disclosure of the participants' views through FOIA could erode that principle of confidentiality. This in turn could lead to a chilling effect, whereby participants will be less willing to express their free and frank opinions in future.*

*Such a loss of frankness and candour could result in poorer quality debate and decision-making and have a detrimental effect on the robustness of the nomination process.*

*The risk of a chilling effect is at its greatest during the nomination process and continues to be a significant issue in the period immediately following the publication of the honours list. However, the risk gradually begins to decrease as time passes and the participants' expectations of confidentiality start to lessen, although it never diminishes entirely.*

*The nominees themselves are likely to have a reasonable expectation that their nominations will remain confidential until the honours list is officially published. Once the list has been published this should no longer be a factor.*

*Candidates who were nominated but did not receive an honour might expect this confidentiality to extend beyond the publication of the honours list. This is due to the potential distress and embarrassment they may suffer should this become public knowledge. In this situation, you must give strong weight to the heightened expectation of confidence those individuals might have. You have to balance the factors in favour of disclosure and those in favour of maintaining the exemption."*

31. In *Department for Environment, Food and Rural Affairs v Information Commissioner and Badger Trust* ([2014] UKUT 526 the UT said (para 75-76)

*"75 We are not persuaded that persons of the calibre required to add value to decision making of the type involved in this case by having robust discussions would be inhibited by the prospect of disclosure when the public interest balance came down in favour of it...."*

*"76...They and other organisations engage with, or must be assumed to have engaged with, public authorities in the full knowledge that Parliament has passed the FOIA and the Secretary of State has made the EIR. Participants in such boards cannot expect to be able to bend the rules."*

32. In *Department of Health v Information Commissioner and Simon Lewis* ([2015] UKUT 159 (AAC) Charles J held:-

*"27. ...The lack of a right guaranteeing non-disclosure of information...means that that information is at risk of disclosure in the overall public interest ... As soon as this qualification*

*is factored into the candour argument (or the relevant parts of the safe space or chilling effect arguments), it is immediately apparent that it highlights a weakness in it. This is because the argument cannot be founded on an expectation that the relevant communications will not be so disclosed. It follows that ... a person taking part in the discussions will appreciate that the greater the public interest in the disclosure of confidential, candid and frank exchanges, the more likely it is that they will be disclosed...*

28. *...any properly informed person will know that information held by a public authority is at risk of disclosure in the public interest.*

29. *...In my view, evidence or reasoning in support of the safe space or chilling effect argument in respect of a FOIA request that does not address in a properly reasoned, balanced and objective way: i) this weakness... is flawed."*

33. In *Davies v Information Commissioner and Cabinet Office* [2020] AACR 2 the UT at para 26 said that para 75(vii) of the decision of the FtT in *Department for Education and Skills v Information Commissioner and Evening Standard* (EA/2006/0006) was common sense. That was:-

*"In judging the likely consequences of disclosure on officials' future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants since the Northcote-Trevelyan reforms. These are highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions. The most senior officials are frequently identified before select committees, putting forward their department's position, whether or not it is their own."*

### **Section 41 FOIA**

34. Section 41(1) provides that information is exempt 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.*

35. Although the PIBT does not apply to this exemption it is a defence to a claim of breach of confidence to assert that disclosure was in the public interest.

36. We had regard for example to the decisions in *Coco -v- A N Clark (Engineers) Limited* [1968] and *Derry City Council -v- the Information Commissioner* (EA/2006/0014). We considered the issues based on these steps:-

- (a) was the information obtained from a third party, for the purposes of section 41(1)(a) and, if so*
- (b) would its disclosure constitute an actionable breach of confidence, ie:*

(i) did the information have the necessary quality of confidence to justify the imposition of a contractual or equitable obligation of confidence?; if so:-

(ii) was the information communicated in circumstances that created such an obligation?; and, if so

(iii) would disclosure be a breach of that obligation?;

(c) would HOLAC have had a defence to a claim for breach of confidence based on the public interest in disclosure of the information?

37. The burden of demonstrating this element is on the Appellant (see *Evans v Information Commissioner* [2012] UKUT 313 (AAC)).

38. Additionally in our view if a person with a potential cause of action is unidentifiable or can be made to be unidentifiable for example by appropriate redactions then there may be no actionable breach of confidence.

### **Section 40(2) FOIA**

39. Personal data is defined in section 2 Data Protection Act 2018 as “any information relating to an identified or identifiable living individual...” and section 40(2) FOIA provides that:-

*“Any information to which a request for information relates is also exempt information if*  
*(a) it constitutes personal data which does not fall within subsection (1), and*  
*(b) the first, second or third condition below is satisfied.”*

40. Section 40(3A)(a) FOIA is the first of these three conditions by which personal data is exempt if “disclosure of this information to a member of the public otherwise than under this Act (a) would contravene any of the data protection principles...”

41. The GDPR principles include Article 5(1) GDPR which provides that personal data shall be processed “lawfully, fairly and in a transparent manner as regards the data subject” and Article 6(1) which provides for example that the processing of personal data shall only be lawful if:-

*(f) 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.*

42. Finally even if processing is lawful it must be carried out in a fair and transparent manner as regards the data subject.

### **The Parties' cases on section 37(1)(b) FOIA and the PIBT**

43. It is accepted that section 37(1)(b) is engaged thus the issue concerns the balance of the public interest. The parties set out their cases on the PIBT in the correspondence, DN, Appeal, responses and reply and submissions. A summary only follows.

#### **Reasons in favour of disclosure**

44. These were some of the reasons given in favour of disclosure:-

(a) HOLAC in its letter of response said (B58) "*there is a strong public interest in knowing that the appointments process is accountable and transparent, and in maintaining public confidence in the peerage appointments system.*"

(b) (B61) The Appellant said when seeking a review:-

*"The material under discussion concerns the appointment process and suitability of members of a legislative assembly – people who will be voting on laws, taking part in parliamentary debate, directly questioning ministers and so on. They will possess decision-making powers and political influence. The process for giving certain individuals this role requires a special, very high degree of legitimacy in our society, as it involves determining who has the right to make important decisions and influence debate on behalf of society as a whole. This requires maximum transparency, so that the process is both legitimate and seen to be legitimate, and the public can see for themselves that appropriate procedures and rules are followed. I therefore believe the public interest favours disclosure.*

and

*"This is particularly true in the case of the two individuals named in this request, given (a) their comparative youthfulness means they are likely to hold their decision-making and politically powerful roles for very many years, giving them power and influence for a much longer period than most of our legislators, and indeed they are likely in due course to be amongst the longest-serving legislators who have ever held that role in the UK; and (b) the widespread puzzlement and concern, of which HOLAC must be aware, as to what they have achieved, or what qualities they have demonstrated they possess, which could justify their appointment."*

(c) in its review HOLAC said (B64)

*"...we do appreciate the importance of transparency in the peerage appointments vetting process that encourages public interest, and the public's awareness of how the peerage appointments are handled. We also recognise that there is a public interest in the workings of the peerage system...The Commission fully agrees with your view that scrutiny of peerage appointments is critical, given the role that peers then play in the public and parliamentary life of the nation"*

(d) (A8) the IC in the DN said:-

*"it is clearly in the public interest that the public understand, and have faith in, the peerage appointments process. This includes understanding how HOLAC assesses nominations for peerages as part of a Prime Minister's Resignation List. The Commissioner appreciates that*

*HOLAC already places into the public domain significant information about the assessment process for such nominees. However, in the Commissioner's view disclosure of the withheld information in this case would provide a particular insight into how these processes were followed in respect of the two individuals in question.*

*The Commissioner is conscious that the two nominations in question were the subject of particular press and public interest as noted by the complainant. To some degree, the Commissioner can see that the public interest in the disclosure of information that HOLAC holds regarding these two nominations is therefore perhaps greater than in relation to the nominations of other individuals who received such peerages."*

(e) in his GoA the Appellant said (A18):-

*"2. This issue concerns the appointment of members of a legislative assembly, people with substantial political influence and decision-making powers to make laws governing the rest of the population. That process must require a great degree of legitimacy in our society, and that in turn demands maximum transparency.*

*4. Issues of propriety (which are HOLAC's responsibility) are an important aspect of assessing suitability for membership of the House of Lords.*

*5. There is extensive unease as to the lack of transparency in HOLAC's work, as evidenced for example in the recent call from the UK Governance Project for HOLAC to start to publish citations about all individuals it approves. "*

45. In his reply the Appellant said in addition:-

*"10 The case for disclosure goes well beyond the normal principles under FOI of promoting transparency, scrutiny, accountability and public understanding in relation to any key public function, although these principles are still applicable and are significant factors to be taken into account as a base level for the public interest in disclosure.*

*11 The material at issue here concerns the appointment process for a constitutional role involved in determining the rules of our society. Those appointed are members of the UK's legislature – people who can approve or reject proposed laws (and whose individual votes could be decisive), as well as being able to take part in parliamentary debates, directly question ministers, and so on. They possess decision-making power and political influence"*

46. He also argued against the damaging effects contended by HOLAC including any chilling effect on the basis for example of *Department for Education and Skills v Information Commissioner and Evening Standard (EA/2006/0006)* and *Davies and DEFRA*.

### **Reasons in favour of maintaining the exemption**

47. These included:-

(a) (B58) HOLAC said that *"there is a strong public interest in protecting the confidentiality of the consideration of individual nominees and ensuring the potentially sensitive vetting information can be candidly assessed.*

(b) The IC in the DN said " *However, the Commissioner agrees with HOLAC that in assessing the public interest in disclosure it is vital to remember that its role is limited to assessing the propriety of those nominated, which involves the assessment of the factors set out at paragraph 17. The Commissioner appreciates the complainant's point that propriety could, and should, be seen as part of assessing an individual's suitability. Nevertheless, the Commissioner does not wish to enter into a semantical debate about the definition of the word "suitability". Rather, in his view the key point is that HOLAC's role in considering a Prime Minister's resignation list does not involve any assessment as to the merits of a particular individual's nomination. The press and public criticism and concern at the nomination (and elevation to the House of Lords) of the two individuals, can in the Commissioner's view, be fairly and objectively described as questions regarding whether they merited such an award. Given the limited role of HOLAC in assessing such nominations, the Commissioner does not consider that disclosure of the withheld information would provide any particularly useful input into this debate or issue.*

(c) the IC also said:- *With regard to the public interest in maintaining the exemption, the Commissioner accepts that for HOLAC's processes to operate effectively there has to be a degree of confidentiality around individual nominations and their assessments. This is to ensure that all relevant parties can contribute freely and fully to the process without fear that potentially sensitive information would be disclosed.*

(d) In its response to the Appeal HOLAC said (A30):-

*"29. The Appellant's arguments on public interest substantially mirror those he put forward to the IC as part of his complaint, and again ignore the limited nature of HOLAC's function in respect of political nominees. Paragraph 3 of section 7.1 (of the Notice of Appeal) states that there was "widespread public puzzlement and concern as to the reasons for [the two life peers'] appointment". Paragraph 4 implies that this concern goes to HOLAC's assessment of their "propriety".*

*30. This is incorrect. HOLAC's consideration of 'propriety' (as defined in paragraph 10 of this Response) would not include assessment of experience/age, achievements, qualifications or suitability generally. The Appellant's attempt to link the two nominees' individual characteristics and the 'propriety' of their appointment confuses HOLAC's two distinctive functions. The concerns to which the Appellant alludes go to the nominees' suitability/merit (which fall outside HOLAC's function in this case), not their propriety/probity (which was HOLAC's focus).*

*31. Accordingly, disclosure of the withheld information would not meet the public interest arguments put forward by the Appellant. The DN was correct in its analysis, at par. 21, of the relevance of HOLAC's limited role in respect of the two nominations and that "given the limited role of HOLAC in assessing such nominations...the [withheld information would not] provide any particularly useful input to this debate or issue".*

*32. While there is a generic public interest in the transparency in and the public's understanding of the appointments process, its level is much lower than, for example, in Corke. The public interest in maintaining the confidentiality of vetting records is far greater, having regard to the following:*

a. HOLAC already facilitates transparency of its processes via guidance/information provided on its website. Members of the public armed with that information will know what issues are part of HOLAC's advisory role in relation to political nominees, and that it is not concerned with the suitability of those nominees. Disclosure of withheld material is not required for that purpose;

b. For HOLAC's processes to operate effectively, there must be confidentiality around individual nominations and their assessments. This ensures that all those who input into the process (the political party, the nominee, various agencies/authorities with whom enquiries are made) contribute freely and fully to the process, without fear of potential disclosure of any sensitive information. Disclosing the withheld information would severely undermine the confidentiality of the process (which is its cornerstone) and so HOLAC's effectiveness in the future. Furthermore, if the probity bodies did not have confidence that HOLAC would protect the information they provide it, they would need to reassess its future supply (having regard to their own legal duties). This would be significantly contrary to the public interest. This public interest analysis is on all fours with the IC's guidance;

c. The public interest in withholding the information, in the context of the 'chilling effect'/'confidentiality' considerations identified in the IC guidance, has not significantly diminished – the resignation list was published less than a year ago;

d. HOLAC's vetting requires the nominee's consent, which can be withdrawn at any time. If the confidentiality of the information a nominee provides to HOLAC (as well as information provided about them) is no longer properly protected, it is likely that future nominees will be deterred from providing the necessary consent. This would likely result in the reduction in the pool of those willing to go through the process and may ultimately lower the calibre of those who complete the process. This would be detrimental to the public interest.

33. Any information held by HOLAC which may be incidentally relevant to the issue of 'suitability' of the nominees (notwithstanding that this was not the subject of HOLAC's consideration), would nonetheless be exempt pursuant to s. 37 (1) (b) FOIA, for the same reasons"

## **Balance**

48. When addressing the question of the balance HOLAC said:-

(B58)"Taking all of the relevant factors into consideration, including the fact that the Commission already places a great deal of information about its working practices in the public domain to reassure the public that these are sufficiently rigorous, I consider that the balance of the public interest lies in maintaining the section 37(1)(b) exemption in respect to the advice given by the Commission to the Prime Minister regarding the above individuals on Boris Johnson's resignation peerage list"

(B64) "...I believe that the balance of the public interest was fully considered for the reasons set out in our previous letter. Having considered the public interest tests, we do appreciate the importance of transparency in the peerage appointments vetting process that encourages public interest, and the public's awareness of how the peerage appointments are handled. We also recognise that there is a public interest in the workings of the peerage system. While we



*acknowledge the weight of these public interest factors, I would maintain, however, that the public interest is in favour of withholding the information within scope of the request. "*

*(B65) "The Commission does not advise the Prime Minister about whether an appointment may be justified on grounds of suitability or merit; and its advice is not binding on the Prime Minister. The Commission therefore considers that the legitimate public interest in peerage appointments is not, in this instance, best served through releasing material it holds in which other considerations are in play; and in which the focus of your public interest concerns is unlikely to be well addressed. Confidentiality is important in order to protect the integrity of the system and without which the system could not function. It ensures that those involved, including nominees submitted to the Commission (whether successful or otherwise), can take part in the understanding that their confidence will be honoured and that decisions made are taken on the basis of full and honest information."*

49. The IC in the DN said:-

*(A8) The Commissioner accepts that disclosure of the information in the scope of the request would significantly undermine the confidentiality of the process, and in turn, HOLAC's ability to effectively conduct such assessments in the future. As a result the Commissioner considers there to be a significant public interest in maintaining the exemption, sufficiently so, that this outweighs the public interest in disclosure when taking into account the points that he has made above.*

50. In his reply (A46) the Appellant said that *In this case the balance of the public interest strongly favours releasing the information. The Commissioner's decision notice is wrong, because it does not fully take account of the factors for disclosure, and it also exaggerates the weight of the case against disclosure.*

51. In his reply (A51) and as explained at the Appeal the Appellant when concluding that the balance favoured disclosure set out his methodology as follows:-

*(a) There is a basic level of public interest in transparency, scrutiny, accountability and public understanding in relation to a key public function of this kind;*

*(b) On top of this, the process of selecting legislators has a very special and important constitutional status which requires maximum legitimacy in our society, and that in turn demands maximum transparency;*

*(c) This is especially true in the case of these two individuals;*

*(d) There is significant concern about a current lack of transparency in HOLAC's operations;*

*(e) It is particularly important for the biographical information and reasons for nomination on to be released (or alternatively for it to be stated that it was never supplied);*

*(f) Disclosure will not stop those involved in the vetting process continuing to fulfil their duties professionally and conscientiously"*

### **The Parties' cases on section 41 FOIA**

52. When HOLAC replied to the FOIA request it said (B59):-

*"...At the start of the vetting process the Commission informs nominees that any information provided by them and any information the Commission obtains in the course of its further enquiries of other bodies will be treated as confidential. The information therefore has the necessary quality of confidence and there is no overriding public interest that would allow it to be disclosed in breach of that confidence.... "*

53. In his request for a review (B61) the Appellant said that he did not accept that section 41 was relevant because

*"...disclosure can only constitute an actionable breach of confidence if it would be counter to the public interest. For the reasons I have already given above, I maintain that there are overriding public interests which favour disclosure."*

54. Responding (B66) HOLAC accepted a public interest defence existed for section 41 but:-

*"The information that is provided to the Commission, including on resignation honours, is obtained from another person and with their consent, is shared with the Commission members. It is only on this basis that the information is shared. I am satisfied that such information has the necessary quality of confidence, was imparted in circumstances which imported an obligation of confidence and that the disclosure of the information would have been both unauthorised by the person confiding the information and would be detrimental to them. I am in no doubt that disclosure of the information would be a breach of confidence and that it would be actionable in the courts. I also consider that any court action brought against the Commission would be likely to succeed."*

55. It was not dealt with in the DN but in his GoA (A18) the Appellant said:-

*"8. As to Section 41, in my opinion there would not be an actionable breach of confidence, because the public interest (for the reasons already given above) favours disclosure."*

56. HOLAC's Response was that (A32)

*"HOLAC identified to the IC that "it is holding agreements with the associated vetting bodies that the information they provide would remain confidential". If this confidentiality can no longer be assured, these vetting bodies would need to reassess the future supply of their information/advice (having regard to their own legal duties)"*

#### **The Parties' cases on section 40(2) FOIA**

57. In its response to the FOIA request HOLAC said that names and other personally identifying information about the nominees themselves was personal data and (B59):-

*"If it would not be fair to the data subject to disclose their personal data, an absolute exemption from disclosure applies. Even if the disclosure of personal data might be fair in some individual; cases, further consideration is then given to Schedule 2 and 3 of the Data*

*Protection Act, including whether processing might be necessary for the purposes of legitimate interests. The Commission undertakes to treat nominations in confidence, thereby creating a reasonable expectation that their names or similarly personally-identifying information, will not be released publicly. To release personally-identifying information (including an individual's name) would therefore, in the Commission's view, be unfair and would therefore contravene the first data protection principle."*

58. The Appellant accepted some information may be personal data but disclosure would be both fair and lawful because (B61):-

*"...disclosure is necessary to satisfy the extremely important legitimate interests of the general public to understand fully the processes for appointing people who take decisions and influence debate on behalf of the nation, and for the public to be able to see for themselves whether the processes are adequate and merit reassurance or modification"*

59. In its response following the review HOLAC said disclosure would contravene Article 5(1) GDPR and (B65):-

*"While I acknowledge a legitimate interest in the disclosure of the information requested, I do not consider that this outweighs the interests and rights of the individuals concerned. I am therefore satisfied that disclosure would not be lawful in this instance. I have also concluded that it would be neither fair nor transparent."*

60. In his Appeal the Appellant said:-

*"As to Section 40, in my opinion disclosure would be fair and lawful processing of personal data, as it is necessary for the vital legitimate interests of the general public to understand fully the processes for appointing people who take decisions on behalf of the nation, and for the public to be able to see for themselves whether such crucial processes are adequate."*

61. In HOLAC's response (from A32) it:-

- (a) referred to the data subjects' reasonable expectation of confidentiality
- (b) the potential for harm due to the nature of the vetting process
- (c) the relevant data subjects privacy rights outweighing the legitimate interest of the Appellant

62. In his reply the Appellant added (A52/53) that:-

*"34...I maintain that disclosure would be fair and lawful processing in this case for the personal data of these successful nominees who have been granted peerages This is because (in line with article 6(1)(f) of the UK GDPR) it is necessary for the legitimate interests of others, and those legitimate interests override the interests of the data subjects in their data being protected."*

*35.... disclosure is necessary to satisfy the extremely important legitimate interests of the general public to understand fully the processes for appointing parliamentarians who take decisions, make laws and influence debate on behalf of the nation, and for the public to be*

able to see for themselves whether the processes are adequate and merit reassurance or modification.

36. These legitimate interests in disclosure are extremely weighty, for the reasons I presented above under section 37.....it is also significant to note that people who agree to be nominated for a peerage have to accept they would be taking on a central public, political and constitutional role. This will inevitably come with additional scrutiny of their personal activities, background and interests, and thus reduced privacy. The legitimate interests of the public in the release of the information are therefore much greater than those of the data subjects in it being withheld"

### **Witness evidence**

63. The Tribunal had an open witness statement of Ms Brunton who attended the Appeal. From her statement we saw that she had been a civil servant since January 2013 and since July 2024 she had been employed:-

*"...as a Deputy Director in the Cabinet Office, in which role I am Head of the Honours and Memorialisation Secretariats and, in a separate capacity, Secretary to the House of Lords Appointments Commission (HOLAC / Commission). In my role I am responsible for the honours system and memorialisation of The Late Queen Elizabeth II as well as supporting HOLAC as its senior official. These roles are separate, given that HOLAC is an arms-length advisory body, which is staffed by civil servants but which supports the Commission as an independent organisation. In my role as Secretary to HOLAC, I am responsible for supporting the Commission in its core functions of making nominations for membership of the House of Lords to the independent non-party-political (crossbenches) and of the propriety vetting of life peerages to the crossbenches and political benches..."*

64. Because of her central role in HOLAC, it was useful to have evidence from Ms Brunton. However, and in fairness to her, we noted that she had only been in post at HOLAC since July 2024 and had no previous experience dealing with its role. Her statement was signed within about 10 weeks of taking up her HOLAC role and she had not been involved with the resignation list in question.
65. Ms Brunton was asked questions by the Appellant. Those we found most helpful for us in considering this matter appear below.
66. She was asked about the vetting process as outlined in para 20 of her statement. She was asked to explain the words propriety and probity and the phrase "good standing in the community in general." It was suggested that not being in good standing was broader than the role as described for political peers and was in effect a "suitability" test. Ms Brunton's evidence was to refer back to the definition set out by HOLAC itself.
67. Ms Brunton was referred to para 21(f) of her statement. She did not know what would happen if the PM of the day did not follow HOLAC's advice and if HOLAC were to make a referral to the Public Administration and Constitutional Affairs Select Committee.

68. Questions were put to her which sought to establish if disclosure would cause harm. Ms Brunton's answer was in effect that while she could not see any harm in the release of some of the information they held as regards the two peers in question the issue would be that in future HOLAC, when being asked for information, would need to decide whether to disclose it or not and if they did not then inferences could be drawn. The concern in effect was that to release this type of information once would set a precedent for the future.
69. Ms Brunton was also asked if the information in the citations was mostly in the public domain and what HOLAC would do if something said was a lie. She confirmed that HOLAC did check the content against publicly available information but potentially not all. She gave a hypothetical example that the exact details of a person's primary school might not be checked. She indicated that the information was not always a carbon copy of that published on the individual's LinkedIn profile. She said that not everything in a citation would always be in the public domain. She also indicated that in her view those providing information to HOLAC did so on an understanding of confidentiality.
70. Ms Brunton was asked whether HOLAC ever "strayed" into looking at "suitability" more broadly than "propriety" and if they did if that would be recorded in the record of HOLAC's meetings. She indicated that if something was raised it would be in the minutes.
71. In paragraph 33 of her statement Ms Brunton had referred to HOLAC's decision to publish information having been motivated by a recognition of the general public interest in what they do. It was put to her that in fact there was no such motivation and publication had been forced previously by IC decisions.
72. She also said that if required to release information as a result of a FOIA request that would create the need always to publish the same category of information because otherwise false inferences might be drawn that some issue existed simply by different approaches being taken.

### **Closed hearing**

73. Part of the Appeal was in a closed session with Ms Brunton, counsel and others from HOLAC. The Tribunal kept the decision in *Browning* in mind. We reviewed the closed version of Ms Brunton's statement and the closed material in the closed final bundle and closed supplementary bundle. We asked questions the Appellant had suggested we put to Ms Brunton such as:-
- (a) is the information in the two citations in the public domain?
  - (b) what checks are done by HOLAC in respect of that?
  - (c) to what extent is there material that strays into merit/suitability within the meeting notes?

74. A gist of the closed hearing was prepared by counsel. This had with it a "schedule of information in scope" prepared by HOLAC with one element redacted and with a note of where it was said section 23 might also apply. Additionally most of one previously redacted part passage from the witness statement was to be provided to the Appellant.
75. Following the closed hearing when the Appeal reconvened in open the Appellant was updated in brief on what had occurred in addition to being provided with the gist.

### **Tribunal's Review**

76. For the Appeal (and at it) we were provided with information, evidence and submissions which dealt with how HOLAC was set up, how it goes about its role, how it defines and interprets the vetting tests it uses and the interest shown in the relevant life peers. The Appellant referred to concerns such as the need (as he sees it) for legitimacy in the process of appointment to the HoL, the recommendation of the UK Governance Project, the age of the two people concerned meaning they could be in Parliament for a long time, and what he called "puzzlement" at their appointment. He questioned the use and HOLAC's interpretation of the words "propriety, probity and suitability". However, in general terms the more constitutional questions and views did not themselves form a central part of our consideration of the issues.
77. As regards the UK Governance Project report of 1 February 2024 we gave this no weight when considering the PIBT as it was not in existence at the date HOLAC responded to the request on 2 August 2023.
78. HOLAC in its submissions referred to their concern that the publication of HOLAC's information would set precedents for their future handling of information and would risk the integrity of the process itself. However our approach was to consider the issues including the PIBT at the relevant date and on a case specific basis. HOLAC seemed to us in effect to be suggesting something akin to a blanket approach when considering a FOIA request. However section 37 FOIA does not provide an absolute exemption and so in each case the PIBT has to be considered leading to the possibility that the public interest might favour disclosure or might not. We gave this some but little weight.
79. Additionally, in our view this Decision on the PIBT does not set a binding precedent. It is based on the facts in relation to this request only. A different request based on different facts with different documents involving different people and tested as at a different date could result in a different outcome.
80. We also noted when considering this matter and from the evidence that as regards the two life peers in question it was public knowledge that they had been nominated by Boris Johnson as political peers and had become Life Peers. In the absence of any suggestion that HOLAC had made a reference to the Public Administration and Constitutional Affairs Select Committee we concluded that it followed that HOLAC

were supportive (in its terms) of the appointments and the PM made the recommendations to the King.

81. We were able to review the disputed material in the closed part of the Appeal. We reviewed the public interest arguments presented for and against disclosure and we considered them against the disputed material. As well as the points set out above which apply generally there were specific matters considered on each of the other elements of the disputed material as set out below.

**The schedule of information in scope (A5CB- A6CB)**

82. This had been reviewed in the closed session and as reported to the Appellant, HOLAC had altered its position in relation to it. HOLAC provided a redacted schedule identifying which exemption(s) were asserted in relation to which document. We did not consider it necessary to deal with this further as a result.

**An email to HOLAC of 11 November 2022 and connected HOLAC emails (A11CB- A13CB)**

83. In our view the disclosure of this material is not on balance in the public interest. This is because it came from a member of the public who requested anonymity and because we accept that disclosure carries a high risk that in the future members of the public would hold back from offering information to HOLAC. This chilling effect risks weakening the process undertaken by HOLAC which is against the public interest.

84. As regards the connected emails they have no information in them sufficient to outweigh the public interest in not undermining the HOLAC process and the PIBT favours maintenance of the exemption.

**Letter from the Chair of HOLAC to the PM of 5 February 2023 (A48CB)**

85. In our view the letter itself does not form part of the scope of the request. The schedule attached to it reveals the names of the two relevant life peers in an otherwise redacted list. In our view the PIBT does not favour disclosure because the two were appointed and so it reveals nothing.

**HOLAC Minutes for 8 December 2022 (A14CB) and HOLAC meeting minutes of 12 January 2023 (A105CB)**

86. In our view the PIBT favoured maintenance of the exemption. This is because all parties accepted that openness and transparency were in the public interest however the outcome as regards the two peers was made known and HOLAC did publish minutes (albeit abridged versions of that provided in the closed bundle) which goes some way to reduce the public interest need for disclosure. Having seen the disputed material in our view little relevant transparency would be gained by disclosure and not enough to outweigh the risk of undermining the HOLAC process in which there is considerable public interest.

**HOLAC consent form from Ross Kempzell (A9CB) and Charlotte Owen (A114CB)**

87. In our view the PIBT favoured maintenance of the exemption because the forms contain only some factual information about the nominees provided by each of them as compared to the citations which explain the basis for the person being nominated. Additionally we accept that the information contains personal data necessary to enable HOLAC to carry out its role but where disclosure would risk prospective nominees being put off allowing their names to go forwards which is against the public interest.
88. Additionally we concluded that section 40(2) FOIA applied to this material. Almost all the content is personal data. Redacting to remove such data would leave mainly pre printed headings such as "statement of citizenship". Processing of such data by publication has to be in accordance with the data protection principles. In our view some of the information is special category data and without explicit consent of the data subject (or some other reasons set out in Article 9(2) GDPR) disclosure would not be lawful. As regards the rest, while it is accepted this matter involves a legitimate purpose we do not accept that disclosure of this material and personal data assists that purpose and so is not necessary. Further it would also be our view that the data subjects rights on this occasion did outweigh the interest being pursued.
89. We also concluded that section 41(1) applied to this material. It was obtained from the two third parties. In our view it has the necessary quality of confidence and was communicated to HOLAC in confidential circumstances. Disclosure would be a breach of that obligation and the Appellant has not satisfied us that HOLAC would have had a defence to a claim for breach of confidence based on the public interest in disclosure of the information.

**HOLAC's vetting material for Ross Kempzell (A7CB) and for Charlotte Owen (A112CB) and vetting summary paper and vetting tracker (A37 CB - A47CB) Full vetting report (A53CB) and Updated vetting reports (A96CB)**

90. In our view the PIBT favoured maintenance of the exemption because the ability for HOLAC to collect and collate this information is a central part of its role. While there is nothing harmful as Ms Brunton said as regards these peers we accept that the risk of disclosure (which is against the public interest) is that the organisations providing information may refuse to do so or become guarded in what they report. Additionally nominees, if they knew that the outcome of requests made to organisations such as ACRO or HMRC or DWP might be made public, could be put off allowing their name to go forward again against the public interest.
91. We also take the view that both section 40(2) and section 41(1) would apply to the third party responses as set out above.

**Email correspondence in October 2022 between HOLAC and the Cabinet Office about the list (A16CB - A20CB)**



92. In our view much of this material was not in scope as it did not relate to the relevant nominees. Where it does it is only because their names appear on an otherwise redacted list and the emails deal with administrative issues such as where the honours list process had reached. In our view as a result the PIBT for the material in scope favours maintenance of the exemption.

#### **ACOBA results list (A117CB)**

93. ACOBA is the Advisory Committee on Business Appointments. In our view the PIBT favoured maintenance of the exemption because as set out above there is nothing noteworthy in the material and disclosure would risk undermining the HOLAC process.

#### **The Citations (A21CB)**

94. Our view on the public interest balance as regards the citations is as follows:-

(a) we agree with HOLAC when it says that there is a strong public interest "*in knowing that the appointments process is accountable and transparent, and in maintaining public confidence in the peerage appointments system*" and we attributed considerable weight to the public interest knowing the PM's reasoning as set out to HOLAC.

(b) while we accept that a nominee can withdraw consent at any time and it is not in the public interest for the pool of those willing to be nominated or the calibre of candidate to be lowered. However, in this Appeal we are dealing only with two who were appointed and a request that was made after their appointment was made public.

(c) Life peers are Members of Parliament with the rights, obligations and influence associated with such an appointment thus enhancing further the weight of the public interest in the PM's citations.

(d) while HOLAC says that for its "*processes to operate effectively, there must be confidentiality around individual nominations and their assessments*" as far as we could see the citations for political life peers (on a resignation list) are not in fact part of HOLAC's process. These Citations were prepared by the former PM and sent to HOLAC who take no part in assisting in the choice of nomination and the content is entirely outside their prior knowledge and control. Therefore, in our view disclosure would not reveal HOLAC's process or role.

(e) we accept that it is important and strongly in the public interest that all those who take part in the nomination of a life peer should be able to take part fully and without fear. However (1) public officials and politicians (including the PM) who take part in the process know or ought to know relevant information is subject to FOIA and (2) that even when engaged section 37 is subject to the PIBT.

(f) we considered the Decision in *Ranger* that:-

*"...the availability of access might inhibit frank contributions of information to the appointments process. It is very much in the public interest that decisions about membership of the legislature should be made with full information"*

however we were not persuaded that publication of these two citations would result in a PM in the future providing less frank contributions or being less open or candid. We reach that conclusion because of the importance of the role of the PM, the importance of the role a PM takes in the appointment of political peers and because of the role HOLAC play and its ability, if appropriate, to refer an outcome to the Public Administration and Constitutional Affairs Select Committee.

(g) we do not know whether when Boris Johnson was preparing these citations he knew that they might be published as a result of a request, thought they could not be or gave no thought to it. However, having seen them, we do not think it likely that had he known about the potential for disclosure their content would have been different.

(h) we do not accept that publication of these two citations would create a future "chilling effect" on a PM seeking to achieve the successful appointment of a political Life Peer. As is said by the UT in the *Badger Trust* case

*"75 We are not persuaded that persons of the calibre required to add value to decision making of the type involved in this case by having robust discussions would be inhibited by the prospect of disclosure when the public interest balance came down in favour of it...."*

and by Charles J in the *Simon Lewis* case

*"...any properly informed person will know that information held by a public authority is at risk of disclosure in the public interest."*

and on considering officials in *Davies*:-

*"In judging the likely consequences of disclosure on officials' future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants since the Northcote-Trevelyan reforms."*

(i) we took the view that it was equally possible that a reminder that a citation might be disclosed if the PIBT favoured it could result in greater openness and candour.

(j) we gave no weight to the Appellant's submission that their relatively young age and potential length of time as life peers was a material factor when weighing the public interest because in our view such an issue had no relevance to the assessment of the PIBT.

(k) we gave some, but little, weight to the "*widespread puzzlement*" submission made by the Appellant based, for example, on a number of press reports provided to the Tribunal. In an Appeal it might be possible for evidence to be produced of "puzzlement" that could greatly influence the balance of the PIBT. However, that was not the case here. Additionally in our view there was some danger of the PIBT

being judged on the basis of an attempted assessment of the media and the public's reaction in this situation. We were also not convinced it could even be objectively done.

(l) we considered the IC's view in the DN that "... *disclosure of the information in the scope of the request would significantly undermine the confidentiality of the process, and in turn, HOLAC's ability to effectively conduct such assessments in the future.*" We accept that it is strongly against the public interest for this process to be significantly undermined. However, in our view it is also important to note that while those involved may consider it to be a confidential process it is one that (as they know) is subject to a FOIA request and the PIBT. Also as regards the two citations in scope of this request produced by Boris Johnson and sent to HOLAC we do not accept that their disclosure would undermine the HOLAC's effectiveness in the future.

95. From the above in our view based on the evidence and submission and authorities the balance of the public interest favours the disclosure of the PM's citation concerning-

(a) Ross Kempself at part page A26CB – A27CB.

(b) Charlotte Owen on part of page A31CB.

96. We also considered the supportive comments appended to the citation relating to Baroness Owen. It is our view that the public interest favours disclosure of parts of pages A31CB A32CB to show only who the others were who supported the citation but not what they said. This is because in our view the supporters are public figures lending their support for a process that was intended to (and did) result in a person becoming a life peer. However, we accept that the content is personal subjective opinion which is the personal data of one of the two individuals. Releasing this information risks producing a chilling effect for the future in relation to those asked to provide or volunteering comments as it may limit their willingness to become involved at all or to be candid about an individual's strengths and weaknesses. This could result in valuable candidates missing out on nomination and/or HOLAC considering the nomination with less information.

97. As regards the citations and because of our conclusions above we have also considered whether the exemptions at section 41(1) and/or 40(2) apply:-

(a) as regards section 41(1) in our view while the information was obtained from a third party, disclosure would not constitute an actionable breach of confidence because the content (on this occasion) did not have the necessary quality of confidence even if arguably the information was communicated in circumstances that created such an obligation. Finally, and in any event, on the same basis as set out for the PIBT and section 37 in our view the Appellant had demonstrated that HOLAC would have had a defence to a claim for breach of confidence based on the public interest in disclosure of the information

(b) finally, as regards section 40(2) FOIA, Article 5(1)(a) with 6(1)(f) GDPR requires processing to be lawful, fair and transparent for example where necessary for the pursuit of a legitimate interest unless overridden by the rights and freedom of the data subject. Both citations do contain personal data being the sort of information that might appear in a cv or a professional networking site such as LinkedIn or appear in an online site such as Wikipedia. HOLAC accepted (B65) that the request involved a *legitimate interest* in the disclosure of the information requested and in our view disclosure was necessary in the pursuit of that interest because it would add to the public's understanding of the process and how political peers come to be appointed and what was said as regards these nominations. Having seen the content and because the data subjects concerned on this occasion were ultimately both appointed as life peers and Ms Brunton's evidence that on this occasion disclosure would not cause any particular harm our conclusion was that the data subjects rights did not outweigh the interest being pursued and that disclosure would be fair and transparent as regards the data subjects as well as lawful.

### **Decision**

98. In summary therefore it is our decision that the DN was partly in accordance with the law and partly not. The disputed material to be disclosed as a result are the two citations prepared by Boris Johnson namely:-

(a) the citation in respect of The Rt Hon the Baron Kempself of Letchworth at pages A26CB - A27CB

(b) the citation in respect of Rt Hon the Baroness Owen of Alderley Edge at A30CB - A31CB together with the names of those who supported that citation but not the content of their expressed support.

99. The Appeal is therefore allowed in part and dismissed in part.

**Signed Tribunal Judge Heald**

**Date: 16 December 2024**