

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 July 2009

Public Authority: Cabinet Office
Address: Propriety and Ethics Team
Room 118
70 Whitehall
London
SW1A 2AS

Summary

The complainant requested information the Cabinet Office held about the decision to award Colin Bell with an MBE in the 2004 New Year's Honours list. The Cabinet Office explained that although it held some information it considered all of it to be exempt from disclosure by virtue of the exemption contained at section 37(1)(b) of the Act (conferring of an honour by the Crown) and some of the information to also be exempt from disclosure on the basis of section 40(2) of the Act because disclosure would breach the first data protection principle. In correspondence with the Commissioner the Cabinet Office also confirmed that it believed that some of the information would be exempt from disclosure on the basis of section 40(4) of the Act because Colin Bell would not be able to access some of the withheld information under his subject access rights under the Data Protection Act. The Commissioner has concluded that all of the withheld information is exempt from disclosure under section 37(1)(b) of the Act and that the public interest favours withholding the information. The only exception to this is the short citation included which falls within the scope of the withheld information, but as this information is already in the public domain the Commissioner has not ordered the Cabinet Office to now disclose this. The Commissioner has however concluded that the Cabinet Office breached sections 10(1) and 17(1) of the Act by failing to provide a refusal notice within 20 working days.

The Commissioner's Role

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

The Request

2. On 27 March 2007 the complainant submitted a request to the Cabinet Office for information that it held about the decision to award a Mr Colin Bell an MBE.
3. The Cabinet Office provided the complainant with a response on 30 April 2007 in which it confirmed that it held some information relevant to his request. However, the Cabinet Office explained that it considered all of the information it held to be exempt from disclosure on the basis of section 37(1)(b) of the Act which provides an exemption for information which relates to the conferring by the Crown of any honour or dignity. The Cabinet Office explained that it had considered the public interest test and in all the circumstances of the case concluded that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Cabinet Office also explained that the some of the information that it held was exempt from disclosure on the basis of section 40(2) of the Act because this information constituted personal data, the disclosure of which would be in breach of the first data protection principle of the Data Protection Act 1998 ('the DPA').
4. The complainant contacted the Cabinet Office on 10 May 2007 and explained that he was dissatisfied with the response provided and requested that an internal review be carried out.
5. The Cabinet Office informed the complainant of the outcome of the internal review on 7 June 2007 which upheld the initial decision that all of the withheld information was exempt from disclosure on the basis of section 37(1)(b) and that some of the information was also exempt from disclosure on the basis of section 40(2).

The Investigation

Scope of the case

6. On 18 November 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled.¹ The complainant specifically asked the Commissioner to consider the Cabinet Office's failure to provide the information he had requested. The complainant also asked the Commissioner to consider whether the type of award conferred on Mr Bell was appropriate.

¹ The Commissioner will not usually accept complaints under section 50 of the Act if there has been an undue delay in the complainant bringing the matter to his attention; rather he expects individuals to complain within 2 months of receiving a public authority's final response. Although some 5 months elapsed between the complainant receiving the outcome of the internal review and complaining to the Commissioner, the Commissioner is satisfied that there was a legitimate reason for this delay in this case and therefore the Commissioner has accepted the complaint.

7. Before beginning his investigation, the Commissioner explained to the complainant that the Act provides a right of access to recorded information held by public authorities and in certain circumstances the Act allows public authorities to refuse to disclose information on the basis of a number of exemptions. The role of the Commissioner was limited to establishing whether a public authority had complied with the requirements of the Act; in many cases this involved deciding whether information was exempt from disclosure. The Commissioner explained to the complainant that it was not his role to independently investigate why public authorities have made certain decisions or to ask public authorities to explain or account for decisions that they had taken.
8. The complainant subsequently confirmed that he understood that the scope of the Commissioner's investigation would be limited to establishing whether the Cabinet Office was correct to withhold the information he had requested on the basis of sections 37(1)(b) and 40(2) of the Act.

Chronology

9. The Commissioner contacted the Cabinet Office on 10 September 2008 and asked to be provided with a copy of the withheld information along with a detailed explanation to support its position that the information was exempt from disclosure under sections 37(1)(b) and 40(2) of the Act. The Commissioner also asked the Cabinet Office if it had considered whether some of the withheld information might also be exempt from disclosure on the basis of section 40(4) of the Act. This section provides that information is exempt from disclosure under the Act if it constitutes personal data which would be exempt from disclosure under the DPA to the individual whose personal data it is, were they to request it. The DPA contains an exemption from the subject information provisions for information processed for the purposes of conferring a Crown honour (Paragraph 3, Schedule 7).
10. On 28 October 2008 the Cabinet Office provided the Commissioner with a copy of the withheld information and a detailed explanation as to why it considered the exemptions in section 37(1)(b) and 40(2) to apply. The Cabinet Office also confirmed that it considered some of the information falling within the scope of the request to be exempt from disclosure on the basis of section 40(4).

Findings of fact

11. Colin Bell is a footballer who retired from the game in 1980. He played most famously for Manchester City between 1966 and 1979 and also won 48 caps for England.
12. Since retiring from football, Colin Bell has been a supporter and fundraiser for a number of charities.

13. In the New Year's honours list of 2004 he was awarded an MBE. The short citation which was issued at the time of the award explained that Mr Bell had been given the honour 'For services to the community in Manchester'.²
14. The withheld information consists of two forms:
 - The first is a summary sheet compiled by a member of the then Ceremonial Secretariat including brief details of the information put forward in support of the nomination and comments by officials as to the validity of the nomination;
 - The second is a citation form including details of the submissions put forward to the honours committee, further details of Mr Bell's (including personal details, e.g. address); opinions from various individuals on the strength of the nomination; the type of award which was recommended; and details of some of those supporting the nomination.
15. The Cabinet Office has explained that it considers all of the information contained in both forms to be exempt from disclosure on the basis of sections 37(1)(b) of the Act.
16. The Cabinet Office has explained that it believes that some of the information contained in the two forms constitutes the personal data of a number of individuals:
17. Firstly, that of Mr Bell himself – this data consists of the various personal details (e.g. date of birth, address) as well as the statements of opinion about his nomination. The Cabinet Office has confirmed it believes that this information is exempt from disclosure on the basis of section 40(4).
18. Secondly, the opinions given by two civil servants on Mr Bell's nomination constitute the personal data of these two individuals (who are identifiable from the withheld information) and this information is exempt from disclosure on the basis of section 40(2) of the Act.

Analysis

Procedural matters

19. Section 10(1) of the Act states that public authorities must respond to a request within 20 working days following the date of receipt.
20. Section 17 of the Act states that if public authorities are seeking to reply on exemptions as a basis to refuse to disclose any information which has been requested they must provide the applicant with a refusal notice. Section 17(1) specifically states that this notice must be provided within the time limit provided by section 10(1).

² The list of New Year's honours for 2004 can be viewed here: <http://www.gazettes-online.co.uk/ViewPDF.aspx?pdf=57509&geotype=London&gpn=14&type=>

21. In this case the complainant submitted his request on 27 March 2007 and the Cabinet Office replied on 30 April 2007 providing the complainant with a refusal notice citing sections 37(1)(b) and 40(2).
22. Taking into account the two bank holidays which fell within this period (Easter Sunday was on 7 April in 2007) the Cabinet Office took 22 working days to respond to the complainant's request and in doing so breached sections 10(1) and 17(1) of the Act.

Exemption

23. Section 37 is a class based exemption. That is to say if information falls within the scope of the section it is automatically exempt; there is no need for the public authority to demonstrate any level of prejudice that might occur if the information was disclosed in order for the exemption to be engaged.
24. Section 37(1)(b) of the Act provides a specific exemption for information that relates to the conferring by the Crown of any honour or dignity.
25. Having reviewed the two documents which comprise the withheld information the Commissioner is satisfied that they clearly relate to the conferring by the Crown of an honour, specifically the decision to award Mr Bell an MBE, and thus they fall within the scope of section 37(1)(b).
26. However, section 37(1)(b) is a qualified exemption. Therefore, the Commissioner must consider the public interest test set out at section 2(2)(b) of the Act and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
27. The Cabinet Office has provided the Commissioner with a detailed analysis of the public interest arguments in this case, especially the arguments in favour of withholding the information. The Commissioner has outlined these arguments below along with the additional public interests both he and the complainant have identified, before going on to consider where the balance of the public interest lies.

Public interest arguments in favour of withholding the information

28. The Cabinet Office argued that the public interest in maintaining the exemption contained at section 37(1)(b) is based upon the importance of confidentiality in ensuring the effective operation of the honours system. Indeed the Cabinet Office suggested that the existence of section 37(1)(b) in law reflects the fact that this view was endorsed by Parliament.
29. The Cabinet Office identified a number of different facets to this public interest argument, namely:

30. Communications between and amongst officials and honours assessment committees and contributors to citations should remain confidential to ensure that business can be operated in a spirit of openness and trust.
31. It is particularly important that officials who conduct honours assessments can carry out their work free from pressure from, or on behalf of, potential or actual candidates. Presently, officials and honours committees are presented with nominations for a variety of individuals and must determine on the basis of the information contained in the citations which of the cases are stronger. There is a strict limit on the number of honours available and only the most deserving candidates will succeed. It is important that each nomination should be judged objectively on the basis of the information given and its relative strength in comparison with others, rather than on the basis of whether a decision will meet approval from various sectors and pressure groups.
32. The members of the honours committees and the officials working within the system were recruited with the explicit undertaking by the government that discussions of candidates, successful or unsuccessful would remain confidential.
33. The Cabinet Office suggested that even if disclosure of information relating to the awarding of an honour did not result in the release of particularly candid or frank discussions, it is important nevertheless that the principle of confidentiality should remain.
34. It is was also in the public interest to maintain the confidentiality of the process in order that honours assessment committees continue to receive free and frank advice and hold thorough and candid discussions about individual honours candidates. Failure to maintain the confidentiality of their work would have a significant and deleterious impact on the quality of the decision making and on the integrity of the system.
35. The Cabinet Office also noted that disclosure of the information would serve no constructive process because there was no right of appeal or review in relation to the award of an honour by HM Queen.
36. The Cabinet Office suggested that disclosure of the particular information in this case was unlikely to aid the public's understanding of why Mr Bell had been awarded the type of honour that he had.

Public interest arguments in favour of disclosing the information

37. The Cabinet Office noted that there was a general public interest in the transparency of the process for awarding honours and disclosure of the requested information may add to that transparency.
38. The Commissioner believes that increased transparency in the honours system would be in the public interest because it could lead to increased public confidence in the operation of the system.

39. The complainant has argued that disclosure of the information may also address specific issues of accountability that he believed need to be explained in the awarding of this particular honour.

Balance of public interest arguments

40. With regard to the specific arguments that the Cabinet Office has advanced in support of the importance of the confidentiality in the honours system, the Commissioner believes that their arguments are similar to two concepts used in relation to the application of the public interest test under section 35(1)(a).
41. The first concept is that of civil servants and ministers needing a 'safe space' in which to formulate policy and debate live issues away from public scrutiny and particular away from lobbying and media involvement. This safe space therefore allows policy makers to hammer out policy by exploring both safe and radical options, without the fear of headlines suggesting that ideas that have merely been touched upon during the formulation/development process have in fact been accepted or are being seriously considered as policy options.
42. The second concept is that of a chilling effect which is directly concerned with the potential loss of frankness and candour in debate and advice which may lead to poorer quality of advice and less well formulated policy and decision making if information was disclosed under the Act.
43. The safe space argument can be compared to the argument advanced by the Cabinet Office at paragraph 31, i.e. that the decisions to award particular honours need to be made on the merits of each case without the interference from various sectors and pressure groups. In theory, the Commissioner accepts the logic of this argument in this instance. It would clearly not be in the public interest if media or public pressure interfered with the established system of awarding honours.
44. However, he also notes that in considering safe space arguments under section 35(1)(a) of the Act, the need for such a safe space diminishes once the policy decision in question has been taken. In the context of this case it is clear that by the time of the complainant's request in March 2007 the decision making process in relation to the awarding of this particular honour had obviously been completed. Therefore disclosure of the requested information in this case would not lead to any prejudicial media involvement or lobbying from third parties which would interfere with the Cabinet Office's decision to award Mr Bell an MBE. Consequently, this reduces the force of the arguments in this case for the need for officials to have a safe space for deliberation.
45. However, this does not altogether negate the strength of the safe space argument generally. The Commissioner takes into account how those involved in the awarding of honours will act in the future if this information were to be disclosed. In particular, would they be inhibited from freely and frankly discussing the merits of the candidates who have been nominated? Clearly, such a line of argument is closely aligned to the concept of the chilling effect described above. The Commissioner is conscious that although a number of Information Tribunals have indicated that such arguments should not be dismissed out of hand, public

authorities have found it difficult to substantiate chilling effects with significant evidence.

46. The Commissioner notes that the Tribunals have also acknowledged that the chilling effect arguments have to be considered on a case by case basis and in particular with reference to the specific information that has been withheld. Furthermore the Commissioner does not consider that a direct parallel can be drawn between the concept of the chilling effect in relation to policy formulation and the decision making process surrounding the awarding of honours.
47. The Commissioner believes that a key distinction is the nature of the issues discussed in the information which falls within section 35(1)(a) of the Act and that which falls within section 37(1)(b). The nature of the discussions by those involved in the honours system, and recorded in information which falls within the scope of section 37(1)(b), obviously involves the discussion as to whether individuals are deserving of an award, and if so, the type of award which is appropriate. Such discussions inevitably involve making candid and frank assessments of an individual's suitability for a particular award, including, in some circumstances, why an individual's achievements, while notable, are not sufficient to merit the award of an honour.
48. Therefore, the Commissioner accepts that an effect, similar in nature to the chilling effect, is likely to be created if information used in the honours assessment process is routinely disclosed. With regard to the specific information which is the focus of this request, the Commissioner would agree with the Cabinet Office's assessment that the information in this case is perhaps not the most overly candid or frank in nature, but it does still obviously contain direct comments about the merits of Mr Bell's nomination. Therefore, the Commissioner accepts that disclosure of this information could lead to those involved in the honours system being less candid in future about the nominations which are being assessed.
49. Moreover, the Commissioner accepts the Cabinet Office'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. The Commissioner 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.
50. Furthermore, the Commissioner is conscious of the significant numbers of nominations that the honours system has to process. The Commissioner understands that the Nominations Team at the Ceremonial Secretariat receives on average 3,500 nominations each year. In the three year period 2006 to 2008 these resulted in 181 Dames/Knights and 2 Companions of Honour. There were also 647 CBEs, 1392 OBEs and 3499 MBEs awarded.³

³ Figures taken from the report produced by the Cabinet Office and published in July 2008 entitled '[Three years of the operation of the reformed honours system](#)'

51. Given the significant number of nominations that are assessed and honours that are awarded, the Commissioner believes that the likelihood of the process being harmed by a loss of frankness and candour could be said to be relatively high. Therefore even if the disclosure of this information would only lead to a relatively minor, though still prejudicial loss of candour on the part of the officials involved, given the number of nominations that are assessed the effect on the process could still be significantly adverse.
52. In reaching this conclusion, the Commissioner wishes to emphasise that he is not suggesting that there is an inherent public interest in non-disclosure of information which falls within the scope of section 37(1)(b). Indeed a number of Tribunals have indicated that there is no inherent public interest in withholding information simply because it falls within the scope of the a class based exemption. This approach was supported by the High Court's consideration of the case *OGC v The information Commissioner*.⁴ However, a significant amount of information which falls within the scope of section 37(1)(b) is likely to include candid discussions about nominations for honours and for the reasons outlined above in the vast majority of cases there is likely to be a public interest in the confidentiality of such discussions being preserved.
53. With regard to the argument set out at paragraph 35, the Commissioner accepts that disclosure of this information may not serve any constructive process given that there is no right of appeal in relation to an honour that has been awarded. However, that is not to say that disclosure of this information would not contribute towards making the honours system more transparent and accountable. In other words, disclosure of information can still be in the public interest even if it does not result in a particular outcome or specific result. Indeed, disclosure of information such as this could, by increasing the transparency around the honours system, result in better quality decision making because those involved will be aware that their decisions will be subject to some level of public scrutiny.
54. In the Commissioner's opinion the public interest arguments in favour of disclosing information that would show the honours system to be objective, accountable and transparent should be given appropriate weight.
55. The Commissioner notes that in 2005 two independent reviews were undertaken into how honours system operated and following these reviews significant changes were made to the system, aimed at making the system more transparent. For example, a new system of eight honours committees was established with non-civil servants in the chair and in the majority on all committees. Opportunities for members of the public to sit on the committees were advertised in the press. The chairs and the members of the committees will have their names made public.
56. However, the honour which is the subject of the request for information in this case was awarded in the New Year's List of 2004, i.e. before the introduction of

⁴ See *Office of Government Commerce v Information Commissioner & the Attorney General* [2008] EWHC 737 (Admin) (11 April 2008), in particular paragraph 79.

these reforms. In weighing the balance of the public interest in this case the Commissioner has given little weight to the impact of these reforms.

57. With regard to the complainant's argument that the disclosure of this information would address specific issues of accountability in relation this particular honours award, clearly the Commissioner cannot comment explicitly on the contents of the withheld information as to do so would negate the purpose of this decision. However, having considered the arguments advanced by the complainant and having viewed the withheld information itself, the Commissioner agrees with the Cabinet Office that disclosure of this information would be unlikely to assist in answering the complainant's specific questions about this particular honours award.
58. In conclusion, the Commissioner believes that in this case the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information. In reaching this conclusion the Commissioner does recognise that disclosure could contribute to improving the transparency and accountability surrounding the process of awarding honours and thus increase the public's confidence in the system. However, the Commissioner believes that disclosure of this information would begin to erode the confidentiality of the operation of the honours system and he believes that for the system to operate efficiently and effectively some level of confidentiality is necessary. The Commissioner has placed particular weight on the fact that those involved in the honours system need to be able to make candid and frank comments in the future. He believes that strong counter-veiling arguments would need to be made in support of disclosure of this kind of information held only for this purpose before an order for disclosure would be justified in the public interest. Having looked at the information that is the subject of this particular case, he does not believe that such arguments can be made, or at least not sufficiently strongly that the public interest in favour of disclosing the requested information could be said to be greater than or equal to that in maintaining the exemption.
59. Finally the Commissioner wishes to note that the short citation which is included on the second of the forms (and reads 'For services to the community in Manchester') is in fact already in the public domain. The short citation was produced with intention of being published and clearly does not include any candid or frank comments. Therefore the Commissioner does not believe that it can be said to be in the public interest to withhold this part of the requested information. It is, however, already publicly available and was at the time of the request
60. In light of his findings in relation to section 37(1)(b) the Commissioner has not gone on to consider whether some of the withheld information is also exempt by virtue of sections 40(2) and/or 40(4) although given the nature of the information it is very likely that it would be.

The Decision

61. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The information falling within the scope of the request (save for the short citation) is exempt from disclosure by virtue of section 37(1)(b) and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
62. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- By taking 22 working days to provide the complainant with a refusal notice the Cabinet Office breached sections 10(1) and 17(1) of the Act.
 - Given that the short citation is already in the public domain the Commissioner's believes that the public interest under section 37(1)(b) does not favour withholding this information.

Steps Required

63. The Commissioner does not require the Cabinet Office to take any steps in pursuance of this Decision Notice.

Right of Appeal

64. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 30th day of July 2009

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 37(1) provides that –

“Information is exempt information if it relates to-

- (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household, or
- (b) the conferring by the Crown of any honour or dignity.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Data Protection Act 1998

Schedule 7 – Miscellaneous Exemptions

- ‘3. Personal data processed for the purposes of –
- (a) assessing any person’s suitability for judicial office or the office of Queen’s Counsel, or
 - (b) the conferring by the Crown of any honour,
- are exempt from the subject access provisions’.