

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 24 November 2009

Public Authority: House of Lords Appointments Commission ('HLAC')
Address: 35 Great Smith Street
London
SW1P 3BQ

Summary

The complainant asked the House of Lords Appointments Commission (HLAC) whether Lord Clement-Jones had proposed, nominated, seconded or supported any individual's nomination for the peerage. The HLAC interpreted this request as seeking information about all candidates other than Lord Hameed who was the subject of another request submitted by the complainant. The complainant was content with this interpretation of the request. The HLAC refused to confirm or deny whether it held information falling within the scope of this request citing the exemptions contained at sections 37(2) (conferring of an honour), 40(5)(b)(i) (personal data) and 41(2) (information provided in confidence) of the Act. The Commissioner has concluded that the HLAC were correct to rely on section 40(5)(b)(i) as basis upon which to refuse to confirm or deny whether it held any information falling within the scope of this request.

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.

Background

2. The public authority to which this request was submitted - House of Lords Appointments Commission (HLAC) - was established by the Prime Minister in May 2000 as an independent, advisory, non-departmental public body. The remit of the HLAC is to recommend to Her Majesty The Queen people for appointment as non-party-political peers and to vet all nominations for membership of the House, including those put forward by the political parties, to ensure the highest

standards of propriety. The HLAC's considers self-nominations for the peerage and nominations by another person or organisation.

The Request

3. On 14 January 2008 the complainant submitted the following request for information to the HLAC:

'Please would you let me know in writing if you hold information of the following description:

All the candidates for a peerage who have been proposed/nominated/seconded/supported in writing by Lord Clement-Jones.

I would like a copy of the information'.

4. The HLAC responded on 11 February 2008. In this response the HLAC explained that it had taken this request to cover all candidates other than Lord Hameed who had been the focus of a previous request submitted by the complainant.¹ The HLAC noted that unsuccessful nominations are destroyed in line with the provisions of the Data Protection Act 1998 (the DPA) and therefore the information contained in them is no longer held. However, the HLAC refused to confirm or deny whether it held any information falling within the scope of the complainant's request on the basis of the exemptions contained at sections 37(2), 40(5)(b)(i) and 41(2) of the Act.
5. The complainant asked for an internal review of this decision on 12 February 2008.
6. On 26 February 2008 the HLAC informed the complainant that an internal review had been carried out and the conclusion of that review was that the HLAC was correct to refuse to confirm or deny whether it held any information falling within the scope of his request on the basis of the three exemptions cited above.

¹ This previous request sought all information held by the HLAC concerning the appointment of Lord Hameed to the peerage. In response to this request the HLAC provided a small amount of information - it did not refuse to confirm or deny whether it held information because it was a matter of public record that the HLAC had recommended Lord Hameed for a peerage - but refused to disclose the majority citing the exemptions contained at sections 37(1)(a), 40(2) and 41(1)(b) of the Act. The HLAC's handling of this complaint is subject to separate complaint to the Commissioner.

The Investigation

Scope of the case

7. The complainant contacted the Commissioner on 29 February 2008 in order to complain about the HLAC's refusal of his request. The complainant argued that not only should the HLAC confirm whether it held any information falling within the scope of his request, but furthermore, if any information was held, it should be disclosed. The Commissioner confirmed with the complainant that he was happy with the HLAC's interpretation of his request, i.e. to cover all candidates other than Lord Hameed.

Chronology

8. The Commissioner contacted the HLAC on the 31 March 2008 and asked it to confirm whether it held any information falling within the scope of the request, if it held such information to be provided with a copy, and also for further arguments to support its position that it was exempt from having to confirm or deny whether it held any information falling within the scope of the request on the basis of the three exemptions cited above.
9. The HLAC provided the Commissioner with a response to his enquires on 24 April 2008.
10. Due to a backlog of complaints received about the Act, the Commissioner was unable to begin his detailed investigation of this case immediately. Therefore it was not until 28 January 2009 that the Commissioner contacted the HLAC in relation to this complaint and sought clarification on a number of issues.
11. The HLAC provided the Commissioner with this clarification in a letter dated 3 April 2009.

Analysis

Exemption

Section 40 – personal data

12. Section 1 of the Act provides a general right of access to information held by public authorities. This right of access is split into two parts; firstly the right to know whether information is held by a public authority and secondly, if this is the case, to have that information disclosed, as section 1(1) makes clear:

‘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.'

13. In this case the HLAC has argued that it does not have to confirm or deny whether it holds any information, i.e. it is exempt from the duty contained at section 1(1)(a) of the Act, by virtue of the exemption contained at section 40(5)(b)(i) of the Act.
14. Section 40 of the Act provides a number of exemptions relating to the withholding of 'personal data' with personal data being defined by the Data Protection Act 1998 (DPA).
15. Section 40(5) specifically states that:

'The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).'

16. Therefore, for the HLAC to be correct in relying on section 40(5)(b)(i) to neither confirm or deny whether it holds information falling within the scope of the complainant's request the following conditions must be met:

- Confirming or denying whether information was held would reveal personal data of Lord Clement-Jones; and
- That to confirm or deny whether information was held would contravene one of the data protection principles.

Would the confirmation or denial that information was held reveal the personal data of Lord Clement-Jones?

17. Section 1(1) of the DPA defines personal data as:

'data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual'

18. The complainant's request focuses solely on whether Lord Clement-Jones proposed, nominated, seconded and/or supported another individual's nomination for the peerage (Lord Hameed excluded).
19. The Commissioner believes that if the HLAC confirmed whether it held any information falling within the scope of this request a number of facts would be established:
20. Firstly, confirmation that information was held would clearly reveal whether Lord Clement-Jones had supported another individual's successful nomination to the peerage. This is because the HLAC retains information related to successful peerage nominations.
21. Secondly, confirmation that information was held may reveal whether Lord Clement-Jones had in fact supported another individual's ultimately unsuccessful nomination presuming of course that at the time of the request such a nomination was still being considered and the HLAC had not yet destroyed the relevant paperwork. As noted above the HLAC destroys unsuccessful dominations after three months of any rejection decision.
22. The Commissioner believes that whether an individual proposed, nominated, seconded and/or supported somebody for the peerage falls under the definition of personal data under the DPA. Therefore the Commissioner believes that confirmation or denial which would reveal whether Lord Clement-Jones had, or had not, supported the successful nomination to the peerage (or indeed in the second scenario potential unsuccessful nomination to the peerage) of another individual would constitute his personal data.

Would confirming or denying whether such information was held contravene any of the data protection principles?

23. In support of its application of section 40(5)(b)(i), the HLAC has argued that to confirm or deny whether information falling within the scope of this request would contravene the first data protection principle.
24. The first data protection principle states that:
 1. Personal data must be processed fairly and lawfully; and
 2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

25. The HLAC argued that individuals involved in the nominations process, both those nominated and those involved in supporting an application, have a legitimate expectation that their personal data would not be disclosed given the confidential nature of the nominations process as a whole. Consequently, in the HLAC's view to disclose details of an individual's involvement in a nomination process would be unfair.
26. In assessing fairness, the Commissioner takes into account a number of criteria, including as the HLAC has identified, an individual's reasonable expectations of what will happen to their personal data. The Commissioner also considers the following criteria:
- Whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life);
 - If the information relates to their public life, the seniority of the official and whether they have a public facing role – as a general rule, the more senior an official is the less likely it is that disclosing information about their public duties would be unfair or unwarranted;
 - The potential harm of distress that may be caused by disclosure;
 - Whether the individual has objected to disclosure.
27. With regard to whether individuals involved in the proposing, nominating, seconding or supporting of an application would expect their support to be kept confidential, the Commissioner considered the procedures and guidelines the HLAC has in place.
28. The information pack the HLAC has issued about the process of nominations to the peerage includes a number of specific references to the confidentiality of the nomination process²:
29. Paragraph 18 of the guidelines deals with referees and states:
- 'The Commission believes that references play an essential part in assessing the quality and propriety of nominees. All references will be treated in confidence.'
30. Paragraph 23 is headed 'Confidentially' and states:
- 'The Commission treats all nominations and supporting information in confidence.'
31. The guidelines also have a section regarding the vetting and checking of the suitability of individuals for life peerages which explains that:

² House of Lords Appointment Commission Information Pack can be viewed here:
<http://www.lordsappointments.gov.uk/media/lordsappointments/assets/lordsinfopack.doc>

'The nomination form includes a section requesting the nominee's consent to releasing information in the nomination form to enable further inquiries to be made. The Commission will need to check with former employers, Government departments and agencies, other organisations and individuals to provide an assurance as to the propriety of nominees. This will be done in confidence.' (Paragraph 35 of the guidelines.)

32. On the basis of these guidelines, the Commissioner is satisfied that any individual who may have been involved in the proposing, nominating, seconding or supporting of an application would have been under an expectation that their communications with the HLAC, and thus by direct implication their support of a nomination, would have been kept confidential. The Commissioner understands that this explicit confidence includes not only the content of any communications, but also the fact that an individual had sent such a communication. In other words the content of a reference would not be placed in the public domain and nor would the fact that a named individual had supported another named individual's application (albeit that the identity of the referee would be known to the person being nominated).
33. In the circumstances of this case, the Commissioner does not believe that it is possible to draw a clear and neat distinction between information falling within the scope of the request, if of course any information is held, with regard to whether it relates to Lord Clement-Jones' public or his private life. This is because there is a variety of information which could fall within the scope of the request. For example, the HLAC may hold information detailing a formal nomination Lord Clement-Jones made in order to submit an individual for consideration. Or the HLAC may hold information in which Lord Clement-Jones is simply seconding a proposal. Or the HLAC may hold information in which Lord Clement-Jones simply provides a brief reference, one of possibly many references, to support an individual's nomination.
34. As a leading figure for the Liberal Democrats in the House of Lords it could be argued that his support, particular in the form of a nomination, rather than simply as a referee, for an individual's nomination for the peerage relates to his public life because such a nomination carries weight because of the respected position of Lord Clement-Jones. Equally it may be that Lord Clement-Jones knows an individual because of his work as a peer. In essence, an individual's nomination for the peerage submitted by an existing peer could be seen to carry more weight than if it was supported by a non-parliamentarian. These factors can be used to argue that if Lord Clement-Jones did nominate somebody for a peerage, information relating to this decision relates to his public facing role as a working peer rather than his private life.
35. However, if one assumes that the information the HLAC holds, if indeed it holds any, is simply a very brief reference given by Lord Clement-Jones in support of a nomination – i.e. he is not nominating or seconding the application but is merely one of a number of referees supporting an application – and this reference is based on his knowledge of an individual through private friendship, as opposed to a connection via his position as a peer, then the information could be said to

relate more to his private life than the public role he has by virtue of sitting in the House of Lords and being a spokesman for the Liberal Democrats.

36. Given the way this particular request is phrased – i.e. for any written support Lord Clement-Jones may have provided to another individual's nomination and that may, as in the preceding paragraph relate more to his private life, rather than his public life as a peer, in the Commissioner's opinion any consideration of fairness must be based upon whether it would be fair to confirm whether information is held assuming that such information which relates to his private rather than his public life. Basically, the Commissioner has to decide if the more sensitive type of information, i.e. that which may relate to Lord Clement-Jones' private rather than his public life, needs protection.
37. The HLAC has not provided the Commissioner with any indication as to whether Lord Clement-Jones has objected to the HLAC confirming or denying whether it holds any information of the description requested, or indeed whether he consented to such information being disclosed, if indeed any information is held.
38. With regard to the level of harm or interference confirmation as to whether information was held or not would place on Lord Clement-Jones, the Commissioner considers this to be relatively minimal. Simply confirming whether information was held (or not held) and thus complying with 1(1)(a) of the Act would not disclose the names of the individuals who Lord Clement-Jones supported, if indeed he had given such support. The interference into his private life would be relatively minimal.
39. In summary, the Commissioner accepts that Lord Clement-Jones may have nominated another individual for a peerage in his public role as a sitting peer and thus it could be argued that any information, if held, related more to his public life than his private life. Furthermore the Commissioner believes that simply by confirming or denying whether Lord Clement-Jones had made such a nomination, but not revealing who those nominee(s) were would not lead to a significant infringement into his life. On the basis of these two factors, there is some weight to the argument that disclosure would not be unfair.
40. However, the Commissioner believes that he also has to place significant weight on the fact that the HLAC's guidance to those involved in the nomination process that all correspondence, including that involving the proposing, nominating, seconding and supporting of an application will be treated in strict confidence. Consequently, the Commissioner finds it difficult not to agree with the HLAC that in these circumstances those involved in supporting a nomination would have a reasonable expectation that their communications with the HLAC would be treated in a confidential manner. Furthermore, given the way in which the request is phrased, the Commissioner believes that any disclosure under the Act has to assume that information, if held, could well relate to Lord Clement-Jones' private rather than public life. This is because if he has simply provided a reference or supported a nomination then this may simply have been done in a private capacity. Therefore in assessing whether confirmation or denial would breach the first data protection principle the Commissioner has proceeded on the basis that confirmation or denial would involve the disclosure of personal data provided in a

private capacity in order to ensure an adequate level of protection is provided to such information, if indeed such information is held. The Commissioner therefore accepts that confirmation as to whether information falling within the scope of this request is held would be unfair.

41. The Commissioner has also considered conversely whether it would be unfair to confirm that Lord Clement-Jones did not support any application (presuming of course that was the case). However, in this case the Commissioner believes that the approach taken in such a circumstance needs to be consistent with the approach taken in a circumstance when the HLAC does hold information and confirmation of such a fact would be unfair. (As indeed the Commissioner has established in the proceeding paragraphs.)
42. The approach taken between the two scenarios needs to be uniform otherwise it risks undermining the principle of neither confirming nor denying whether information is held. For example, if the HLAC confirmed that it did not hold information about named individuals' support of any application every time when it did not in fact hold such information but when it did hold such information it simply refused to confirm or deny whether such information was held, by inference it would be clear that when the HLAC stated that it was refusing to confirm or deny it would essentially be confirming that information was in fact held.
43. Therefore the Commissioner believes that confirming or denying whether the requested information is or is not held would be unfair and in breach of the first data protection principle. Consequently, the Commissioner has concluded that the HLAC is exempt from the duty to confirm or deny whether it holds any information falling within the scope of the request (as set out in section 1(1)(a)) by virtue of section 40(5)(b)(i).
44. As the Commissioner has concluded that confirming or denying the existence of the information would breach the first data protection principle because it would be unfair, he has not deemed it necessary to consider whether complying with section 1(1)(a) would be lawful or would meet any of the conditions in Schedule 2 of the DPA.
45. Nor has the Commissioner gone on to consider whether the HLAC is also exempt from confirming or denying whether it held information by virtue of sections 37(2) and 41(2) of the Act.

The Decision

46. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

47. The Commissioner requires no steps to be taken.

Right of Appeal

48. 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 24th day of November 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(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

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 37(2) provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”

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(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection

Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Section 41(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

Data Protection Act 1998

Part I

1) In this Act, unless the context otherwise requires—

“personal data” means data which relate to a living individual who can be identified—

(a)

from those data, or

(b)

from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

Schedule 1

The first principle states that:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Schedule 2

Conditions relevant for purposes of the first principle: processing of any personal data

1. The data subject has given his consent to the processing.

2. The processing is necessary— (a) for the performance of a contract to which the data subject is a party, or (b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4. The processing is necessary in order to protect the vital interests of the data subject.

5. The processing is necessary—

(a) for the administration of justice

- (b) for the exercise of any functions conferred on any person by or under any enactment
- (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department
- (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

6. — (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.