



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2011/0115

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50318448

Dated: 10 March 2011

Appellant: Mrs Lin Luder

1st Respondent: Information Commissioner

2nd Respondent: The Cabinet Office

Heard at: Field House, London

Date of consideration: 26 September 2011

Date of decision: 13 October 2011

Before

Christopher Hughes

Judge

and

Anne Chafer and Paul Taylor

Tribunal Members

Appearance: The hearing was conducted on the papers.

Subject matter: Freedom of Information Act 2000

Section 2 effect of exemptions

Section 37 communication with Her Majesty, etc, and honours

Section 40 personal information

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal rejects the appeal for the reasons stated.

Signed:

Christopher Hughes
Information Rights Judge

Dated this 11th day of October 2011

REASONS FOR DECISION

Background facts

1. On 25 March 2010 the applicant wrote to the Cabinet Secretary. She stated:-

"I write to formally serve notice on you under the Freedom of Information Act for sight of the file reviewed by the Independent Committee Honours Committee and of their conclusions in my husband's case.

I have received a number of telephone calls and letters from people who have informed me that the Cabinet Office have advised them that the CBE was because he did not make the grade. As you can imagine this has created a great deal of stigma in our name.

I know you will want to put this matter to bed and look forward to receiving the data.

A hard copy of this letter is in the post to you and the Prime Minister."

2. On 26 April 2010 the Director of the Cabinet Office replied to her indicating that the Cabinet Office did hold information within the scope of the request but that this information was being held under section 37 (1) (b) which provides that information is exempt from disclosure if it relates to the conferring by the Crown of any honour or dignity. It was considered that the public interest which had to be considered in applying this exemption was best served by maintaining the confidentiality of the

process. The letter also drew attention to provisions of the Data Protection Act which also had the effect of preventing the disclosure because the requested information would not be available to Mr Luder himself under that Act. The letters sought to reassure the applicant in relation to what appeared to be her major source of concern and stated:-

"further, you mentioned that other people have informed you "that the Cabinet Office have advised them that the CBE was because he did not make the grade". I am very sorry to hear this. I can assure you that the Cabinet Office staff have not discussed the case of Mr Luder with any external person or bodies. We adhere to a strict policy of never commenting on individual honours cases and staff in the Honours and Appointments Secretariat and the wider Cabinet Office are quite clear that all honours cases are confidential and that they should not breach this duty of confidentiality."

3. The Appellant was dissatisfied with this response and, by email of the 3rd May 2010, wrote asking for an internal review. The Appellant's husband had already written to the Cabinet Office on the 1st May 2010 confirming that he was aware of his wife's request and that this was made with his full knowledge and agreement. On 7th May 2010 the Cabinet office replied to Mr Luder rebutting the suggestion of a breach of confidentiality by the Cabinet Secretary and another official.:-

"I would like to assure you, and as I said in my letter of 26 April to Mrs Luder, that this is most certainly not the case. The letters to which you refer all made it very plain that the Cabinet Office would not comment on the particular circumstances of your award. Sir Gus and Mr Brennan made clear in their letters that they could not and would not comment on individual cases. The statements in those letters about the operation of the honours system aimed to set out the general principles under which the Honours Committees operate. They did not go into the matter of consideration of your case your individual details or circumstances. The principle of confidentiality is paramount to the honours system. We go to considerable lengths to ensure that the system is accountable and that its processes are transparent. We maintain the confidentiality of all individual cases so that those involved in nominating or commenting on them can do so on the understanding that their confidences will be honoured.

I hope this reassures you that your case was handled properly within the Cabinet Office and that no confidentiality was breached."

4. Mr Luder remained dissatisfied with the position and wrote again on the 11th May 2010.

"Whilst you may feel that no confidentiality was breached, I am unable to agree with your analysis. To use just two examples out of many:

Whilst it is true that the letter from Mr Brennan dated 3rd February 2010 included the phrase "I will not comment on the particular circumstances of Mr Luder" it went on to say that "...every honour recommended by the independent Honours Committees... is examined and discussed very seriously indeed on the basis of written evidence put before the committees...each case is examined entirely on its merits..."

I can assure you that...the members of the independent Honours Committee have no reason to believe that a mistake was made in this case".

The letter from Sir Gus dated 2nd February 2010 whilst including the sentence "I am not able to comment on the particular circumstances of Mr Luder's award..." also went on to say "...I can assure you that the independent chairs and members of the Honours Committee would not accept the criticism that their opinions and judgements are in some way faulty"."

The Cabinet Office maintained its position which it set out in brief response to Mr Luder dated 13th May 2010,

On 26th May 2010 the Cabinet Office responded to the appellant with the outcome of its internal review. This letter confirmed that the file which the appellant sought would not be disclosed. On 15th of June 2010 the Appellant challenged the decision of the Cabinet Office by requesting the Information Commissioner to investigate. The ground that she advanced was:-

"The Cabinet Office argument is that it is in the public interest to apply the exemption from disclosure in respect of matters pertaining to the honours system. My point is that in correspondence with a number of third parties, and in particular

the letters sent by Sir Gus O'Donnell on 1st and 2nd February 2010, and Mr Denis Brennan on 2nd and 3rd February and 24th March 2010, The Cabinet Office have breached the confidentiality of my husband, and thus negated the reasons they claim for the exemption. Whilst Ms Gray believes that these letters only commented on the honours system in general, I believe that this is an incorrect interpretation, and that an independent observer would reach the conclusion that the letters specifically commented on my husband's position."

5. Following an investigation the Information Commissioner issued his decision notice on 10th March 2011, finding that the Cabinet Office was correct to withhold the majority of information. However, he ordered disclosure of the long citation from the document entitled "Honours Citation Form" relating to Mr Luder, which he identified as serving the public interest in understanding departure from the practice of awarding former Lord Mayors of London with a Knighthood. The information correctly withheld was the relevant briefing notes and minutes of the committee.

Grounds of Appeal

6. The appellant was dissatisfied and in her appeal notice dated 25th April 2011, set out a single ground.:-

"The grounds for the appeal are that the Commissioner erred in failing to read the whole of the letters sent to members of the public by the Cabinet Office - see para 14 of the Decision Notice. The Commissioner himself recognised the importance of the question as to whether the Cabinet Office had breached confidentiality in its correspondence. (See paragraphs 12 and 13 of the Decision Notice). Copies of the relevant letters are enclosed."

7. With the appeal notice the Appellant sent five supporting documents which, from the dates, are clearly the letters referred to in paragraph 4 above.
8. In subsequent correspondence the Appellant made a number of points:-
 - the Cabinet Office had waived any right to confidentiality by its breach of confidence;
 - there was public interest and public comment concerning the choice of the award which her husband had received;

- the Cabinet Office had destroyed their personal privacy by the responses it had made to the queries from members of the public;
 - the Cabinet Office could not rely on Article 8 of the European Convention of Human Rights since her husband consented to disclosure of the requested information to the extent that it related to him.
9. The appellant also identified an error in materials initially submitted by the Cabinet Office which, in her submission, indicated a cavalier attitude towards personal data.
10. The Appellant invited the Tribunal to review all communications between the Cabinet Office and a named individual on the subject of the award of honours for Lord Mayor, whether before, during or after the process of the award of a CBE to her husband.
11. The Appellant argued that the Commissioner erred by failing to take note of alleged breaches of confidence contained in the letters referred to above. It is further argued that by informing members of the public that as each case is examined on its own merits, by inference a higher award was not merited in the specific case of the Appellant's husband. This in itself amounts to a breach of confidence.

The position of the two Respondents

12. The Commissioner responded by stating that he took into account a summary of the salient points from the correspondence referred to, which are contained in a letter from Mr Luder to the Cabinet Office . By implication he asserted that he had fairly considered the complaint of breach of confidentiality as set out by the person most directly affected. He further argued that having now viewed the original correspondence (in the course of this appeal) he remained of the same view. The Commissioner maintained that the letters contain no more than general commentary on the honours process and that all five letters make clear that no comment can be made on the specific circumstances of Mr Luder's award. As a result, nothing was divulged which would undermine the Cabinet Office's reliance on the exemption under s.37(1)(b) FOIA. Similarly, the disputed information itself had not been disclosed.
13. The Cabinet Office submitted that the letters to the public contained no more than the following detail:

- that individual cases cannot be commented upon;
- each case is examined in detail and on its own merits, with evidence from a variety of sources;
- that relevant committees have no reason to believe that their conclusions regarding Mr Luder were wrong.

14. This, they argued, made no comment on who provided information about Mr Luder, what that information was, the specific deliberations of the committee or the basis on which it was decided that a CBE was appropriate. The Cabinet Office stated that consequentially, the correspondence was consistent with the principle that consideration of candidates for honours takes place in the strictest confidence.

The legal framework for the appeal

15. The role of the Tribunal laid down by s.58 FOIA is to determine whether or not the Information Commissioner's Decision Notice is in accordance with the law and to do so it can review any finding of fact upon which the Decision Notice was based.

16. The long-standing constitutional convention of confidentiality of communications with the Royal household and the Monarch is protected by s.37(1) which provides that:-

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

However this is not absolute since s.2(2) provides:-

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

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

Consideration of the alleged breach of confidentiality

17. A detailed examination of all five letters indicate that in their essentials they are very similar. Since the incoming letters were all addressed to the Prime Minister they all explain that he does not take an active role in advising Her Majesty on the award of

individual honours. The first letter from the Cabinet Secretary also enclosed a press cutting from the Daily Telegraph which was published to coincide with the Birthday Honours List in June 2009. This commented on some of the newly announced honours, gave brief details of the workings of the honours system and stated that the automatic award of knighthoods to such persons as Permanent Secretaries, heads of the professions, the leaders of major companies and the Lord Mayor of London had now ceased and in future such individuals would be considered on their broader merits rather than receive the award due to a postholder. The purpose of the letters was to provide reassurance as to the propriety with which the decision-making had been conducted and it did so in the context that a very high honour had been awarded. No specific information about the detail of the actual consideration was given – only assurances as to how the system worked. The intention of the letters was to give such transparency as was possible as to the process without providing any specific information as to the particular award and its associated decision-making. Statements in all the letters to the effect that the committee was satisfied that it had not made a mistake are not a breach of confidentiality – they are simply a generalised assertion that the committee having come to its conclusions is satisfied that they are correct.

18. The Tribunal considered that the mistake identified in paragraph 9 was an error which did not demonstrate a cavalier attitude towards personal information or invalidate the reliance of the Cabinet Office on s37(1)(b) but rather indicated the importance of continual vigilance in maintaining the confidentiality of such information such as was shown in the letters under consideration. The Tribunal noted that the request for the Tribunal to consider any communications between the named individual and the Cabinet Office would have inappropriately broadened the scope of the case before the Tribunal beyond the request for information under consideration which was for the material before the relevant committee. The Tribunal is therefore satisfied that the ground of appeal is not sustained by an analysis of the facts of the case. The Cabinet Office have not divulged anything which would invalidate their reliance on s.37(1)(b).

Consideration of the Public Interest

19. The Appellant argued that there is a public interest in the publication of this material. The Information Commissioner identified that there had been questioning in the media of the departure from the previous practice in relation to Lord Mayors of

London by awarding Mr Luder a CBE rather than a knighthood as a factor in favour of disclosing the information contained in the minutes and briefing note. However it should be borne in mind that the level of public interest and engagement with this issue does not, on the evidence before the tribunal, appear to be very extensive. Furthermore, the underlying policy with respect to the shift away from automatic honours had been in the public domain for a significant period of time before decisions were made with respect to the honour to be awarded to Mr Luder.

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

21. The tribunal was satisfied that the disclosure of the long citation promoted understanding of the honours system and the merits of Mr Luder which had led to him being awarded a CBE. It would enable any interested person to be able to form his or her own view of the matter. The substantial public interest in maintaining the confidentiality of the honours process is enshrined in statute. During the House of Lords committee stage Lord Falconer, the responsible Minister stated:-

"The conferring of honours raises questions of personal confidentiality and the Government believe that it should receive substantial protection under the Bill. The conferring of honours raises such questions not just in relation to the candidates for honours themselves and members of their families, but also in

relation to those who contribute to the process of selection. ... The Bill has been drafted in recognition of this ..."

22. There is therefore a substantial public interest in maintaining the confidentiality of the honours system. In support of this interest the tribunal has seen evidence of the harm likely to be caused by the disclosure of their materials sought, the contrary evidence of public interest submitted by the Appellant does not outweigh the balance with these public interests. Accordingly the tribunal is satisfied that there should be no disclosure of the materials sought and that the Information Commissioner's Decision Notice was correct in law.

Signed

C Hughes
Information Rights Judge

13th October 2011

Decision reviewed

2 November 2011