

Decision Notice



Decision 122/2012 Mr Peter Cherbi and the Scottish Ministers

The award of a Damehood to the former Lord Advocate, Eilish Angiolini

Reference No: 201200198
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Summary

Mr Cherbi asked the Scottish Ministers (the Ministers) for any information they held on the awarding of (and recommendation for) a Damehood (DBE) to the former Lord Advocate, Eilish Angiolini. The Ministers originally withheld information on the basis that it related to the exercise by Her Majesty of Her prerogative of honour (section 41(b) of FOISA), but, during the investigation, advised the Commissioner that they did not in fact hold any information falling within the scope of Mr Cherbi's request.

The scope of Mr Cherbi's request was considered during the investigation and, in particular, whether the request included information relating to nominations from the Scottish Government's Honours Secretariat. The Commissioner accepted that it did, as a result of which the Ministers argued, in line with section 18 of FOISA, that it was not in the public interest to confirm or deny whether they held such information.

The Commissioner found: (1) that the Ministers did not hold any information on the awarding of (or any proposal to recommend) the awarding of the DBE and (2) that the Ministers were entitled neither to confirm nor deny whether they held information concerning any nominations from the Scottish Government Honours Secretariat.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 18 (Further provision as respects responses to requests); 41(b) (Communications with Her Majesty etc. and honours)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 7 October 2011, Mr Cherbi wrote to the Ministers requesting information on the awarding of (and any proposal to recommend) a Damehood (DBE) to former Lord Advocate, Eilish Angiolini, including the identity of who in the Scottish Government recommended her for the honour.



2. The Ministers did not respond to Mr Cherbi's request and so, on 16 November 2011, Mr Cherbi sought a review.
3. The Ministers replied on 25 January 2012, apologising for the delay in responding to his request. The Ministers advised Mr Cherbi that, because the information he had requested related to the exercise by Her Majesty of Her prerogative of honour, they considered the information to be exempt from disclosure under section 41(b) of FOISA. Within this response, the Ministers also provided Mr Cherbi with information on the honours process.
4. Mr Cherbi was dissatisfied with this response and, on 26 January 2012, wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA.
5. The application was validated by establishing that Mr Cherbi had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

6. On 20 February 2012, the Ministers were notified that an application had been received from Mr Cherbi and were asked to provide the Commissioner with the information withheld from him. However, in response, the Ministers advised that they did not in fact hold any information which would address Mr Cherbi's request. The case was then allocated to an investigating officer.
7. The investigating officer subsequently contacted the Ministers on 9 March 2012, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to confirm that they were no longer seeking to rely on the exemption in section 41(b) of FOISA and to set out the nature and breadth of the searches they had carried out which led them to conclude that they did not hold any information which would address Mr Cherbi's request.
8. A response was received from the Ministers on 28 March 2012, in which they confirmed that they were no longer seeking to rely on the exemption in section 41(b) of FOISA. The Ministers explained why they did not hold the information covered by Mr Cherbi's request. (This is addressed in more detail below.)
9. The Ministers also offered to advise Mr Cherbi that they were no longer seeking to rely on the exemption in section 41(b) of FOISA on the basis that they did not hold any information falling within the scope of his request, and to provide a fuller explanation to him on the honours process, and on the role of the Scottish Government in the process.
10. The Ministers did this on 16 April 2012.



11. Mr Cherbi then contacted the Ministers, asking them to clarify the differences between “nominations” which are sent to the United Kingdom Government Cabinet Office through the Scottish Government Honours Secretariat and “recommendations” for honours which come from the UK Main Honours Advisory Committee. He commented that any information held by the Scottish Government Honours Secretariat would fall within the scope of his request.
12. The Ministers replied on 26 April 2012, setting out the distinction between a “nomination” and a “recommendation” for an honour, and also explained the differing role that the Scottish Government has (or does not have) in the honours process depending on the stage of the process.
13. Mr Cherbi subsequently contacted the Commissioner, commenting that he considered that the scope of his request was broad enough to encompass any information relating to the award by the Scottish Government, including the nomination process.
14. The investigating officer asked the Ministers whether they would accept that Mr Cherbi’s request encompassed information relating to the nomination process, but the Ministers considered that it did not, and that Mr Cherbi was seeking to expand his original question to include the identity of the source of the nomination.
15. The Ministers advised the Commissioner that, if this was the purpose of Mr Cherbi’s request, they would apply section 18(1) of FOISA, as it would not be in the public interest to confirm or deny whether they held information about nominations.

Commissioner’s analysis and findings

16. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by both Mr Cherbi and the Ministers and is satisfied that no matter of relevance has been overlooked.

The scope of the request

17. Before going on to consider whether the Ministers hold any information which would address Mr Cherbi’s request, the Commissioner considers that it is necessary to reach a view on whether Mr Cherbi’s request of 7 October 2011 was broad enough to encompass information and discussions relating to “nominations” for the DBE. If it is, the Commissioner will be required to consider whether the section 18 applies to such information.
18. The Ministers provided the Commissioner with a guidance note setting out the process which is followed for the award of honours. This note explained the role the Scottish Government has in that process and the point at which responsibility passes to the UK Government. It is apparent from reading this note that there are two key stages in the process, the first being the nomination stage and the second being the assessment and recommendation stage.



19. The Commissioner has considered the wording of Mr Cherbi's request (see paragraph 1) and notes that it specifically uses the word "recommendation". The Commissioner accepts that "nominations" and "recommendations" are, in the eyes of the Scottish Ministers, two distinct parts of the honours process. However, the Commissioner does not consider that the distinction between the two is generally known, or that Mr Cherbi intended to make such a distinction when he made his request. It is unrealistic to expect those who make information requests to be aware of the technical or specialised language used by public authorities, and the Commissioner considers that it would be reasonable to interpret the reference in Mr Cherbi's request to "recommendation" as including "nomination". In interpreting Mr Cherbi's request in an unduly restrictive way, the Commissioner finds that the Ministers breached section 1(1) of FOISA.
20. The Commissioner will therefore consider whether the Ministers hold any information relating to the award of, and any proposal to recommend (section 17), the DBE and will then go on to consider whether the Ministers are entitled neither to confirm nor deny whether they hold any information regarding the nomination process (section 18).

Section 17 of FOISA – information not held

21. In terms of section 1(4) of FOISA, the information to be provided in response to a request is, subject to limited provisions which are not relevant here, that held at the time the request is received. Where an authority receives a request for information that it does not hold, it must, in line with section 17(1), tell the applicant that it does not hold the information. As noted above, during the investigation, the Ministers advised the Commissioner that they do not hold any information regarding the recommendation of the award.
22. The Ministers explained that the Scottish Government does not make recommendations for honours and, whilst nominations are passed to the United Kingdom Cabinet Office through the Scottish Government Honours Secretariat, recommendations come from the UK main Honours Advisory Committee. The Ministers also advised that, since 2007, the First Minister and all other Scottish Government Ministers have chosen not to play a role in the honours process.
23. The Ministers submitted that, given that the Scottish Government has no role in making recommendations, the Ministers do not hold any information on the awarding of, or proposal to recommend, the DBE, or on the identity of who in the Scottish Government recommended Ms Angiolini for the honour. As a consequence, no searches were carried out by the Ministers.
24. It is apparent from reading the guidance note (see paragraph 18) that the Scottish Government only has a role in relation to the nomination stage. The Scottish Government Honours Secretariat considers and processes possible nominations for awards with input, as required, from others. This includes consideration by the internal honours group of civil servants. Following this consideration, the nominations are then passed to the Cabinet Office by the Permanent Secretary and this is where the Scottish Government's role ends.



25. It is clear that the Scottish Government has no role in the assessment and recommendation stage of the honours process, which concludes with a final list of possible honours candidates being submitted through the Prime Minister to the Queen for her approval. Therefore, the Commissioner accepts, on the basis of the submissions received, that the Ministers do not (and did not at the time of Mr Cherbi's request) hold any recorded information concerning information or discussions on the awarding of (and any proposal to recommend) the DBE, or on the identity of who within the Scottish Government recommended Ms Angiolini for the honour.
26. The Commissioner acknowledges that the Ministers notified Mr Cherbi during the course of the investigation that they did not hold any recorded information which would address his request. However, in failing to give Mr Cherbi proper notice in terms of section 17(1) of FOISA at the time they responded to his request, the Commissioner finds that the Ministers breached Part 1 of FOISA.

Section 18 of FOISA – neither confirm nor deny

27. Section 18 gives public authorities the right to refuse to reveal whether information exists or is held by them in the following limited circumstances:
- a request has been made to the authority for information which may or may not be held by it;
 - if the information existed and were held by the authority, the authority could give a refusal notice under section 16(1) of FOISA on the basis that the information was exempt information by virtue of any of the exemptions in sections 28 to 35, 39(1) or 41 of FOISA; and
 - the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
28. In this case, the Ministers submitted that, if information regarding nominations existed and was held by them, it would be exempt from disclosure under both sections 41(b) and 28(1) (Relations within the United Kingdom) of FOISA.
29. It is not sufficient, however, to claim that one or more of the relevant exemptions applies. Section 18(1) makes it clear that a public authority must be able to give a refusal notice under section 16(1) on the basis that the information is exempt information. Given that none of the exemptions currently listed in section 18(1) are absolute exemptions for the purposes of section 2(2) of FOISA, it is only by satisfying a dual test, i.e.:
- that a relevant exemption applies and
 - having carried out the public interest test required by section 2(1)(b) of FOISA and having found the public interest to lie in maintaining that exemption
- can information be considered to be exempt information.
30. The Commissioner will first consider whether the Ministers could have given a refusal notice under section 16(1) in relation to the information in question, if it existed and was held.



Section 41(b) of FOISA

31. Under section 41(b) of FOISA, information is exempt from disclosure if it relates to the exercise by Her Majesty of Her prerogative of honour. The exemption contained in section 41(b) is “class-based”, meaning that it can be applied to information of a certain type without considering the specific content of that information in detail. The information Mr Cherbi has requested on nominations, if held, would clearly be exempt from disclosure under section 41(b) of FOISA, given that it relates to the exercise of Her Majesty of Her prerogative of honour.

The public interest test – section 2(1)(b)

32. As noted above, the exemption is subject to the public interest test in section 2(1)(b) of FOISA.
33. The Ministers consider that the honours process relies on those involved being free to fully express their views in the knowledge that those views will not be made public. According to the Ministers, if there is no expectation of confidence, people will be more circumspect and will be less likely to provide frank views, thereby weakening the integrity of the Honours System.
34. The Ministers referred the Commissioner to the fact that the form on which a nomination is made states that the nomination will be treated confidentially and will not be communicated to any person other than those involved in the administration of the Honours System. The Ministers argued that, if the source of a nomination were made public, prospective recipients of awards may choose to refuse an award out of concern that views expressed during the consideration process might be made public. This protection, the Ministers submitted, is equally important to those who are considered for, but who are not awarded, an honour.
35. Mr Cherbi, on the other hand, considers that it is “most certainly” in the public interest for any information surrounding the award of the DBE to be published, describing Ms Angiolini as a “public and somewhat controversial figure” and referring to her role in the Cabinet. He believes that any information held relating to her award should be published so that the media can report on it, and so the public can judge whether Ms Angiolini merited the award.
36. The Commissioner acknowledges the public interest arguments put forward by Mr Cherbi and accepts that where an individual holds a public position with the level of authority, responsibility and public scrutiny that Ms Angiolini did, that there is a public interest in understanding why and by whom she was nominated for the honour of a Damehood.



37. However, it is clear to the Commissioner that those who nominate an individual for an honour do so in the expectation that their identity will not be made public. The Commissioner agrees with the Ministers (see paragraphs 33 and 34 above) that the public benefits from this: disclosure of information that may reveal who did (or did not) nominate Ms Angiolini for a DBE may cause concern amongst those many individuals who have submitted nomination forms in the past, and may dissuade people in the future from making a nomination, in case the public (or, indeed, the person nominated) discovers their identity. The Commissioner acknowledges that this may undermine the honours process, which would not be in the public interest. On balance, therefore, she considers that, if the information existed and were held, the public interest in maintaining the exemption in section 41(b) would outweigh the public interest in the disclosure of the information.
38. Given that the Commissioner has concluded that, if the information existed and was held by the Ministers, the Ministers could give a refusal notice under section 16(1) of FOISA on the basis that the information would be exempt information by virtue of section 41(b) of FOISA, she is not required to go on to consider whether the Ministers would also be entitled to give a refusal notice on the basis that the exemption in section 28(1) applied.
39. However, the Commissioner is required to go on to consider the public interest in terms of section 18(1) of FOISA and whether to reveal whether the information exists or is held would be contrary to the public interest.

The public interest – section 18(1)

40. In Scotland, nominations for Honours can be received direct from members of the public, the UK Cabinet Office, Scottish Government Directorates and Agencies and Lord Lieutenants. The Ministers consider that confirming whether they hold information about the source of the nomination would reveal whether the nomination was provided by an internal department or from an external group or private individual, which, in the view of the Ministers, would undermine the process by which people are nominated for honours.
41. The Commissioner is satisfied that, were the Ministers to reveal whether they held the information in question, this would undermine the process by which people are nominated for honours. Requesters would be able to frame their questions in such a way that, if Ministers were required to confirm whether they held the requested information, that, in itself, could disclose that a nomination was not made by a specific group/individual, thus providing information about who did or did not make a nomination.
42. As a result, the Commissioner is satisfied that the Ministers were entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether information as to the nomination for the honour is held by them.



DECISION

The Commissioner finds that the Scottish Ministers partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Cherbi.

The Commissioner finds that the Ministers were entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether they held information about the nominations for the DBE to Ms Angiolini.

The Commissioner finds that the Ministers do not hold any information regarding the recommendation of the DBE. By failing to notify Mr Cherbi that they did not hold such information, the Ministers failed to comply with section 17(1) of FOISA.

The Commissioner also finds that the Ministers interpreted Mr Cherbi's request in an unduly restrictive way and, in so doing, failed to comply with section 1(1) of FOISA.

Given that, during the investigation, the Ministers notified Mr Cherbi that they did not hold information regarding recommendations and also widened their interpretation of the request, the Commissioner does not require the Ministers to take any action in respect of these failures.

Appeal

Should either Mr Cherbi or the Scottish Ministers wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Rosemary Agnew
Scottish Information Commissioner
23 July 2012



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
...
- (6) This section is subject to sections 2,9,12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
...
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
...



17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),if it held the information to which the request relates; but
 - (b) the authority does not hold that information,
- it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

18 Further provision as respects responses to request

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.
- (2) Neither paragraph (a) of subsection (1) of section 16 nor subsection (2) of that section applies as respects a refusal notice given by virtue of this section.

41 Communications with Her Majesty etc. and honours

Information is exempt information if it relates to-

...

- (b) the exercise by Her Majesty of Her prerogative of honour.