

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 8 July 2020

**Public Authority:** Cabinet Office  
**Address:** 70 Whitehall  
London  
SW1A 2AS

#### **Decision (including any steps ordered)**

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1. The complainant has requested the name of an individual responsible for writing an internal email which has been disclosed to his wife by the Cabinet Office.
2. The Commissioner's decision is that the Cabinet Office has appropriately applied section 40(2) FOIA (Personal information) to withhold the name.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

#### **Request and response**

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4. On 16 August 2019 the complainant wrote to the Cabinet Office and requested information in the following terms:

"I would be most grateful for your assistance in disclosing who authored this below [Email of 1 August 2018 @ 15:18 – Internal CO] kindly provided to [a named person by a named person]. It has clearly been authored by an FCO public official in the Cabinet Office who has flagrantly misused my data by presenting it to others to serve his own agenda of apparently discrediting the case of[a named person]. Whilst I do not intend to enter into all the potential legal implications of this email, I am concerned that my personal data would form part of a 'package' provided to the Prime Minister's Office by an FCO public official in apparent criminal violation of the DPA."

5. The Cabinet Office responded on 22 August 2019 and confirmed holding the requested information explaining that it was withheld in reliance of section 40(2).
6. On the same day (22 August 2019) the complainant requested an internal review; this request was acknowledged by the Cabinet Office 23 August 2019 and to date remains outstanding.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 19 October 2019 to complain about the way his request for information had been handled. He complained that the Cabinet Office had not provided an internal review.
8. The Commissioner wrote to the Cabinet Office on 11 November 2019 to remind it of its obligation to provide an internal review.
9. No response was received by either the complainant or the Commissioner. In the light of this the Commissioner wrote again on 22 November 2019 to advise the Cabinet Office that the case had been accepted for investigation.
10. On 20 February 2020 the Commissioner wrote to the complainant and to the Cabinet Office requesting its submissions on the application of section 40(2). The Commissioner wrote again to the Cabinet Office on 23 March 2020 and 21 April 2020 requesting its response. As at the date of this Notice no acknowledgement or response has been received by the Commissioner.
11. At the commencement of the Commissioner's investigation the complainant wrote to the Commissioner on 21 February 2020 as follows:

"Apart from the fact that my data appears to have been misused, possibly to misrepresent the case of my wife, [name redacted], to the Prime Minister's Office, I feel that there are other data & legal implications to the below Email of August 1st 2018, written by a Cabinet Office public official, including:

  1. The reasons for processing/misusing my data have not been provided
  2. The data referred to has NOT BEEN PROVIDED TO ME.
  3. The 'background' provided to the Prime Minister has also not been referred to me, even though I understand that it may contain my data - including possibly relating to Sussex Police, HMPPS, the FCO legal counsel in Geneva, criminal 'proceedings' in Geneva, deportations & sentences served by 'offenders' in Geneva.

4. The 'position' of the FCO has not been clarified.
  5. Allegations of obstruction of justice have not, apparently, been reported to law enforcement agencies.
  6. The identity of the author of this email has not yet been disclosed to me."
12. The Commissioner explained to the complainant that the matters referred to in his email, other than disclosure of the author of the email, concerned his own personal data which cannot be accessed through the FOIA as set out in section 40(1):
- "Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."
13. The Commissioner reiterated her previous advice to make a 'subject access request' to the Cabinet Office under the GDPR/DPA 2018 legislation.
  14. In the particular circumstances of this case including the urgency stressed by the complainant and the lack of engagement from the Cabinet Office, the Commissioner has taken a pragmatic view and determined the outcome of this case without any further delay.

## Reasons for decision

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### Section 40 – Personal information

15. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
16. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
17. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.

18. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

**Is the information personal data?**

19. Section 3(2) of the DPA defines personal data as:  
“any information relating to an identified or identifiable living individual”
20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
22. The Commissioner is satisfied that the withheld name comprises personal data. However, the fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
23. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

24. Article 5(1)(a) of the GDPR states that:  
“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”
25. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
26. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

**Lawful processing: Article 6(1)(f) of the GDPR**

27. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:  
“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of

the data subject which require protection of personal data, in particular where the data subject is a child.”<sup>1</sup>

28. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
29. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

*Legitimate interests*

30. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
31. Further, a wide range of interests may be legitimate interests. They can be the requester’s own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

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<sup>1</sup> Article 6(1) goes on to state that:-

*‘Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks’.*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

*‘In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted’.*

32. The Commissioner accepts that there is a legitimate interest in the accountability of public authorities as a general principle. There is also the legitimate interest of the requester, the complainant. The complainant has made clear his view in correspondence with the Commissioner and in the voluminous copies of correspondence with numerous public authorities which he has provided to the Commissioner. He considers his legitimate interest in the name to be compelling.
33. The Commissioner notes that it is also important to acknowledge that section 40 is different from other exemptions in that its consideration does not begin with an expectation of disclosure. As section 40 is the point at which the FOIA and DPA interact, the expectation is that personal data will not be disclosed unless it can be demonstrated that disclosure is in accordance with the DPA.
34. The Commissioner does not agree with the complainant in this regard. Having seen the content of the relevant email, her view is that the content of the email which had been previously provided to the complainant's wife is of paramount importance. The public authority provided the email, the author of the email is a representative of the public authority. The identity of the individual can only be of extremely limited interest to the world at large.
35. The Commissioner therefore considers that there is limited legitimate interest in disclosure of this information.

*Is disclosure necessary?*

36. "Necessary" means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
37. In the Commissioner's view it is not sustainable to argue that disclosure of the name is necessary. Disclosure of such information would not add to the public's understanding in any way. The Commissioner also fails to understand the necessity for the complainant to attribute a name to an internal email clearly intended for internal reference. In the circumstances of this case, the Commissioner has identified that whilst there is a legitimate interest in ensuring accountability and transparency on the part of the Cabinet Office, she is not convinced of the necessity in the disclosure of the withheld name.
38. Given this finding the Commissioner has concluded that disclosure of the name would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure would therefore breach the first data protection

principle and thus such information is exempt from disclosure on the basis of section 40(2) of the FOIA.

## **Other matters**

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39. The FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.
40. The complainant asked for an internal review of the outcome of his request on 22 August 2019. As at the date of this Notice no internal review has been provided. The Cabinet Office has not offered an explanation or apology for this delay.
41. The Commissioner considers this to be extremely unsatisfactory.
42. The Commissioner is equally dismayed by the absence of any engagement with her in the investigation of this complaint. She notes that the submission she requested was due by 19 March 2020, before the onset of government actions in respect of the COVID19 pandemic.

## Right of appeal

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43. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

44. 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.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Susan Hughes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**