

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 January 2020

Public Authority: The Foreign and Commonwealth Office

Address: King Charles Street

London

SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) seeking information about whether Dominic Raab had been the subject of any complaints when he was employed by the FCO during the period 2000 to 2006. The FCO relied on section 40(5) (personal data) of FOIA to refuse to confirm whether it held any information falling within the scope of the request.
2. The Commissioner has concluded that the FCO is not entitled to rely on section 40(5) to refuse to confirm or deny whether it holds any information falling within the scope of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Confirm to the complainant whether or not it holds any information falling within the scope of each of the questions numbered 1 to 9 in his request of 1 April 2019 and disclose or refuse (in accordance with section 17 of FOIA) any information identified.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. The complainant submitted the following request to the FCO on 1 April 2019:

'Can you please provide the following information under the freedom of information act about Dominic Raab.

Mr Raab was employed by the FCO between 2000 and 2006. After leaving the FCO, he joined the Conservative party and has since held several ministerial positions in other departments.

My requests relate to his time at the FCO:

1) were there any complaints made to FCO HR in London about Raab when he worked at the FCO?

2) if so, could you provide a figure for the number of complaints?

3) and, if there were any complaints, could you indicate whether any of the complaints resulted in any written warnings or disciplinary action taken?

4) were there any HR-related complaints made to or shared with Raab's line manager/s at the FCO when Raab worked at the FCO?

5) if so, could you provide a figure for the number of complaints?

6) and, if there were any complaints, could you indicate whether any of the complaints resulted in any written warnings or disciplinary action taken?

7) Were there any HR-related complaints about Raab made to or shared with senior civil servants (specifically: Deputy Legal Adviser, DG Legal, DG HR, perm sec.) in London

8) if so, could you provide a figure for the number of complaints?

9) and, if there were any complaints, could you indicate whether any of the complaints resulted in any written warnings or disciplinary action taken?

10) I understand that Mr. Raab left the the Foreign office in May 2006. Was the contract terminated by the FCO, did it end following mutual agreement between the employer and employee, or did Mr Raab resign?

I understand that you would not be able to provide specific details of any HR-related cases. So for clarity, I am only requesting the following information:

- For question 1), 4) and 7), a yes or no.*
- For question 2), 5) and 8), a number.*
- For question 3), 6) and 9), a yes or no.*

- For question 10), a clarification (i.e. "termination", "mutual agreement" etc).

I also note the following:

- I have asked questions 1-9 to the departments where Raab served as a minister, and these departments have answered the question/s without raising exceptions.

- What the ICO says about privacy expectations and senior officials. I would argue that the request should be considered in the context of Mr Raab's current position: a former minister who is widely viewed as a Tory leadership candidate, and therefore a potential future prime minister.

- If for whatever reason the total number of my requests raises exceptions (for example would take too much time/cost), please respond to only part of the request and do not dismiss it in its entirety.'

6. The FCO responded on 3 May 2019 and in relation to questions 1 to 9 it refused to confirm or deny whether it held any information falling within the scope of the request on the basis of section 40(5B)(a)(i) (personal data) of the FOIA. It confirmed that it held information falling within the scope of question 10 but it refused to provide this information relying on the exemption contained at section 40(2) of FOIA.
7. The complainant contacted the FCO on the same day and asked it to conduct an internal review of these refusals.
8. The FCO informed him of the outcome of the internal review on 25 June 2019. It upheld the decision to refuse to confirm or deny whether it held any information falling within the scope of questions 1 to 9. However, in relation to question 10 it confirmed that Mr Raab had resigned from the FCO.

Scope of the case

9. The complainant contacted the Commissioner on 26 June 2019 in order to complain about the FCO's refusal to provide him with the information falling within the scope of questions 1 to 9 of his request.
10. In relation to this complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested.

Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.

11. As explained above, the FCO is seeking to rely on section 40(5) to refuse to confirm or deny whether it holds information falling within the scope of questions 1 to 9 the request. Therefore, this notice only considers whether the FCO is entitled, on the basis of this exemption, to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.
12. Furthermore, it is important to note – for the reasons that will be become clear below - that the Commissioner's role is limited to considering the application of any exemptions at the point that the request was submitted, in this case April 2019.

Reasons for decision

Section 40 - Personal data

13. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
14. Therefore, for the FCO to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

15. Section 3(2) of the DPA 2018 defines personal data as:-

"any information relating to an identified or identifiable living individual".

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

17. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
18. The FCO argued that complying with section 1(1)(a) of FOIA would reveal Mr Raab's personal data, ie it would disclose whether he had or had not been the subject of any HR related complaints whilst employed by the FCO.
19. The Commissioner agrees with the FCO's position for the following reasons: If the FCO did not hold any information, then confirmation of that fact would reveal that Mr Raab had not been the subject of any such complaints. Conversely, if the FCO did hold any information, then confirmation of that fact would reveal that Mr Raab had been the subject of a complaint, or complaints. In either scenario such information clearly relates to Mr Raab and is biographically significant to him and therefore is his personal data.
20. The fact that confirming or denying whether the requested information is held would reveal the personal data of Mr Raab does not automatically prevent the FCO from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.

Would confirming whether or not the requested information is held contravene one of the data protection principles?

21. Article 5(1)(a) GDPR states that:-

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"

22. In the case of a 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 – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair, and be transparent.

Lawful processing: Article 6(1)(f) GDPR

23. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

24. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

"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"¹.

25. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under 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 confirmation as to whether the requested information is held (or not) 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.

26. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) *Legitimate interests*

27. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOI request, the

¹ 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 2018) 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".

Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.

28. 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.
29. The FCO argued that there is a legitimate interest in transparency regarding the conduct of senior public officials and members of the government. The Commissioner agrees with this assessment and therefore considers this limb of the test to be met.

(ii) Is confirming whether or not the requested information is held necessary?

30. '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 confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
31. The FCO also acknowledged that, in so far as Mr Raab's previous employment with the FCO might be considered relevant to that interest, there is no obvious way of addressing it, other than by disclosing whether or not the requested information is held.
32. Again, the Commissioner agrees with this assessment, and in her view it is necessary for the FCO to comply with section 1(1)(a) of FOIA in order to meet the legitimate interests identified above.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

33. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override

legitimate interests in confirming or denying whether information is held.

34. The FCO argued that its employees have a reasonable expectation that their personal data will not be disclosed in response to an FOI request when, as in this case, the request relates to sensitive data regarding complaints that may have been made against them, or disciplinary issues that they may have been subject to. The FCO argued that disclosure of such specific information (if held) about an individual would be both unlawful and unfair as it would cause unwarranted interference with their privacy rights and could cause them considerable distress, particularly if a complaint had been made that was subsequently judged to be unfounded. The FCO explained therefore that in such cases, the rights of the employee, as the data subject, outweigh any legitimate interests on the part of the requester or wider public in confirming or denying that such information is held. The FCO explained that it also considered that this policy should apply to requests about previous members of staff, whether or not they are in a more senior or high-profile position at the time the request is made.
35. The FCO also argued that it was important to maintain the use of the neither confirm nor deny NCND provision under section 40 for all requests of this nature. This is because if it confirmed that no information was held in those cases where no complaints had been made, use of the NCND provision in other cases would clearly indicate (or be taken to indicate) the opposite.
36. As noted above, the FCO did accept that there were legitimate interests in it complying with section 1(1)(a) of FOIA in respect of this request. However, FCO emphasised that Mr Raab's employment with the FCO ended 13 years ago, and that he was in a relatively junior grade when he worked there. In light of this the FCO argued that his expectation of privacy during his tenure would thus have been considerably higher than if he had been in a senior, public-facing role. The FCO explained that it did not consider that the complainant's arguments regarding Mr Raab's position at the time of the request were grounds for changing its standard approach in this case.
37. The complainant explained to the Commissioner that he had made the same requests as in questions 1 to 9 to all the government departments where Mr Raab had served as a minister and all departments had answered these questions.
38. Furthermore, the complainant emphasised that there is information in the public domain about alleged behavioural matters concerning Mr

Raab. The complainant noted that he had entered into a non-disclosure agreement (NDA) with a former female colleague in 2007, and its existence became public knowledge during a court case in 2012.²

39. Furthermore, the complainant explained that, more recently, a former colleague at the Department for Exiting the EU (DExEU), where Mr Raab was Secretary of State, spoke out about his behaviour there. The complainant cited a particular news article which he argued contained important allegations about Mr Raab's alleged behaviour.³
40. The complainant noted that Mr Raab entered into the NDA a year after leaving the employment of the FCO, and was his first job following his departure from FCO, and marked his shift from the civil service to politics.
41. Given the NDA, and the more recent allegations, the complainant argued that it was strongly in the public interest to establish whether there is (or is not) a pattern in Mr Raab's alleged behaviour that stretches back 13 years and whether there were or were not any complaints and concerns already back then. Furthermore, the complainant argued that should such a pattern be established, it raises questions as to how an individual can rise to a senior role despite such concerns.
42. The complainant argued that complying with his request was the only way to establish this.
43. The complainant noted that the FCO had argued that Mr Raab held a relatively junior role whilst at the FCO and as a result his expectation of privacy during his tenure would thus have been considerably higher than if he had been in a senior, public-facing role. However, the complainant argued that Mr Raab considers the role significant enough to advertise and promote it in his campaign materials. His six years at the FCO are public knowledge and he had a relatively public facing role as an FCO lawyer in the Hague tribunal.⁴ The complainant also noted that Mr Raab had recently made reference to the role during his campaign to lead the Conservative Party. In light of this the complainant explained that in his view scrutiny of Mr Raab's time at the FCO is legitimate.
44. Furthermore, the complainant also argued that six years in a government department is not an indifferent amount of time, and given

² The complainant cited the following news story and also the relevant court documents to evidence this point:

<https://www.buzzfeed.com/albertonardelli/dominic-raab-nda-tory-leadership> and <https://www.bailii.org/ew/cases/EWHC/QB/2011/3375.html>

³ <https://www.thesun.co.uk/news/6887462/dominic-raab-brexit-mr-nasty-rebecca-tott>

⁴ <https://twitter.com/DominicRaab/status/985233027444953088>

Mr Raab's career trajectory his current position cannot be detached from his earlier role(s).

45. The complainant also argued that in considering how to respond to his request, the FCO should consider Mr Raab's current position at the time of the request, which he stated as being a candidate for the leadership of the Conservative Party who has held senior ministerial positions and is likely to do so again soon. He also noted that he had asked for very broad information, and not for specific details of cases, should these have taken place.
46. Finally, the complainant emphasised that Mr Raab is currently Foreign Secretary. He argued that in any other sector and walk of life if somebody leaves say a private company at a mid-level role, and returns a decade later as its CEO, and in between there had been behavioural questions and allegations, it would be in the public interest to ask whether there had been any similar concerns, cases and complaints a decade prior. The complainant also noted that an answer to his request is also in the interests of current staff at the FCO, and a duty of care towards these.
47. In summary, taking all of these points together, the complainant explained in his view that in terms of the balancing test, these interests taken together outweigh the legitimate interests of Mr Raab.
48. In considering the balance between the legitimate interests and those of Mr Raab, the Commissioner recognises that the complainant has submitted the same requests to different government departments and they have responded to these requests. However, in the Commissioner's view there is a significant difference between the circumstances of those requests and the request the complainant submitted to the FCO. Namely, in respect of these other requests the complainant was asking for information about Mr Raab when he was a government minister. However, in the FCO request the complainant was asking for information about Mr Raab when he was an employee of the FCO. Consequently, in the Commissioner's opinion the responses of the other government departments in relation to those requests is not directly relevant to her analysis of the FCO's reliance on section 40(5) in respect the request which is the subject of this decision notice.
49. Furthermore, the Commissioner agrees with the FCO that employees, and ex-employees will have a reasonable expectation that details of any complaints that may be made against them would not be disclosed to the world at large under an FOI request. Moreover, the Commissioner accepts that disclosure of information concerning such matters could cause a significant invasion of privacy for such individuals, particularly in cases where any allegations proved to be unfounded. In the particular circumstances of this case, the Commissioner also recognises that Mr

Raab left the employment of the FCO 13 years before this request was made.

50. However, in the Commissioner's view each request has to be considered on its own merits. In her view there has to be some consideration of the role an individual played after they left the employment of the FCO. In the particular circumstances of this case in the Commissioner's opinion the fact that Mr Raab, prior to the request being submitted, had served as Secretary of State for the DExEU means that there is a legitimate interest in previous matters relating to his employment with the FCO, albeit an employment that he left 13 years previously. Indeed, as the complainant has noted, in his life as a politician Mr Raab has referred to his previous role as lawyer at the FCO. Consequently, in the Commissioner's view to draw a complete and separate distinction between the two would be artificial. Moreover, in the Commissioner's opinion it can be legitimate to question the roles and actions of those who serve in government prior to their arrival into politics. Furthermore, the Commissioner notes that at the time of the request there was information in the public domain about a NDA Mr Raab had entered into in 2007 regarding allegations of workplace bullying and further similar allegations are set out in the newspaper article cited by the complainant at footnote 3.
51. Taking these factors into account the Commissioner is persuaded this is an exceptional case, which does merit deviating from the FCO's standard approach, and where confirming or denying whether the information would meet a clear and significant legitimate interest. She has therefore concluded that the legitimate interests in the FCO confirming whether or not it holds the requested information outweigh the interests of Mr Raab. In reaching this conclusion, the Commissioner wishes to emphasise that she has considered the circumstances as they existed at the time of the request, ie prior to Mr Raab's decision to stand for leader of the Conservative Party and prior to his appointment of Secretary of State at the FCO.

Fairness and transparency

52. Even though it has been demonstrated that complying with section of 1(1)(a) of FOIA is lawful, it is still necessary to show that confirming whether or not the information is held would be fair and transparent under the principle (a).
53. In relation to fairness, the Commissioner considers that if confirming whether or not the information is held passes the legitimate interest test for lawful processing, it is highly likely that providing such a confirmation or denial will be fair for the same reasons.

54. The requirement for transparency is met because as a public authority, the FCO is subject to FOIA.
55. In this instance, the Commissioner has therefore decided that the FCO has failed to demonstrate that section 40(5B)(a)(i) is engaged.

Right of appeal

56. 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 123 4504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

57. 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.
58. 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

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