

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 June 2022

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

Decision (including any steps ordered)

1. The complainant requested from the Cabinet Office ("CO") information relating to Ministerial misconduct complaints. The CO refused to confirm or deny whether it held the requested information to part 1 of the request and relied on section 40(5B) (neither confirm nor deny) of FOIA. It also relied on section 21(1) (information reasonably accessible by other means) to the remaining parts of the request.
2. The Commissioner's decision is that section 40(5B) is not engaged and therefore the CO is not entitled to rely on this exemption.
3. With regard to section 21(1) of FOIA the Commissioner's decision is that he is not persuaded that the requested information is readily available to the applicant, and that the CO is not entitled to rely on this exemption to parts 2 and 3 of the request.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response which must confirm or deny whether the information is held, and either disclose the requested information or issue a valid refusal notice compliant with section 17 of FOIA.
 - Disclose the information withheld under section 21(1) of FOIA.

5. 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.

Background

6. In a previous and similar case¹ to this which was subsequently appealed² at the First-tier Tribunal, the CO provided the following background information on the Ministerial Code which also appears relevant to this particular case:
7. The Ministerial Code (the Code) is a guidance document for Ministers setting out broad and general principles covering conduct, including some procedures and requirements about how government business is conducted. Ministers of the Crown are expected to maintain high standards of behaviour and behave in a way that upholds the highest standards of propriety.
8. The Code should be read against the overarching duty on Ministers to comply with the law and to observe the seven principles of public life and specified principles of ministerial conduct as set out in the Code.
9. The scope of the Code is extremely broad in nature. It includes substantive guidance that Ministers are expected to follow, but it also sets out procedures and requirements for officials to follow on behalf of Ministers. It follows that complaints relating to the Code can themselves be extremely broad in nature – ranging from procedural matters to personal conduct.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617398/fs50849464.pdf>

²

[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2915/Keenan.%20M%20~%20EA.2020.0126%20Final%20Decision%20\(160921\).pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2915/Keenan.%20M%20~%20EA.2020.0126%20Final%20Decision%20(160921).pdf)

Request and response

10. On 1 December 2020 the complainant wrote to the CO and requested information in the following terms:

"In November 2020 the Cabinet Office & Prime Minister, Boris Johnson have in the public interest disclosed into the public domain the Bullying Ministerial Misconduct Complaint & Outcome against Priti Patel therefore, in accordance with the Freedom of Information Act I would like to request the following information.

- 1. How many Ministerial Misconduct Complaints were made against each named Cabinet Minister including the Prime Minister, Boris Johnson for each year between 2012 – 2020?*
 - 2. Of those complaints how many were investigated & how many were upheld?*
 - 3. Of those upheld decisions how many were overturned by the Prime Minister?"*
11. On 29 December 2020 the CO responded. It refused to confirm or deny whether the information was held and relied on section 40(5) (neither confirm nor deny) of FOIA to part 1 of the request. With regard to the remaining parts of the request, the CO withheld information under section 21(1) (information reasonably accessible by other means) of FOIA.
12. On 2 January 2021 the complainant asked the CO for an internal review.
13. On 16 March 2021 the CO provided its internal review response and maintained its original position.

Scope of the case

14. The complainant contacted the Commissioner on 16 March 2021 to complain about the way his request for information had been handled.
15. The following analysis focuses on whether the CO is entitled to rely on section 40(5B)(a)(i) of FOIA to refuse to neither confirm nor deny whether it holds information in relation to part 1 of the request. Also, whether the CO was correct to apply section 21(1) of FOIA to the remaining parts of the request.

Reasons for decision

Section 40(5B) – Neither confirm nor deny

16. 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.
17. Therefore, for the CO to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether they hold 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.
18. In this case, the CO maintains that it can neither confirm nor deny whether any information within the scope of the request is held, even in redacted form, because if it were to confirm or deny that such information were held, it would contravene one of the data protection principles.
19. The Commissioner has considered the CO's submissions provided, and his decision is that the CO cannot rely on section 40(5) of FOIA because it is already publicly known that it holds information in relation to complaints made about Ministers. The Commissioner accepts that although the position with regard to each and every Minister within scope of the request is not publicly known in terms of complaints, it is publicly known that certain Ministers (e.g. Priti Patel and Damien Green) had complaints made about them.
20. The Commissioner notes from the CO's internal review response to the complainant that it advised that "*the provision of information of the nature you have requested (the number of complaints against a named Minister), even in redacted form, would confirm the existence of a complaint, and this would amount to a disclosure of personal data.*" Similarly, within the original response to the complainant (29 December 2020) the CO stated that "*Information on Ministerial complaints is already in the public domain.*" This undermines and contradicts its section 40(5) position, since the CO contended that if it were to confirm or deny that it held the information requested, that would disclose personal data, but such personal data is already in the public domain in respect of some Ministers.

21. In light of this, the Commissioner concludes that section 40(5) of FOIA does not apply in this case.

Section 21 – information accessible to the applicant by other means

22. Section 21 of the FOIA states that:

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

23. Section 21 is an absolute exemption, which means there is no requirement to carry out a public interest test if the requested information is exempt.
24. The Commissioner considers that the purpose of the section 21 exemption is to protect the scarce resources of public authorities by shielding them from replying to requests for information which the requestor can access elsewhere. It also acts as an incentive for public authorities to be proactive in publishing information as part of their publication schemes. Finally, it protects the statutory right of public authorities to charge for certain information which they are bound by law to collect.
25. In the Commissioner's guidance for section 21³ of the FOIA, the Commissioner explains that subsection (1) describes the fundamental principle underlying this exemption. That is, in order to be exempt, the requested information must be reasonably accessible 'to the applicant'. Unlike consideration of most other exemptions in the FOIA, this allows the public authority to take the individual circumstances of the applicant into account.

³ <https://ico.org.uk/media/for-organisations/documents/1203/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf>

26. In effect, a distinction is being made between information that is reasonably accessible to the particular applicant and the information that is available to the general public. In order for section 21 to apply, there should be another existing, clear mechanism by which the particular applicant can reasonably access the information outside of the FOIA.
27. Information is only reasonably accessible to the applicant if the public authority:
- knows that the applicant has already found the information; or
 - is able to provide the applicant with precise directions to the information so that it can be found without difficulty. When applying section 21 of the FOIA in this context, the key point is that the authority must be able to provide directions to the information.
28. Additionally, paragraph 23 of the Commissioner's guidance, following the case of *The London Borough of Bexley and Colin P England v Information Commissioner (EA/2006/0060 & 0066, 10 May 2007)*⁴, states that for section 21 to apply, it is necessary to consider whether all of the information is reasonably accessible to the complainant. At paragraph 113 of the decision the Tribunal stated:

"The reasons are that in section 21 the word 'reasonably' qualifies the 'accessible' and in the majority's view, "reasonably accessible" applies to the mechanism that any applicant has available to him or her to obtain the information. We do not interpret the section as stating that a public authority has no obligation to provide information where a reasonable amount of that information is available elsewhere."

The CO's position

29. With regard to the remainder of the request, the CO withheld the information under section 21(1) of FOIA because it relates to information that is readily accessible by other means. The CO explained that information regarding Ministerial complaints is already in the public domain and this information addresses complaints where the Prime Minister has lost confidence in a Minister or where an issue has been subject to public comment and it is important to set out what the Prime Minister's decision is.

⁴ <https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i146/ENgland.pdf>

30. The CO said that the findings of the former Independent Adviser to the Prime Minister for 2019 and 2020 have been published, and guided the complainant to website links where the information can be found. It said that this also includes the Prime Minister's written statement found within the second link.
- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/854579/Report_by_indep_adviser_FINAL.pdf
 - <https://www.gov.uk/government/news/ministerial-code-investigation>
31. With regard to information for the previous years which the complainant is seeking, the CO informed him that this had already been provided to him within its correspondence of April 2020. The CO informed the Commissioner that the complainant has in the past, raised the argument regarding Ministerial misconduct complaints and outcomes which he said have previously been disclosed into the public domain by the UK Government/Cabinet Office. The CO explained that the complainant is therefore aware of its view on this which is that the outcome of serious breaches, and outcomes where there is significant public interest, of the Code are published, is not an argument in favour of publication of the personal data which the complainant has requested.
32. The CO stated that it had provided information to the complainant about complaints investigated and upheld which was already in the public domain. This, it said, included information about the Prime Minister's decision relating to the then recent investigation concerning the Home Secretary, and links to those publications were provided to the complainant.
33. Therefore, the CO considers it appropriate in the circumstances to rely on section 21(1) of FOIA, particularly given that the complainant had been previously provided with the links and information about publication in the context of his previously almost identical FOI request.

The Commissioner's position

34. The Commissioner notes that the request for information was for the number of complaints that were investigated, upheld and overturned, and was not a request for the general findings of complaints, or for the reports/press releases relating to upheld complaints. The Commissioner acknowledges that information is in the public domain by virtue of referral to the Independent Adviser or press releases by the UK Government. However, he is not persuaded that the specific number of complaints upheld is readily available.

35. The Commissioner is aware that the complainant could search online for Ministerial misconduct complaints, but he considers that the complainant would have to already know the number of upheld complaints per year to be certain that he had located all information within the scope of the request. In view of this, the Commissioner deems that the complainant would only be able to collate an informed estimate, and would not be assured of the correct figure.
36. The complainant is clearly seeking official confirmation of the number of complaints investigated, upheld and overturned. The Commissioner, however, is not persuaded that the requested information is readily available to him, and therefore, the exemption is not engaged.
37. The Commissioner requires the CO to provide the information requested to the complainant, and that is the number of Ministerial misconduct complaints as described in parts 2 and 3 of the request.

Other matters

38. The Commissioner is concerned that previously, it had taken the service of two decision notices before the CO provided an adequate response to the former case which resulted in serving another decision notice (FS50849464). The Commissioner is disappointed that given the considerable amount of time the CO spent on finalising its position in respect of that case, it appears the CO has not learned from it and instead, incorrectly relied on section 40(5) of FOIA in its response to this case. The Commissioner would have expected the CO to have taken a consistent and correct approach in both cases, as the complainant's two information requests were so similar.

Right of appeal

39. 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.

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

40. 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.
41. 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

Gerrard Tracey
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