

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 December 2018

Public Authority: House of Commons

Address: London
SW1A 0AA

Decision (including any steps ordered)

1. The complainant has requested information in relation to the number of complaints made by members of the House of Commons staff about the behaviour of the Speaker of the House of Commons, John Bercow, within a specified period. Relying on sections 40(5B)(a)(i) and 41(2) FOIA, the public authority neither confirmed nor denied holding the requested information.
2. The Commissioner's decision is that the public authority was entitled to rely on section 40(5B)(a)(i) FOIA as the basis for not complying with the duty set out in section 1(1)(a) FOIA to either confirm or deny whether the requested information is held.
3. No steps required.

Request and response

4. The complainant submitted a request for information to the public authority on 3 May 2018 in the following terms:

"I am sending this request under the Freedom of Information Act to ask for the following information:

1. The number of complaints made by members of House of Commons staff about the behaviour of the Speaker, John Bercow, between 22 June 2010 and 3 May 2018.
2. Please provide any further details about the nature of the complaints that are recorded for the answers to Q1
3. For the answers to Q1 please indicate what further action was taken regarding each complaint.....

If it is necessary for any reason to redact any information, please redact the minimum necessary and send me the rest of the material, explaining the legal grounds for each redaction."

5. The public authority provided its response on 30 May 2018. Relying on sections 40(5B)(a)(i) and 41(2) FOIA, it neither confirmed nor denied holding the requested information.
6. The complainant requested an internal review of this decision on 30 May 2018.
7. On 10 July 2018 the public authority wrote back with details of the outcome of the internal review. The review upheld the original decision.

Scope of the case

8. The complainant contacted the Commissioner on 27 July 2018 to complain about the public authority's handling of his request specifically the refusal by the public authority to either confirm or deny whether the requested information is held. The Commissioner has referred to the complainant's submissions in her analysis further below.
9. Nothing in this notice should be construed as confirming or denying that the requested information is held by the public authority.

Reasons for decision

Section 40(5B)(a)(i)

10. As the public authority's refusal of the request was after 25 May 2018, the date the new Data Protection Act 2018 (DPA 2018) and the General Data Protection Regulation EU2016/679 (GDPR) legislation came into force, the Commissioner considers that the DPA 2018/GDPR applies.
11. Under section 1(1)(a) FOIA, any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request.¹ This requirement to inform an applicant whether information matching their request is held by the public authority is commonly referred to as the "duty to confirm or deny."
12. Section 40(2) FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester (ie a third party) and where one of the conditions listed in section 40(3A), 40(3B) and 40(4A) is satisfied.
13. Section 40(5B)(a)(i) 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 GDPR to provide that confirmation or denial.
14. Therefore, for the public authority to be entitled to rely on section 40(5B) 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) DPA 2018 defines personal data as:-
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¹ Subject to other provisions in the FOIA.

"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 public authority has argued that the requested information if held, would constitute personal data because press coverage has repeatedly referred to alleged complainants by name. It would also reveal whether the Speaker has been the subject of any such complaint.
19. In the circumstances of this case, the Commissioner is satisfied that the requested information relates to the Speaker of the House of Commons, John Bercow and also relates to the individuals alleged to have complained about the behaviour of the Speaker towards them. She is satisfied that the requested information both relates to and identifies the Speaker because the request is about him and he is named in the request. It would reveal whether the Speaker has been the subject of a complaint about his behaviour towards members of his staff. The Commissioner is further satisfied that the requested information is of biographical significance for the individuals who have been named in the media as individuals who have allegedly complained about the behaviour of the Speaker.
20. In order not to reveal their personal data and defeat the purpose of relying on the exemption in the first place, the Commissioner has not revealed the basis for the public authority's view that the requested information is of biographical significance for the individuals concerned.
21. The Commissioner therefore finds that confirming or denying whether the requested information is held would result in the disclosure of the personal data of the Speaker and that of some of the individuals named in the media. The first criterion above is therefore met.
22. The fact that confirming or denying whether the requested information is held would reveal the personal data of the Speaker and the relevant individuals does not automatically prevent the public authority 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.
23. The Commissioner agrees that the most relevant data protection principle is principle (a).

Would confirming whether or not the requested information is held contravene principle (a)?

24. 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"

Public authority's submissions

25. The public authority considers that confirming or denying whether it holds the requested information would contravene principle (a). This is because members of staff have a reasonable expectation when choosing to make a complaint that the fact that they have done so will not be disclosed. Complaints under the House's Respect policy are always treated confidentially. This is specifically stated at paragraphs 3.8 and 14.1 of the policy. Acting in opposition to that expectation would be in breach of principle (a).
26. Furthermore, when choosing not to use the policy, members of staff (including former members of staff) have a reasonable expectation that disclosure under the FOIA will not be used to inform other people whether they made a complaint.

Complainant's submissions

27. The complainant's submissions are reproduced below.
28. "The first question I have asked seeks a single figure for the total number of complaints made against Mr Bercow across 8 years, and I fail to see how confirming whether they held this information would breach anyone's personal data. In fact, as I argued to the House of Commons, the only person whose personal data this could affect is Mr Bercow himself, and given the nature of the public allegations that have been made against him by several former members of staff, I think the public interest favours disclosure."
29. "I appreciate the concerns raised in response to my Q2 which asks for further details about the nature of the complaints, but I think that NCND is a rather excessive response to this request also. I would argue that given the publicity surrounding Mr Bercow and several accusations of bullying by his former employees, coupled with his high public profile and important role in our political life – the public interest in confirming whether this information is held is clearly in favour of disclosure."
30. "I also think in relation to my Q3 that it is extremely important for public confidence in the House of Commons' own internal procedures that this information is confirmed or denied. Given the publicity around the

allegations of bullying made against Mr Bercow I think it is vitally important to know whether House authorities deal with these adequately.”

The Commissioner’s considerations

31. The Commissioner has found that confirming or denying whether the requested information is held would result in the disclosure of the personal data of the Speaker and that of some of the individuals named in the media.
32. 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 (ie it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), fair, and transparent.

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

33. 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 issuing a confirmation or denial that the requested information is held would be considered lawful.
34. 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’².

² 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:-

35. In considering the application of Article 6(1)(f) 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.
36. 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

37. In considering any legitimate interest(s) in confirming or denying whether a request for information under the FOIA is held, 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.
38. 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.
39. There is a legitimate interest in maintaining public confidence in the public authority's complaints handling procedures in particular in knowing whether allegations of the nature mentioned by the complainant are dealt with adequately. Further to that legitimate interest, the Commissioner considers that given the Speaker's high

"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".

public profile and important role in our political life, there is a legitimate interest in knowing whether current and former members of House of Commons staff have made complaints about his behaviour.

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

40. '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 the FOIA as to whether the requested information is held must therefore be the least restrictive means of achieving the legitimate aim in question.
41. In the circumstances of this case, the Commissioner is not persuaded that there is a compelling legitimate interest in revealing whether the Speaker has been the subject of a complaint(s) about his behaviour. She has accepted that there is a legitimate interest in maintaining public confidence in the public authority's complaints handling procedures. However, the Commissioner considers that in the circumstances of this case, there is no compelling legitimate interest in confirming or denying whether complaints have been made about the Speaker's behaviour by members of staff in order to maintain public confidence in the public authority's complaints handling procedures.
42. The Commissioner is not persuaded that revealing under the FOIA whether the Speaker has been the subject of a complaint(s) about his behaviour and as a consequence whether individuals alleged to have complained about his behaviour have in fact done so is necessary in the circumstances of this case in order to maintain public confidence in the public authority's complaints handling procedures.
43. Furthermore, the Commissioner is not persuaded that it is necessary in the circumstances of this case to reveal the personal data of the individuals alleged to have complained about the Speaker's behaviour. On the contrary, she considers that it is important to protect their identity given that the Speaker's public profile is likely to generate media coverage of a highly intrusive nature for these individuals.
44. The Commissioner is not persuaded that revealing under the FOIA whether the Speaker has been the subject of a complaint(s) about his behaviour and as a consequence whether individuals alleged to have complained about his behaviour have in fact done so is necessary in order to maintain public confidence in the public authority's complaints handling procedures.

45. In the Commissioner's view, not confirming or denying whether the requested information is held is unlikely to undermine public confidence in the adequacy of the public authority's complaints handling procedures. Revealing whether complaints have been made about the Speaker's behaviour by members of House of Commons staff is unlikely to be particularly informative with respect to whether adequate procedures are in place for handling complaints made by staff.
46. Rather, in the Commissioner's view, the public will have trust and confidence in a process that does not reveal under the FOIA whether the Speaker has been the subject of a complaint(s) in the absence of an investigative purpose. They will not expect information about whether the Speaker has been the subject of a complaint(s) about his behaviour to be disclosed merely to satisfy public or journalistic curiosity in the absence of facilitating the complaints handling process. If such complaints have in fact been made, how they have been handled would carry more weight in informing the public's views on the adequacy of the public authority's complaints handling procedures. Revealing whether complaints have been made alone is unlikely to sufficiently inform the public. On the other hand, it is highly likely to undermine confidence in how complaints, in particular against high profile individuals, are handled and would be disproportionately intrusive on the individuals alleged to have complained about the Speaker's behaviour.
47. The Commissioner considers that confirming or denying whether the requested information is held does not meet the three part legitimate interests test outlined above. The Commissioner does not consider that disclosure is necessary to meet the legitimate interest in maintaining public confidence in the House of Commons complaints handling procedures.
48. The Commissioner has therefore concluded that the requirements of Article 6(1)(f) of the GDPR have not been met and so confirming or denying whether the requested information is held would not be lawful. Complying with section 1(1)(a) would therefore breach principle (a) and thus the public authority is excluded from the duty set out in section 1(1)(a) FOIA on the basis of section 40(5B)(a)(i) FOIA.

Right of appeal

49. 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@hmcts.gsi.gov.uk

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

50. 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.
51. 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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