

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

### **Decision notice**

**Date:** 3 March 2020

**Public Authority:** The Cabinet Office

**Address:** 70 Whitehall  
London  
SW1A 9AS

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

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1. The complainant has requested information on the number and distribution of Ministerial Misconduct complaints.
2. The Cabinet Office disclosed information in relation to questions one and three, withheld the information falling within the scope of question two under section 40(2) and confirmed that the information requested in question four was already in the public domain and relied on section 21 to refuse to provide this information.
3. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 40(2) to withhold the information within the scope of question two, the Cabinet Office does not hold any further information within the scope of question three and is not entitled to rely on section 21 in relation to question four.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information withheld under section 21.
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

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6. The Cabinet Office provided the following background information on the Ministerial Code:
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.

## Request and response

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10. On 25 January 2019, the complainant wrote to the Cabinet Office and requested information in the following terms:

*"1. HOW MANY MINISTERIAL MISCONDUCT COMPLAINTS DID THE UK GOVERNMENT RECEIVE FOR EACH OF THE FOLLOWING YEARS 2012, 2013, 2014, 2015, 2016 & 2017?"*

*2. PLEASE PROVIDE A BREAKDOWN OF HOW MANY COMPLAINTS WERE MADE AGAINST EACH NAMED MINISTER FOR EACH OF THE FOLLOWING YEARS 2012, 2013, 2014, 2015, 2016 & 2017?"*

*3. HOW MANY MINISTERIAL MISCONDUCT COMPLAINTS DID THE UK GOVERNMENT INVESTIGATE FOR EACH OF THE FOLLOWING YEARS 2012, 2013, 2014, 2015, 2016 & 2017?"*

*4. HOW MANY MINISTERIAL [sic] MISCONDUCT COMPLAINTS DID THE UK GOVERNMENT UPHOLD FOR EACH OF THE FOLLOWING YEARS 2012, 2013, 2014, 2015, 2016 & 2017?"*

11. Following two decision notices issued by the Commissioner<sup>1</sup>, the Cabinet Office provided its current response on 6 June 2019.
12. The Cabinet Office confirmed that information within the scope of the request was held but was incomplete. It provided a table regarding requests 1 and 3 in which one column provided the year and the other column provided the "*Number of Complaints received by the Cabinet Office*". The Cabinet Office explained that the numbers provided were the "*total number received. This includes complaints that did not engage, and were not relevant to, the Ministerial Code upon assessment.*" The Cabinet Office withheld the information sought by the second element on the request on the basis of section 40(2) of the Act.
13. With regards to the fourth element of the request, the Cabinet Office stated that this information was already in the public domain and was therefore exempt under section 21 of the Act. The Cabinet Office explained the role of the Independent Adviser on Minister's Interests' and provided their reports from 2011 to 2018, a report into the allegations regarding Damien Green's conduct and a letter from the Prime Minister to Priti Patel.
14. Due to the length of time since this request was made, the Commissioner did not require an internal review to be undertaken before accepting this complaint for investigation.

### Scope of the case

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15. The complainant wrote to the Commissioner on 6 June 2019 to complain about the handling of his request for information.
  16. The complainant did not dispute the response provided by the Cabinet Office in relation to request 1.
  17. The Commissioner considers that the scope of this case is to determine the following:
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<sup>1</sup> <https://icosearch.ico.org.uk/s/search.html?collection=ico-meta&profile=decisions&query&query=FS50810878>

<https://icosearch.ico.org.uk/s/search.html?collection=ico-meta&profile=decisions&query&query=FS50736559>

- Whether the Cabinet Office is entitled to rely on section 40(2) to withhold the information falling within the scope of request two.
  - Whether the Cabinet Office has correctly interpreted request 3 in light of the responses to requests 1 and 3 being the same information.
  - Whether the Cabinet Office is entitled to rely on section 21 to refuse to provide the information falling within the scope of request 4.
18. As the Cabinet Office applied section 40(2) after the implementation of the General Data Protection Regulations and Data Protection Act 2018, she considers this to be the relevant legislation in this case.
19. In order to provide a determination in this case, the Commissioner required multiple submissions from the Cabinet Office and met with senior officials at the Cabinet Office to gain an understanding of the Ministerial Code and complaints made under it.

## Reasons for decision

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### **Section 40(2): Third Party Personal Data**

20. Section 40(2) of the Act 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.
21. In this case, the relevant condition is contained in section 40(3A)(a)<sup>2</sup>. 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 GDPR.
22. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data, then section 40 of the Act cannot apply.

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<sup>2</sup> As amended by Schedule 19 Paragraph 58(3) of the DPA.

23. 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?**

24. Section 3(2) of the DPA defines personal data as:

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

25. The two main elements of personal data are that the information must relate to a living person and that person must be identifiable.
26. 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, genetic, mental, economic, cultural or social identity of the individual.
27. Information will relate to a person if it is about them, linked to them, had biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
28. In the circumstances of this case, the Commissioner is satisfied that, as the request is for the names of Ministers and the number of Ministerial Misconduct Complaints made against them, the withheld information both identifies and relates to the specific Ministers within the scope of the request. The information therefore falls within the definition of 'personal data' as set out in section 3(2) of the DPA.
29. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the Act. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
30. The most relevant DP principle is principle (a).

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

31. 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 subjects."*

32. In the case of a request under the Act, 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.

33. 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.

34. 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>3</sup>"*

35. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the Act, 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 the disclosure of the requested information under the Act, the Commissioner recognises that

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<sup>3</sup> Article 6(1) goes on to state that:-

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

However, section 40(8) of the Act (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."*

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. The complainant considers that there is a legitimate interest in transparency and holding Ministers to account.
40. The Cabinet Office explained that it recognised the importance of transparency, especially in relation to Ministers and their conduct. The Cabinet Office considers that it is important that Ministers remain accountable and conduct themselves in accordance with the Code.

### **Is the disclosure necessary?**

41. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the Act must therefore be the least intrusive means of achieving the legitimate aim in question.
42. The Cabinet Office considers that disclosure is not necessary in order to meet the legitimate interests in transparency and accountability. It set out that under the current publication scheme, it is normal practice to release the outcome of public complaints which have been upheld where there has been a serious breach of the Code and provided examples of recent high profile investigations into Ministerial Misconduct.
43. The Cabinet Office considers that the information in the public domain addresses complaints where the Prime Minister has lost confidence in a Minister due to their conduct as judged against the Code. The Cabinet Office considers that publication of this information assures the public that complaints are investigated and resolved. The Cabinet Office considers that this demonstrates how the Prime Minister holds Ministers to account under the Code.
44. The Cabinet Office therefore considers that disclosure of the requested information is not reasonably necessary because the legitimate aims of transparency and accountability can be achieved by less intrusive means.

45. Furthermore, as part of its submissions to the Commissioner on this case, the Cabinet Office also questioned the value in disclosing the number of complaints made rather than the number of determined breaches or the nature of those determined breaches. This is primarily because a "mere complaint" is not necessarily reliable information regarding a breach of the Code, and may contain inaccurate information. Some complaints are raised a number of times by the same individual against the same Ministers. Some complaints are vexatious and have no substance.
46. The Cabinet Office also stated that the publication of the number of complaints against the Minister does not convey any substantive information about the nature and seriousness of the complaint raised. Release of the requested information, without knowing the nature of the complaint (noting that the nature of the complaint is not within the scope of the FOI request) could inaccurately suggest that the Minister has engaged in conduct which relates to a breach of the Code when in fact it does not.
47. The Commissioner acknowledges that the Cabinet Office does publish some information on complaints that have been upheld and that it has disclosed the number of Ministerial Misconduct complaints received from 2011 to 2017. However, she also notes that the Cabinet Office states that it publishes information where there has been a *serious* breach of the Code, rather than in all cases where a complaint is upheld. There is also no guidance available publicly which defines what constitutes a serious breach of the Code.
48. Furthermore, the Commissioner considers that there are clear legitimate interests in public scrutiny of the conduct of Ministers and the process of investigating complaints. However, the Commissioner is not persuaded that disclosure of the requested information is necessary to meet these legitimate interests. The information is purely numerical and does not take into account the severity of a complaint, for example a procedural matter versus an allegation of harassment. The information will also include, as the Cabinet Office notes, vexatious complaints and complaints ultimately not upheld. As a result the Commissioner is not persuaded that disclosure of the requested information provides any real effective scrutiny of Ministerial conduct or the robustness and effectiveness of the complaints investigation process. Consequently, the Commissioner has concluded that disclosure of the information sought by question two is not necessary. The Commissioner therefore considers that section 40(2) is engaged and as disclosure of the information would be unlawful.

## **Section 1: General right of access to information**

49. Section 1(1) of the Act states that 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 relevant to the request, and if so, to have that information communicated to them. This is subject to any procedural sections or exemptions that may apply. A public authority is not obliged under the Act to create new information in order to answer a request.
50. Where there is a dispute between the information located by a public authority, and the information a complainant believes should be held, the Commissioner follows the lead of a number of First-Tier Tribunal (Information Rights) decisions in applying the civil standard of the balance of probabilities.
51. The complainant confirmed that he considered the Cabinet Office had not complied with his third request for information, namely the number of complaints the Cabinet Office had investigated.
52. The Commissioner notes that the figures provided for the number of complaints received and the number of complaints investigated are the same number, implying that all complaints received go through the investigative process. In light of the Cabinet Office's assertion that not all complaints are valid, it may be expected that the number of investigations would be lower than the number of complaints received. The Commissioner will therefore determine whether the Cabinet Office has interpreted request 3 correctly and whether there is further information held within the scope of the request.

### **The Cabinet Office's position**

53. The Commissioner has taken account of submissions from this investigation and arguments from her previous decision notice (FS50810878).
54. The Cabinet Office explained that in its response of 5 June 2019, to the complainant it addressed questions 1 and 3 jointly. It explained that this is because the complaints process is a flexible one and there is no clear dividing line between the initial assessment of a complaint and the more formal investigation of the complaint. The Cabinet Office considers that to impose such a line would create an artificial distinction, which does not reflect the way complaints are considered in practice. Rather, all complaints would be investigated in order to determine the best way to handle them.

55. The Cabinet Office explained that there is no specific process of "*investigation under the Ministerial Code of Practice*". The Code describes only one part of the overall process for investigation of an alleged breach of the Code. That is at paragraph 1.4 which refers to a request for "further investigation" by the Prime Minister to the Independent Advisor. Therefore, the Cabinet Office considers that it is not able to readily or accurately apply a distinction to the process by which alleged breaches undergo.
56. The Cabinet Office considers that the fairest and most accurate answer to the question raised is by way of answering question 1 and 3 jointly, as was done in its response dated 18 September 2019.
57. In response to the Commissioner's questions, the Cabinet Office explained that in light of a previous response to the complainant in which it stated that it considers all complaints, it accepts that it needs to clarify its position. The Cabinet Office explained that some matters are subject to an assessment of engagement of the Code, rather than a more detailed investigation.
58. The Cabinet Office provided a high level background of the general investigation process.
59. In the previous decision notice, the Cabinet Office explained that complaints made under the Code were not held in a structured and easily accessible manner due to the routes through which the complaints may be made and the various established processes for addressing and resolving such complaints.
60. The Cabinet Office confirmed that it receives allegations of ministerial misconduct via a number of means:
  - Public correspondence
  - Parliamentary questions
  - Issues raised in Parliament directly
  - Direct queries to the Propriety and Ethics team by email, phone or face to face.
61. In relation to complaints received by the Cabinet Office, whether or not a complaint engages the Code will be considered on a case by case basis, usually through a combination of both formal and informal processes, which are normally undertaken by the Cabinet Office Propriety and Ethics Team. The level of assessment that each complaint receives will depend on the nature of the complaint. The Propriety and

Ethics team makes a determination, on a case by case basis, as to the procedure to be followed.

62. In some cases, it is identified at an early stage that the Code is not engaged, while other complaints require further assessment in order to determine whether or not the Code is engaged. Therefore, the level of assessment that potential breaches are subject to will differ depending on the nature of the complaint. This ensures matters are dealt with in a flexible and proportionate manner. Where it is considered that the Code may be engaged, the matter may require a preliminary investigation, in order to consider whether there are likely breaches of the Code. Handling will depend on the sensitivity and seriousness of the allegation – from personal misconduct to minor procedural matters.
63. The Cabinet Office set out that contrary to what has been suggested by the complainant, it does not investigate every complaint to the UK Government which touches upon potential ministerial misconduct under the Code. Rather, the Propriety and Ethics team may determine that a complaint can be handled at departmental level. Similarly, as the Code is clear that it is for Ministers themselves to justify their actions and conduct to Parliament and the public (paragraph 1.5 of the Code), there may be circumstances where the Minister does this and so there is no requirement for further investigation. Therefore, if further complaints are received by the Propriety and Ethics team and they do not raise anything new, the response points to the Minister's action and the Cabinet Office may not undertake any further action or work.
64. If the Prime Minister, having consulted the Cabinet Secretary, feels the complaint warrants further investigation, they may refer the complaint to the Independent Adviser.
65. The Code, in place at the time of the request, says the following about the investigation of complaints:  
  
*"1.4 ... If there is an allegation about a breach of the Code, and the Prime Minister, having consulted the Cabinet Secretary feels that it warrants further investigation, she will refer the matter to the independent adviser on Ministers' interest."*
66. The Cabinet Office explained that this reflects the fact that, at the later stages of an investigation of a complaint, the procedure can be more independent – reflecting the severity or complexity of the allegation. However, at the earlier, internal stages it may be more focussed on identifying material information.
67. The purpose of an investigation by the Independent Adviser is to establish the facts relating to the allegation and to provide advice to the

Prime Minister whether the established facts support, or otherwise, the allegations(s) that there has been a breach of the Code.

### **The Commissioner's Position**

68. The Commissioner considers that in this case, the interpretation of "investigate" is key to determining whether the request has been interpreted correctly.
69. The Cabinet Office has made clear that it considers that every misconduct complaint is investigated, however, the level of investigation differs. This is in response to the Commissioner's queries regarding the differences between assessing a complaint and investigating a complaint.
70. The Cambridge English Dictionary defines investigate<sup>4</sup> as:  
*to examine a crime, problem, statement, etc. carefully, especially to discover the truth:*
71. Given this definition, the Commissioner accepts that the differing levels of actions taken by the Cabinet Office on receipt of a complaint can all be considered to be an investigation. This is also in light of the Cabinet Office's explanation that it does not have a specific process which it follows from which it can define a case as reaching the point of an investigation as opposed to an assessment or review.
72. The Commissioner therefore considers that, on the balance of probabilities, the Cabinet Office does not hold any further information in scope of question 3.

### **Section 21: Information reasonably accessible to the applicant by other means**

73. Section 21(1) states:  
*"Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information"*
74. Section 21 provides an absolute exemption, meaning it is not subject to the public interest test.

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<sup>4</sup> <https://dictionary.cambridge.org/dictionary/english/investigate>

75. Although the information that is requested may be available elsewhere, a public authority will need to consider whether it is actually reasonably accessible to the applicant before it can apply section 21.
76. Unlike consideration of most of the other exemptions under the Act, section 21 allows a public authority to take the individual circumstances of the applicant into account. The inclusion of "to the applicant" creates a distinction between information that is reasonably accessible to the particular applicant and the information that is available to the general public.
77. The Cabinet Office explained that in its response to the complainant dated 5 June 2019, with regard to request 4, it provided links to the Independent Adviser's published reports, the Damien Green investigation summary outcome and resignation letters relating to Michael Fallon and Priti Patel. It also explained that where complaints are upheld, details of the breach and the action taken as a result is published. The Cabinet Office confirmed that not all complaints are referred to the Independent Adviser and that his published reports contain information on investigations conducted, which will include the complaints deemed to lead to a finding that there has been a breach of the Code.
78. The Cabinet Office explained that the Code sets out at paragraph 1.6 that the Prime Minister is the judge of the standards expected. The Cabinet Office confirmed that it interpreted "*upheld*" to mean complaints where the Prime Minister has found that a Minister breached the Code. In these circumstances, the Cabinet Office explained that the complaint would be made public either by referral to the Independent Adviser or by press release by the Prime Minister's Office.
79. The Cabinet Office explained that the Independent Adviser published regular reports which include information about the investigation of breaches of the Code.
80. The Cabinet Office therefore considers that breaches are made public via the Independent Adviser's report or by press releases from the Prime Minister's Office.
81. The Cabinet Office considers that it is entitled to rely on section 21(1) of the Act as the information is in the public domain. However, it agreed to collate and send the information which has been made public by the Independent Adviser, and other relevant reports and press releases to the complainant.

### **The Commissioner's position**

82. The Commissioner notes that the complainant did not request the reports or press releases relating to upheld complaints, he requested the specific number of complaints upheld.
83. Whilst the Commissioner acknowledges that these are in the public domain by virtue of referral to the Independent Adviser or press releases by No. 10, the Commissioner is not persuaded that the number of complaints upheld is readily available.
84. Whilst the complainant could undertake an online search for ministerial misconduct complaints, the Commissioner 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. The Commissioner therefore considers that the complainant would, at best, only be able to collate an informed estimate and would not be certain of the correct figure.
85. As the complainant is clearly seeking official confirmation of the number of complaints upheld, the Commissioner is not persuaded that the requested information is readily available to him.
86. The Commissioner therefore requires the Cabinet Office to provide the number of ministerial misconduct complaints upheld, by year, to the complainant.

## Right of appeal

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87. 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)

88. 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.
89. 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 .....**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
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