

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 December 2024

Public Authority: Ministry of Housing, Communities and Local Government

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested information about any communications relating to the former Secretary of State Michael Gove and the subject of recusal. The Ministry and Housing, Communities, and Local Government ("the MHCLG") refused to confirm or deny that information was held under the exemptions provided by section 40(5) (Personal information) and section 41(2) (Information provided in confidence). During the course of the Commissioner's investigation, the MHCLG revised its position. It confirmed that information was held but withheld it under the exemption provided by section 40(2) (Personal information) and section 41(1) (Information provided in confidence).
2. The Commissioner's decision is that the MHCLG has correctly relied on section 40(2) of FOIA to withhold the information. However, the MHCLG breached section 10(1) by failing to confirm that the information was held within the time for compliance.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 10 January 2024, the complainant wrote to the MHCLG and requested information in the following terms:

“Please provide a copy of any letters or emails between (to and from) the secretary of state, Michael Gove, and his permanent secretary of accounting officer, setting out any matters from which Michael Gove should recuse himself owing to a conflict or a potential conflict of interest.

This communication may be passing on advice from the cabinet secretary or the Propriety and Ethics team.

Please provide information from 1st September 2022 to date.”
5. The MHCLG responded on 26 February 2024. It refused to confirm or deny that information was held under sections 40(5) and 41(2).
6. Following an internal review the MHCLG wrote to the complainant on 7 March 2024. It maintained its earlier response.
7. During the course of the Commissioner’s investigation, the MHCLG revised its position. It confirmed that information was held, but withheld it under the exemption provided by section 40(2), and at a later stage, section 41(1).

Reasons for decision

Section 40 - personal information

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

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

Is the information personal data?

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

“any information relating to an identified or identifiable living individual”.

13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
15. 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.
16. In the circumstances of this case, having inspected and considered the withheld information, the Commissioner is satisfied that the information does relate to Mr Gove.
17. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
18. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
19. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

20. Article 5(1)(a) of the UK GDPR states that:

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

21. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

22. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

23. 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”¹.

24. In considering the application of Article 6(1)(f) of the UK 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 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.

25. 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

26. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that

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) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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.

27. 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.
28. In this case the Commissioner recognises that the requested information relates to the subject of recusal as it relates to the then Secretary of State, Mr Gove. The Commissioner recognises that there is an intrinsic legitimate interest in such information, as it relates to an elected official's ability to undertake their duties.

Is disclosure necessary?

29. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
30. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

31. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
32. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and

- the reasonable expectations of the individual.
33. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
 34. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
 35. In the circumstances of this case, the MHCLG has explained to the Commissioner that the information was collected under the terms of a privacy notice attached to the Declaration of Interests form.
 36. This privacy notice informs individuals that that any personal data which is collected and processed is strictly controlled, and where necessary and proportionate will be shared with the following third parties: The Independent Adviser on Ministers' Interests; Government departments; Legal advisers, and data processors who provide email and document management/storage services.
 37. The privacy notice also explains that, outside of the Ministerial Interests publication regime, personal data may be shared with third parties in exceptional circumstances, and only when necessary and proportionate to do so. For example, where action is required to prevent harm or for the purposes of national security.
 38. The MHCLG has further explained that Mr Gove's expectations will have also been informed by Section 7 of the Ministerial Code², and specifically section 7.5 which states "The personal information which Ministers disclose to those who advise them is treated in confidence. However, a statement covering relevant Ministers' interests will be published twice yearly."
 39. The MHCLG has argued that Mr Gove would have had a reasonable expectation of privacy surrounding the collection of their personal data, as informed by the terms of the privacy notice and the Ministerial Code. He would have reasonably expected that the conclusion of the process would have been the publication of the twice-yearly List of Ministerial

² <https://www.gov.uk/government/publications/ministerial-code/ministerial-code>

Interests³. This has been confirmed by consulting Mr Gove and his private office in respect of this request.

40. The MHCLG acknowledges that Mr Gove was particularly high profile, and held a position of significant authority with influence over planning decisions and the allocation of public funds. However, it argues that there is already significant transparency about the Ministerial Interests process, and of cabinet members declarations, and that this addresses the legitimate interest.
41. The Commissioner has considered the MHCLG arguments, as well as the withheld information, and accepts the Mr Gove will have reasonably expected that the information would not be disclosed. The information relates to his private life and was collated under a clear privacy notice, and expressly for the purposes of the Ministerial Interests process.
42. The Commissioner understands that the Ministerial Interests process exists to meet the legitimate public interest in addressing whether an elected representative's personal interests might affect their work, and to provide transparency about these personal interests through the publication of the List of Ministerial Interests.
43. Whilst the Commissioner recognises that the disclosure of the requested information in this case would add further detail about those personal interests, he considers that the legitimate interests in this case is met through the Ministerial Interests process, as well as the demonstration that this is functioning (such as through the confirmation that relevant information is held).
44. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh Mr Gove's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
45. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

³ <https://www.gov.uk/government/publications/list-of-ministers-interests>

46. As the Commissioner has found that the MHCLG is entitled to withhold the information under section 40(2), he has not needed to consider the MHCLG's application of section 41(1).

Procedural matters

47. The MHCLG failed to respond to the request within the statutory time period, the Commissioner has therefore found a breach of 10(1) of FOIA.

Right of appeal

48. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

49. 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.
50. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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