

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 January 2021

Public Authority: Department for Education
Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Decision (including any steps ordered)

1. The complainant has requested from the Department for Education (DfE) information about whether Dominic Cummings had had any complaints made about him whilst working as a special adviser for Michael Gove at the DfE. The DfE refused to confirm or deny whether there had been any complaints as to do so would in itself breach data protection principles.
2. The Commissioner's decision is that the DfE was entitled to rely on section 40(5B)(a)(i) of the FOIA to neither confirm or deny holding any information falling within the scope of the request.
3. The Commissioner does not require any further steps to be taken.

Background

4. The DfE has provided the Commissioner with some background and context to this request. The request relates to the time (2011-2014) that Dominic Cummings spent as a special adviser to Michael Gove who was then Secretary of State at the DfE.

5. Special advisers are employed as temporary civil servants for the period they are in post and are bound by the same standards as civil servants, as set out in the Civil Service Code. They work alongside civil servants to deliver ministerial and governmental priorities and are appointed to serve the Prime Minister and the Government, not just their appointing minister.
6. These special advisers add a political dimension to the advice and assistance available to ministers while reinforcing the political impartiality of the permanent civil service by distinguishing the source of political advice and support. Their management, conduct and discipline rests with the minister who made the appointment. The Prime Minister can terminate their employment by withdrawing consent to an individual appointment.

Request and response

7. On 3 February 2020 the complainant made the following request for information under the FOIA -

"In Decision Notice ref FS50854236, the Information Commissioner's Office told the Foreign and Commonwealth Office to provide information about whether Dominic Raab had been the subject of complaints. Dominic Cummings was special adviser to Michael Gove in 2007-2014, including when Mr Gove served as Secretary of State for Education in 2010-2014. In light of the above Decision Notice, I would be grateful if you could provide the following information under the Freedom of Information Act 2000 about Dominic Cummings during his time at the Department for Education:

- 1. Were any complaints made to HR about Mr Cummings (yes or no)?*
- 2. If yes to (1), please provide a figure for the number of complaints.*
- 3. If yes to (1), please confirm whether any resulted in written warnings or disciplinary action (yes or no).*
- 4. Were any HR-related complaints made to or shared with Mr Cummings' line manager/s (yes or no)?*
- 5. If yes to (4), please provide a figure for the number of complaints.*
- 6. If yes to (4), please confirm whether any resulted in written warnings or disciplinary action (yes or no).*
- 7. Were any HR-related complaints about Mr Cummings made to or shared with senior civil servants, including the permanent secretary, senior HR staff,*

or to lawyers (yes or no)?

8. If yes to (7), please provide a figure for the number of complaints.

9. If yes to (7), please confirm whether any resulted in written warnings or disciplinary action (yes or no).

I trust that there will not be any questions about the public interest in disclosing information relating to the Chief Special Adviser to the Prime Minister, someone with reportedly significant influence over major policy decisions."

8. On 2 March 2020 the DfE refused to confirm or deny whether the requested information was held under section 40(5) of the FOIA.
9. The complainant asked for an internal review on 12 March 2020.
10. The DfE provided an internal review on 8 April 2020 in which it maintained its original position.

Scope of the case

11. The complainant contacted the Commissioner on 1 May 2020 to complain about the way his request for information had been handled. His view is that the processing of this information was necessary to serve legitimate interests in the conduct of senior public officials and members of the government.
12. During the course of her investigation the Commissioner went back to the DfE with links to certain articles in the public domain, to ask if it wished to maintain its position. The DfE responded to say that it did maintain its position.
13. The Commissioner considers that the scope of this case is whether the DfE is entitled to neither confirm nor deny whether it holds the requested information because it considers it to be personal data and that to do so would breach data protection principles.
14. This decision notice can only consider whether the DfE is entitled on the basis of section 40(5) to refuse to confirm or deny that it holds this information. The Commissioner has not gone beyond that consideration.

Reasons for decision

Section 40 - personal information

15. 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.
16. Therefore, for the DfE 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?

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

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

18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. 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.
20. The Commissioner is satisfied that confirming or denying whether the information is held would result in the disclosure of a third party's personal data because the request clearly names an identifiable living individual, Dominic Cummings. She also notes that for the DfE to confirm or deny that it holds information relating to complaints might infer something that would disclose his personal data -

"There may be circumstances in which simply confirming whether or not you hold the personal data could itself reveal something about that individual.

For example, if you are dealing with a request for information about disciplinary records, you could indicate that a person is or is not the subject of a disciplinary process by either confirming or denying that

you hold the information.”¹

If the DfE confirmed that it did hold information then that would confirm that Dominic Cummings had been the subject of complaint. If the DfE denied that it held any information falling within scope, that would mean that he had not been the subject of a complaint. Either response reveals personal biographical details and is therefore personal data.

21. For the reasons set out above the Commissioner is satisfied that if the DfE confirmed whether or not it held the requested information this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.
22. However, the fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent the DfE 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 principal (a).

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

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”

25. 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), be fair, and be transparent.

¹ <https://ico.org.uk/media/for-organisations/documents/2614719/neither-confirm-nor-deny-in-relation-to-personal-data-section-40-5-and-regulation-13-5-v20.pdf>

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

26. 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.
27. 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.

28. 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

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: -

“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”.

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.

29. 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*

30. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

31. The complainant argues that there is no alternative means of obtaining the information that he has requested and that a full response from the DfE would be the least intrusive means of achieving the legitimate aims of transparency and accountability. His view is that what he seeks concerns the conduct of the chief adviser to the Prime Minister at the time of the request, including while he was special adviser to the Secretary of State for Education. The complainant argues that the Commissioner’s decision notice [FS50854236](#) said that the Foreign and Commonwealth Office could not rely on section 40(5) in relation to a similar information request because processing was necessary for the purposes of a legitimate interest. His opinion is that the legitimate interest in transparency and accountability in this case are greater than that identified in FS50854236.

32. The complainant supports his view by stating that,

“There were persistent allegations that Mr Cummings fostered a culture of bullying and intimidating behaviour when he was at DfE. It reportedly took a private settlement of £25,000 to stop some of those allegations being heard in an employment tribunal. Several years later, Mr Cummings has been widely accused of fostering a culture of bullying and intimidation in the Cabinet Office and across Whitehall. These are serious, longstanding allegations that appear

to amount to a pattern of behaviour in respect of someone with significant influence over public policy. Allowing DfE to deny that scrutiny is against the public interest in the clearest possible sense. To choose one recent example, experts on the Scientific Advisory Group for Emergencies were reportedly worried by the presence of Mr Cummings at meetings, which they said stems partly from his reputation in Whitehall. Mr Cummings' record needs to be scrutinised urgently, within the principles of fair and lawful processing, and the implications for public policy properly considered."

33. When he requested a review of the DfE's response the complainant argued that it is in the public interest to know if there are allegations or questions over behaviour and that this knowledge is also in the interests of other staff in both the government and the civil service. His view is that government departments have a duty of care to staff which should not disappear when people of influence are concerned. There is a legitimate interest in transparency regarding the conduct of the "Chief Senior Adviser to the Prime Minister" who he argues has a significant influence on government policy and who makes decisions that have a tangible impact on people's lives.
34. The complainant's view is that these alleged behavioural matters have an impact across government. After he made his complaint to the Commissioner, he underpinned his arguments by pointing out that there had been a decline in confidence in public health measures since Dominic Cummings "broke lockdown rules". He provided several examples of why he doesn't accept the DfE's neither confirm nor deny response is appropriate in the case of Dominic Cummings. The complainant supported his view with the assertion that SAGE meetings which should have been impartial have been influenced and that scientific advice has been inhibited.
35. The DfE was asked by the Commissioner what legitimate interests it had identified for confirming or denying the requested information. Focusing on the decision notice quoted by the complainant that relates to Dominic Raab, the DfE disputed the assertion that "...principles of accountability and transparency apply in this instance, to an even greater extent". Dominic Raab is Secretary of State and has the powers to instigate, sign-off and implement policies that come under his department's remit. It acknowledges that Dominic Cummings was in a position of significant influence at the time of the request but that he was not a member of the government and did not have the same position or the publicly accountable powers of a minister. This, the DfE suggests, is a key difference between the Raab and the Cummings' cases when testing legitimate interests.

36. The DfE contends that there are no allegations available in such an evidential way for the public to view. It suggests that they are stories based on rumour and allegation. For this reason the DfE did not find any legitimate interests in confirming or denying that it holds the requested information. It highlights the fact that the complainant stated that confirming or denying that it held the information would in itself be "*intrusive*" acknowledging that it was personal information relating to a named individual.
37. The Commissioner accepts that there is a legitimate interest that could be met by a confirmation or denial. It was reported that Michael Gove was summoned to appear in front of MPs on the Education Select Committee regarding allegations and that this was reported by the BBC.³

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

38. '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.
39. As set out earlier in this decision notice, the DfE has suggested that there are no legitimate interests in confirming or denying that the requested information is held. However, the Commissioner does not consider that there would be any other way of satisfying the complainant's stated legitimate interest without confirming or denying that it holds the information, therefore she considers it necessary.

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

40. 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,

³ <https://www.bbc.co.uk/news/education-21601673>
<https://www.politics.co.uk/news/2013/03/13/leading-by-example-gove-bullies-mps-over-bullying-allegation>

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.

41. The DfE has not consulted the data subject over this matter and it does not consider it necessary to do so, as the DfE's view is that it is defending the principle of neither confirming or denying that it holds information relating to complaints made against employees because to do so would release personal information.
42. The DfE explains that, as a special adviser, Dominic Cummings was a temporary civil servant and he was expected to adhere to the civil service code. The DfE states that his role means that it has approached the request in the same way as it would for any other civil servant employed there. Its view is that it would be inappropriate to provide confirmation or denial as this would release personal data about him.
43. Whilst employed by the department the DfE bases its neither confirm nor deny response on the protection and duty of care of its staff. Its starting position is therefore that Dominic Cummings would have an expectation that the DfE would not confirm or deny whether any complaints had been made about him. The DfE's view is that this is particularly important where allegations are made against employees that are later judged to be unfounded and no action is taken.
44. Whilst considering the complainant's references to the Dominic Raab decision notice the DfE stressed that the Commissioner considered it to be an exceptional case where weight was given to Dominic Raab's subsequent career as an MP, government minister and member of the Cabinet. The DfE drew the Commissioner's attention to pp 48-51 of that decision notice and made the observation that her view in that case was that section 40(5) would usually be the right response. It maintains that the departure from this approach was due to the responsibility, accountability and, most importantly, the decision-making powers Dominic Raab had as a government minister and Cabinet member.
45. For those reasons the Commissioner had decided that the legitimate interests in confirmation or denial outweighed Dominic Raab's interests or fundamental rights and freedoms due to his position in the government, even though the request referred to an earlier time. He himself had made reference to his previous employment and there was information in the public domain about an NDA (non-disclosure

agreement) that had been entered into in 2007 regarding allegations of workplace bullying which were in the press at the time of the request⁴. Dominic Raab subsequently sued Associated Newspapers for libel and the Mail on Sunday issued an apology in 2012. The DfE suggests that Dominic Cummings does not have the same powers as a government minister and that to confirm or deny the requested information would amount to a *"significant invasion of privacy"* ⁵.

46. The DfE believes that it remains appropriate and fair and that data protection legislation would be breached if confirmation or denial was made. Under the new legislation, the Commissioner considers lawfulness before fairness or transparency.
47. In the Commissioner's decision notice FS50854236 she agreed that employees and ex-employees will have a reasonable expectation that details of any complaints made against them would not be disclosed under an FOI request. In that instance, the Commissioner accepted that, if information was held, disclosure would cause a significant invasion of privacy and that this would be particularly so where allegations had proved unfounded. She also noted the time that had passed from that period of Mr Raab's employment to the time of the request.
48. FS50854236 was based on the specific circumstances of that particular case. The reasons that the Commissioner gave were the role played by an individual after leaving the employment around which the request centred. The complainant had highlighted the fact that Mr Raab referred to his previous role during his campaign to lead the Conservative Party. There was also information in the public domain about an NDA that had been entered into in 2007 and which featured in a court case brought by Dominic Raab against Associated Newspapers Ltd⁶.
49. The complainant's view appears to be that the important position that Dominic Cummings held at the time of the request in terms of influence and what that influence had on people's lives, means that the balance in favour of his rights and freedoms carries less weight than the legitimate interests of the complainant and the public generally.
50. The Commissioner acknowledges the complainant's view that Dominic Cummings had significant influence and was a well-known public figure

⁴ www.bailii.org/ew/cases/EWHC/QB/2011/3375.html

⁵ FS50854236 (p 49)

⁶ <https://www.bailii.org/ew/cases/EWHC/QB/2011/3375.html>

due to events that had placed his background role to the forefront of events. However, the Commissioner has set against this the length of time that has passed since Dominic Cummings worked at the DfE where his public profile was far lower.

51. The Commissioner has also considered the fact that there was some media speculation and questions raised in an Education Select Committee about Mr Cummings's conduct in 2013. The Commissioner notes that the requested information relates to information that, if held, would date from seven to ten years before the request, rather than to more recent events. She has also taken into account that the public interest was served by the mechanisms in place at the time, such as the Education Select Committee's deliberations.
52. The Commissioner's decision is finely balanced in this case. She understands the complainant's reasoning and his opinion that the requested information concerning an individual's earlier role and conduct within that role might have a bearing on their later, more influential roles. The public are quite likely to be interested in whether information is held or not but she does not accept that the public interest would be served by confirmation or denial. The Commissioner has concluded that these earlier events are too long ago and too inconclusive to justify overturning the DfE's policy neither to confirm or deny whether it holds personal data related to the request.
53. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.
54. The Commissioner has therefore decided that the DfE was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5B)(a)(i) of FOIA.
55. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that she does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and transparent. The Commissioner has therefore decided that the DfE was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5)(B) of FOIA.

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 1234504

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

Pamela Clements
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