

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 June 2020

Public Authority: House of Commons

Address: London
SW1A 0AA

Complainant: on behalf of The Guardian Newspaper

Decision (including any steps ordered)

1. The complainant has requested details of the number of times each Former Member's security pass was used. The House of Commons ("the Commons") disclosed an anonymised version of the list, but relied on section 40(2) of the FOIA to withhold the name linked to each individual pass.
2. The Commissioner's decision is that the information in question is personal data but that the legitimate interests in disclosure outweigh the rights of the data subjects. She therefore finds that the Commons is not entitled to rely on section 40(2) of the FOIA to withhold the information.
3. The Commissioner requires the Commons to take the following steps to ensure compliance with the legislation.
 - Disclose a de-anonymised version of the list it has already disclosed.
4. The Commons 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.

Request and response

5. On 8 August 2019, the complainant wrote to the Commons and requested information in the following terms:

"Please may I be provided with the following information concerning the most recent (July 2019) list of former Members who hold a pass for the parliamentary estate:

*"1) For each former Member named in the spreadsheet, please provide us with the total number of dates on which their parliamentary pass was used between 1 July 2018 to 30 June 2019. We anticipate that this information will likely be held by the Parliamentary Security Department or the Pass Office. **Please do not provide us with the individual dates; only the total number of dates on which each pass was used.**" [original emphasis]*

6. The Commons responded on 30 August 2019. It provided a list which showed the number of occasions on which each individual pass had been used, but did not link the passes with the individual users. It stated that linking an individual with a particular pass would result in a disclosure of personal data about that individual which would breach the data protection principles. It therefore relied on section 40(2) of the FOIA to withhold the information.
7. The complainant sought an internal review on 2 September 2019. He noted that the list of former member pass holders was already in the public domain and therefore the withheld information could not be personal data. Furthermore, he argued, even if the information was personal data there would be a legitimate interest in its disclosure.
8. The Commons completed its internal review on 15 October 2019. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner 16 December 2019 to complain about the way his request for information had been handled.
10. The Commissioner considers that the scope of her investigation is to determine whether the requested information would result in the disclosure of personal information and, if it would, whether that disclosure would breach the data protection principles.

Reasons for decision

Section 40 personal information

11. Section 40(2) of the 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.
12. In this case the relevant condition is contained in section 40(3A)(a)¹. 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 General Data Protection Regulation ('GDPR').
13. 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 the FOIA cannot apply.
14. 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?

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

"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. 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.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

18. 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.
19. In this case, the complainant has argued that the withheld information is not personal data because it is a list of names and that list has already been published elsewhere.
20. Whilst the information which has been withheld is literally a list of names, the Commissioner agrees with the Commons that it is the complete information (ie. the withheld information combined with what has already been disclosed) and what that might reveal, that should be considered.
21. Providing the withheld information as well as that already disclosed would reveal a list which would link the names of former Members of Parliament with the exact number of times their Parliamentary security pass had been used. This usage data would have the individuals involved as its main focus and the individuals would clearly be identifiable from the complete list.
22. Whilst the Commissioner has not viewed the complete list in this case (as she does not consider it would add anything substantive to her considerations) she is satisfied that the complete information would clearly both *relate to* and *identify* the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

Would disclosure contravene principle (a)?

23. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
24. The most relevant DP principle in this case is principle (a).
25. 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 subject".
26. 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.
27. 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.

28. 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*" lawful bases for processing listed in the Article applies.
29. 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".²*
30. In considering the application of Article 6(1)(f) of the 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.
31. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

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) 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 interests

32. 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 interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests or purely private concerns. However, the more trivial the interest, or the more unrelated the private concern is to the broader public interest, the less likely it is that any balancing test would conclude that unrestricted disclosure to the general public is proportionate.

33. In its submission, the Commons noted that there was a legitimate interest in:

"understanding the access that former Members may have to parliamentarians and others visiting the parliamentary estate, also in transparency about the use of publicly funded resources on the estate."

34. In this particular case, the complainant is journalist. He argues that this type of pass affords the individuals involved privileged access to one of the institutions at the heart of government and that there is thus a legitimate interest in understanding how those passes are being used. He also noted that there would be a legitimate interest in understanding who the most frequent users of the passes are – so that those individuals can be subject to further journalistic inquiry. This would be particularly important where former MPs have business interests.

35. The Commissioner's view is that understanding *how* the passes are being used and identifying the *misuse* of the passes are two distinct, but related, legitimate interests in disclosure of this personal data. She also considers that there is a third legitimate interest: that of *preventing* (or, at least, deterring) the misuse of passes from occurring in the first place.

36. The Commissioner is therefore satisfied that the legitimate interest test has been met and will therefore go on to consider the Necessity test.

Is disclosure necessary?

37. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

38. When asked why the Commons did not consider disclosure to be necessary to satisfy the legitimate interest identified, the Commons responded to say that:

"In this case, disclosure would not be targeted at any individual but would cover a large group of over four hundred former Members. It would not achieve the requestor's stated purpose and for the reasons set out below, disclosure would not meet the legitimate interests we have identified. As explained in this response, the level of pass usage does not give any information about the purpose of each visit to the estate. It is not, of course, the case that parliamentarians can only have meetings with individuals on the parliamentary estate. This type of pass enables former Members to make very limited use of catering facilities and not, for example, to take advantage of publicly funded services or to book meeting rooms (see below on the facilities made available to an individual with a former Member's pass). If individuals use any catering facilities, then they must pay for them in the same way as any other customer.....Passes are issued to former Members subject to restrictions which make it clear that access to facilities on the parliamentary estate is not permitted and that the passes may be withdrawn in the event of misuse. In the small number of cases where this has occurred, passes have been suspended or withdrawn. In addition, the Code of Conduct for Members sets out rules to prevent advocacy, and former Ministers are also subject to restrictions on employment. The legitimate interests are not, therefore, unaddressed."

39. Whilst the Commissioner does not consider the arguments above to be unreasonable, she notes that the arguments appear aimed at the Balancing test rather than the Necessity test. As a result the Commons has failed to show how the legitimate interests could be met by other means which would be less intrusive to the privacy of the individuals concerned.
40. As she is also the regulator of data protection legislation, the Commissioner has considered whether there might be other means of satisfying the legitimate interests identified above.
41. In its submission, the Commons informed the Commissioner that, in order to be eligible for such a pass, a former member would need to undergo a criminal record check. Each pass is valid for up to five years, after which the individual would need to submit a fresh application and undergo a further police check.

42. The Commons was also keen to point out that there are strict rules in place to govern the use of the pass. Members are prohibited from lobbying activities for six months after leaving office and they are not permitted to use publicly-funded resources available on the Parliamentary estate (such as stationery or copying facilities).
43. Any allegation that a pass had been misused would, the Commons noted, be referred to the Commons Administration Committee (HCAC) which could, for the most serious infringements, order that passes be withdrawn. It argued that this process was sufficient to satisfy any legitimate interests in the information.
44. Whilst the Commissioner accepts that disclosure of the complete list would not, on its own, enable any misuse of passes to be identified, she considers that it is a necessary tool in doing so. Furthermore, she considers that disclosure *is* necessary to satisfy the other legitimate interests identified above.
45. The Commissioner notes that whilst sitting Members, their staff members (who hold passes), journalists and All-Party Parliamentary Groups (APPGs) are subject to some form of Register of Interests – in which any financial interests which might affect, or might be thought to affect, their work, must be declared – former members (whose passes confer many of the same privileges) are not.³
46. Where misuse of a pass does occur, this will not necessarily be identified by HCAC unless a complaint is made. In practice, the Commissioner considers that misuse instances are likely to be underreported. For a Member, or the staff of a Member, reporting an inappropriate conversation would involve admitting they had themselves been party to an inappropriate conversation which, for political reasons, they may well be unwilling to do – particularly if the former member involved is a personal friend.
47. The Commons has given no indication that it uses this data itself to identify misuse of former member passes. The Commissioner therefore considers that any former member who wished to abuse their pass would have little reason to suspect that they would be detected.
48. Making the usage data publicly available would, in the Commissioner's view, act as a deterrent to any former member who might be tempted

³ The Commons did point out that, where former members had recently vacated their seat, entries on the Register of Members' Interests might still be relevant, but noted that there were practical difficulties in creating and maintaining a register for former members.

to abuse their position of trust. In the absence of any other significant deterrent, she therefore considers that disclosure of the information *is* necessary for the purpose of satisfying a legitimate interest.

49. As the Commissioner is satisfied that disclosure in this case meets the Necessity test, she will now go on to consider the Balancing test

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

50. Even where disclosure of personal data is necessary to satisfy a legitimate interest, the Commissioner must still 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 the 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.

51. 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.

52. 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.

53. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

54. The Commons noted that former members would be aware that the House of Commons was subject to the FOIA and that, as passholders, their names would be published. However, it argued that the data subjects concerned would have no reasonable expectation that the frequency with which they used their pass would be made public and therefore disclosure would potentially cause distress.

55. Former members had not given their consent to such disclosure and the Commons considered that it would be impractical to consult all 467

passholders prior to responding to the request. When applying for a pass, the application form states that the information collected will be kept confidential. Therefore any disclosure would take place without meaningful consent.

56. Use of the pass would, the Commons argued, relate to the personal life of the individual passholder. Therefore disclosure would be unfair because:

"It is a matter for each individual to decide how often they visit the estate and why. It is possible that their partners or spouses may not know the exact details of how they spend their days and this is each individual's prerogative as part of their personal life."

57. As noted above, the Commons also drew attention to what it considered to be the lack of evidence supporting a correlation between *frequency* of pass usage and *mis-usage* of passes. An individual could, as the Commons argued, have multiple inappropriate conversations on a single visit or behave entirely appropriately throughout multiple visits. Disclosure of all the data, to the world at large, which would not necessarily achieve the stated purpose, would, the Commons argued, be a disproportionate method of achieving the legitimate interest.
58. The Commissioner accepts all these arguments as reasonable ones to present. However, she is not convinced that, in the circumstances, they outweigh the legitimate interests in disclosure.
59. The Parliamentary Estate is where the nation's lawmakers have their offices. Because government ministers are drawn from Parliament, senior members of both the executive and the legislature are often to be found moving freely around the Estate in a manner which does not occur anywhere else.
60. The Estate is also one of the most heavily-protected non-military sites in the United Kingdom. It is patrolled by armed guards, access to the general public is severely restricted and, where visitors are admitted, they must be accompanied at all times.
61. By contrast, passholders are permitted to visit many areas of the Estate unaccompanied – including communal areas, such as Portcullis House, where Members can often be found socialising or seeking refreshment.
62. The Commissioner therefore considers that there is a compelling interest in understanding which individuals have passes allowing them privileged access to this sensitive location – a privilege not available to the general public – and how that privilege is being utilised.

63. The Commons has noted that former Members are not entitled to use publicly-funded resources or entertain non-family members as guests. It has also pointed out that most of the areas that former Members can access are areas the general public can access – albeit that the general public are not permitted to have *unaccompanied* access to these areas. Nevertheless, the Commissioner still considers that former Members' passes give them privileged access to the corridors (and cafeterias) of power – and that those afforded this privilege should have a reasonable expectation that the privilege will come with increased scrutiny.
64. The fact that former Members are not subject to the same degree of transparency, in respect of their financial interests, as other passholders, in the Commissioner's view, strengthens the legitimate interests in understanding how often they are making use of their privilege and weakens any expectations of privacy.
65. Given that the evidence suggests that several of the passholders are employed by lobbying or public relations companies, there is a legitimate concern about how such passes are used.⁴ Whilst the Commissioner is not aware of any evidence to suggest widespread misuse of the passes, she does consider that the current system is vulnerable to abuse.
66. The Commissioner accepts that transparency alone will not be enough to identify when passes are being misused, nor to prevent any future misuse. Nevertheless she considers that it is an important tool, as having access to data will enable journalists and others to ask legitimate questions of those who might seek or have sought (or might be perceived to be seeking or have sought) undue influence over those who shape our laws.
67. The data which the Commons has released indicates that four individuals accessed the estate on over 70 occasions during the course of a year. Allowing for the Parliamentary calendar, that is approximately equivalent to a visit every other day that the House sat during that period. There is no suggestion that any of those individuals has acted inappropriately – indeed the data does not indicate how many of the visits were on sitting (as opposed to non-sitting – when MPs would be unlikely to be present) days – but that does not, in the Commissioner's view, mean that it would be illegitimate to ask why an individual required such frequent access to a restricted area.

⁴ See, for example: <https://www.independent.co.uk/news/uk/politics/lobbying-calls-for-transparency-over-former-mps-access-to-parliament-6277136.html>

68. The Commissioner notes that some of the individuals who hold these passes, whilst no longer sitting Members, remain very much in the public eye. The current list of passholders includes Greater Manchester Mayor Andy Burnham, Evening Standard Editor George Osborne and Facebook Vice-President Nick Clegg.
69. Whilst the Commissioner notes that disclosure of the data will likely cause some of the individuals involved a certain degree of inconvenience – in that they may be asked to justify the frequency of their visits – she also notes that these individuals would, by definition, be familiar with (and are likely to have had training to deal with) press enquiries by virtue of the office they once held. Equally, the names of these individuals are already in the public domain and it is clear that they have already been subjected to scrutiny. Therefore the Commissioner considers that, not only would the *additional* scrutiny be relatively modest, but that, because additional scrutiny would be likely to focus on those whose usage is frequent, or who have outside interests, it is likely to result in some of the former Members receiving *fewer* enquiries.
70. Admittedly, the individuals would reasonably have expected that, having left office, they would be subject to less rigorous scrutiny. However, the Commissioner considers that, as ex-MPs, the data subjects would be much better prepared to deal with that scrutiny than ordinary members of the public.
71. Finally, the Commissioner considers that disclosure of the usage data would reveal relatively little about the personal life of the former members involved – other than that they visited the Parliamentary Estate. She therefore considers the privacy intrusion to be relatively low.
72. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of the information would be lawful.

Fairness and transparency

73. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
74. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons. Having carried out a balancing test, she considers that the rights of the data subjects

involved have been appropriately considered and weighted against other considerations.

75. The requirement for transparency is met because as a public authority, the Commons is subject to the FOIA.
76. Having considered the arguments fully, the Commissioner has decided that the Commons has failed to demonstrate that the exemption at section 40(2) is engaged.

Right of appeal

77. 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

78. 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.
79. 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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