

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

### **Decision notice**

**Date:** 22 July 2021

**Public Authority:** Chief Constable of Durham Constabulary  
**Address:** Police Headquarters  
Aykley Heads  
Durham  
County Durham  
DH1 5TT

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

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1. The complainant has requested from Durham Constabulary information about its investigation into Dominic Cummings' trip to Durham to self isolate, in March 2020. Durham Constabulary disclosed some information but withheld the investigation report, citing the non-disclosure exemptions at sections 30(1)(a)(i) (Investigations and proceedings) and 40(2) (Personal information) of the FOIA.
2. The Commissioner's decision is that Durham Constabulary was entitled to rely on section 30(1)(a)(i) to withhold the investigation report.
3. No steps are required as a result of this decision.

## Background

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4. There is a great deal of information in the public domain about the events which underpin this request<sup>1</sup>.
5. To summarise, on 26 March 2020, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020<sup>2</sup> were enacted. They contained restrictions on freedom of movement, gatherings and businesses during the COVID-19 emergency period.
6. On 27 March 2020, Dominic Cummings (a Special Adviser to the prime minister) drove his family from London to Durham while a member of his party was showing symptoms of COVID-19.
7. These events were widely reported in the media. On 25 May 2020, Mr Cummings held a press conference in which he gave an account of his actions, saying that he believed he behaved "*reasonably and legally*".
8. Durham Constabulary investigated whether Mr Cummings' actions had breached criminal law. On 28 May 2020, it issued a press statement confirming that he had not committed a criminal offence by travelling with his family to self-isolate in Durham, but that by later travelling to Barnard Castle during his stay, "*...there might have been a minor breach of the Regulations*". It said:

*"Durham Constabulary view this as minor because there was no apparent breach of social distancing.*

*Had a Durham Constabulary police officer stopped Mr Cummings driving to or from Barnard Castle, the officer would have spoken to him, and, having established the facts, likely advised Mr Cummings to return to the address in Durham, providing advice on the dangers of travelling during the pandemic crisis. Had this advice been accepted by Mr Cummings, no enforcement action would have been taken.*

*In line with Durham Constabulary's general approach throughout the pandemic, there is no intention to take retrospective action in respect of the Barnard Castle incident since this would amount to treating Mr Cummings differently from other members of the public. Durham*

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<sup>1</sup> See, for example, <https://www.itv.com/news/2020-05-26/dominic-cummings-durham-trip-timeline>

<sup>2</sup> <https://www.legislation.gov.uk/ukxi/2020/350/contents/made>

*Constabulary has not taken retrospective action against any other person.*<sup>3</sup>

## Request and response

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9. On 28 May 2020, the complainant wrote to Durham Constabulary and requested information in the following terms:
  - *"Please disclose the name and rank of the SIO [Senior Investigating Officer] /officer in charge of the Dominic Cummings lockdown case;*
  - *Please disclose when Durham Police began its investigation into the alleged lockdown breaches and the date it concluded;*
  - *Please provide a copy of the SIO/officer's closing report;*
  - *Please disclose if any legal advice was sought in relation to the case and, if so, whether this was internal or external. If external, please disclose the cost and who provided it.*
  - *Please provide copies of the minutes of all Gold Group meetings in which the case was discussed."*
10. Durham Constabulary contacted the complainant on 25 June 2020 and, as it was entitled to do under section 17(2) of the FOIA, it informed him that it was considering the application of section 30 to the requested information and required further time to consider the public interest test.
11. On 21 July 2020, Durham Constabulary responded to the request. It disclosed the information requested in the first part of the request. In response to the fourth part, it confirmed that legal advice had not been sought. For the second, third and fifth parts, it refused to disclose the requested information on the grounds that it was exempt under sections 30(1)(a)(i) (Investigations and proceedings) and 40(2) (Personal information) of the FOIA.
12. The complainant requested an internal review on 27 July 2020 and Durham Constabulary provided the outcome on 20 August 2020,

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<sup>3</sup> <https://www.heraldscotland.com/news/18481324.full-durham-police-release-statement-investigation-finds-cummings-broke-lockdown-rules/>

maintaining the application of sections 30(1)(a)(i) and 40(2) of the FOIA to the second, third and fifth parts of the request.

## Scope of the case

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13. The complainant contacted the Commissioner on 23 October 2020 to complain about the way his request for information had been handled. He disagreed with the application of sections 30(1)(a)(i) and 40(2) of the FOIA to withhold the information at the second, third and fifth parts of the request.
14. During the Commissioner's investigation, Durham Constabulary revised its position. It disclosed the information requested at the second part of the request. For the fourth part of the request, it clarified its previous response, saying that legal advice had been sought in respect of the press statement it issued on 28 May 2020, but not in respect of the investigation itself. For the fifth part of the request, it said that no minutes were taken and therefore that it did not hold the requested information.
15. The complainant confirmed to the Commissioner that he was satisfied with Durham Constabulary's response on those points and that, going forward, he only wished to challenge its refusal to disclose the information specified in the third part of the request (the senior investigating officer's report on the investigation).
16. The analysis below therefore considers whether Durham Constabulary was entitled to rely on section 30(1)(a)(i) to withhold the information requested at the third part of the request. In view of her decision on that point, she has not proceeded to consider whether section 40(2) also applies.
17. The Commissioner has viewed the withheld information when making her decision.

## Reasons for decision

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### Section 30 – investigations and proceedings

18. Section 30(1)(a)(i) of the FOIA states:

*"Information held by a public authority is exempt information if it has at any time been held by the authority for the purpose of –*

*(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained –*

*(i) whether a person should be charged with an offence...*

19. The Commissioner considers that the phrase "at any time" means that information can be exempt under section 30(1)(a) of the FOIA if it relates to a specific ongoing, closed or abandoned investigation.
20. Consideration of section 30(1)(a)(i) is a two-stage process. First, the exemption must be shown to be engaged. Secondly, as section 30 is a qualified exemption, it is subject to the public interest test. This involves determining whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

*Is the exemption engaged?*

21. The first step is to address whether the requested information falls within the class specified in section 30(1)(a)(i) of the FOIA.
22. The Commissioner has issued guidance on section 30<sup>4</sup> which states that section 30(1)(a) can only be claimed by public authorities that have a duty to investigate whether someone should be charged with an offence.
23. The Commissioner's guidance describes the circumstances in which the subsections of section 30(1) might apply. With respect to section 30(1)(a), the guidance says:

*"The exemption applies to both investigations leading up to the decision whether to charge someone and investigations that take place after someone has been charged. Any investigation must be, or have been, conducted with a view to ascertaining whether a person should be charged with an offence, or if they have been charged, whether they are guilty of it. It is not necessary that the investigation leads to someone being charged with, or being convicted of an offence..."*

24. Durham Constabulary explained that it carried out an investigation into whether there had been any breach of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. It was a criminal investigation, as the Regulations establish several offences. It said that the investigation was completed prior to the request being received.

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<sup>4</sup> <https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>

25. As a police force, Durham Constabulary has a duty to investigate allegations of criminal offences by virtue of its core function of law enforcement. The Commissioner is therefore satisfied that it has the power to carry out investigations of the type described in section 30(1)(a)(i) of the FOIA.
26. The Commissioner is satisfied that the withheld information was held in relation to a specific investigation conducted by Durham Constabulary of the type described in section 30(1)(a)(i) of the FOIA. She is therefore satisfied that the exemption provided by section 30(1)(a)(i) is engaged.

### **The public interest test**

27. Section 30(1)(a)(i) is subject to a public interest test. This means that even though the exemption is engaged, the information may only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
28. In accordance with her guidance, when considering the public interest in maintaining exemptions the Commissioner considers that it is necessary to be clear what they are designed to protect.
29. The purpose of section 30 is to preserve the ability of the police (and other applicable public authorities) to carry out effective investigations. Key to the balance of the public interest in cases where this exemption is found to be engaged, is whether the disclosure of the requested information could have a harmful impact on the ability of the police to carry out effective investigations. Clearly, it is not in the public interest to jeopardise the ability of the police to investigate crime effectively.

#### *Public interest arguments in favour of disclosure*

30. In his request for an internal review, the complainant said there was a significant public interest in the information being disclosed:

*"The force only investigated Cummings' actions after media reports of his travel to the Durham area and trip out to Barnard Castle. It follows, therefore, that there is a compelling public interest in the force being open and transparent about its investigation ...*

*It is also unclear what, if any, action the force took to interview Cummings, his wife, family members, neighbours and residents of Barnard Castle. ...*

*It is paramount, therefore, that the force is open and transparent about its investigation ...*

*The force will be well aware of the potential consequences of Cummings' actions - with people already saying they will no longer abide by lockdown rules, test and trace etc."*

31. Durham Constabulary acknowledged the public interest in promoting transparency, accountability and openness, with regard to its own investigation of allegations about the conduct of a senior public official. It also recognised that the subject matter (compliance with government policy on lockdown) and the high profile nature of the case were additional factors favoring disclosure. It said:

*"The investigation was the subject of intense public and media attention, due to the role of Mr Cummings (at the material time) as a chief advisor to the Prime Minister; the circumstances of the Covid-19 lockdown and the public interest in compliance by all persons with the 2020 regulations. There was also the more general public interest in the accountability of public persons or persons considered to be in power.*

*Disclosure of the information requested may have reassured persons regarding the nature and impartiality of investigation conducted by Durham Police, and whether the police had acted in accordance with law and conducted a proportionate investigation. There was also the more general public interest in demonstrating integrity and transparency as a public authority with investigatory responsibilities."*

*Public interest arguments in favour of maintaining the exemption*

32. Durham Constabulary argued that the exemption at section 30(1)(a) of the FOIA exists to safeguard the effective investigation and prosecution of offences. The exemption recognises the need to prevent disclosures that would prejudice either a particular investigation or set of proceedings, or investigatory and prosecution processes generally.
33. It referred the Commissioner to 'safe space' arguments contained in her guidance on section 30 and the need to fully explore all aspects of a case without fear that information will be reported in the press or enter the public domain. Such concerns would hinder the efficient running of an investigation if disclosed:

*"Our position in this particular case is similarly that police must be given space to investigate impartially and in accordance with conventional practices and principles. An investigator (and other officers involved in an investigation) must focus on those practices and principles, and not the potential reaction to what they do and say if their analysis is published to the world at large.*

*The methods of investigation...should be kept confidential. If they become widely known they will be open to manipulation or avoidance.*



*Release of the report concluding the investigation regarding the allegations would publicise police methods and tactics (even if they are already publicly known of to some degree) and the personal data of the subject...as well as witnesses and other persons referred to therein.*

...

*Police investigations in the pre-trial phase are also confidential in the interests of all persons involved, including the accused, complainants and potential witnesses. Such persons should have the confidence that they can disclose information to the police who have specific responsibility for investigating allegations, without disclosing them to the world at large, in relation to information which is inherently personal.*

*Were the confidentiality of criminal investigations to be departed from, the cooperation of such persons would be threatened, as they may be deterred from interacting candidly with police (which would in turn undermine the ability of police to investigate allegations at all) or people might provide information to police with a view to it being disclosed to the world at large (under the FOIA or otherwise) with the added weight that it had been disclosed via the police."*

34. Durham Constabulary acknowledged the high profile of the individual under investigation but said that he still had a right to privacy and due process:

*"The fact that the person who was the subject of the allegations in this case was a public figure does not necessarily change the engagement of their rights as the subject of the investigation and the kinds of interests referred to above (though status as a public figure may be relevant to the balance of interests under the FOIA, as we have acknowledged and see below). There have been some significant instances of police failing to respect the rights of high profile persons in the recent past, resulting in unfairness and unjustified invasion of privacy...The subject matter of those cases was of course very different, but they underscore the fact that high profile persons are also entitled, in the criminal investigations context, to the same rights in connection with investigations as other member of the public.*

*The rights and interests in favour of maintaining the section 30 FOIA exemption are engaged in this case especially because part of the subject matter of the investigation into Mr Cummings was his movements in a personal capacity (i.e. his private life, as the allegations did not concern his performance of public duties), his travel (including his particular whereabouts on particular dates, with members of his family) and the reasons asserted as to why he was*



*travelling (which related to his personal health and the health of his family)."*

35. Durham Constabulary also noted that independent scrutiny of its investigation could be pursued through other channels:

*"These are not arguments against any form of review or transparency, and we note that there are significant avenues for review of investigations. These include review by the independent CPS, review by the courts (including the High Court on judicial review of investigation decisions), statutory police complaints procedures and Her Majesty's Inspectorate of Constabulary (HMIC). The specialist nature of these avenues of review and transparency reflects the sensitive nature of criminal investigations.*

...

*The appropriate forum for determining the merits of criminal allegations is the courts, which make careful decisions about disclosure, and not police investigation reports or similar, whether at the time of the allegations or many months later. Investigators should be permitted to communicate frankly and fearlessly between themselves, in internal reports and/or with the Crown Prosecution Service (CPS) without having to tailor those communications to publication to the world at large."*

#### *Balance of the public interest*

36. In reaching a conclusion on the balance of the public interest, the Commissioner has considered the public interest in Durham Constabulary disclosing the requested information. The Commissioner has also considered whether disclosure would be likely to harm any investigation, which would be counter to the public interest, and what weight to give to these competing public interest factors.
37. As set out above, the purpose of section 30 is to protect the effective investigation and prosecution of offences. Clearly, it is not in the public interest to jeopardise the ability of the police to investigate crime effectively.
38. Set against this, the Commissioner recognises the importance of the public having confidence in public authorities that are tasked with upholding the law. Confidence will be increased by allowing scrutiny of their performance and this may involve examining the decisions taken in particular cases.
39. The Commissioner also recognises the public interest in transparency and accountability with regard to the conduct of high profile public officials who are subject to allegations, and in the public being able to

reach an informed view as to whether they have been investigated appropriately by the police. The information under consideration here relates to an alleged failure by Mr Cummings to abide by government 'lockdown' policy which was the subject of much public debate and which he had had some involvement in implementing.

40. However, the information relates to Mr Cummings' actions in a personal capacity, and not to his public life. Durham Constabulary's investigation found that no offences were committed and it released a statement explaining its conclusions. In light of this, the Commissioner has no difficulty accepting that Mr Cummings, and the witnesses and other third parties identified in the report, would not expect the investigation report to be disclosed to the general public under the FOIA, as they would consider the matter to be formally closed.
41. It might be argued that the public interest in disclosure is increased by the great deal of information about the matter which is already in the public domain. Much of it has been placed there by Mr Cummings himself, and also by some alleged witnesses, who spoke to the media. On that point, the Commissioner notes that the requested information is not precisely what is already in the public domain. Rather, it sets out the known facts of the case, which might, or might not, be at variance with what was reported in the media. As the Commissioner's guidance on section 30 says, "*There is clearly a qualitative difference between information in a speculative news report and an official confirmation of events*".
42. The investigation report also reveals the investigative process by which Durham Constabulary reached the conclusions that it had announced, and this is not information which is in the public domain. As such, it is information which may be of interest to someone looking to evade detection for breaching lockdown rules and it has the potential to harm the ability of the police to carry out effective investigations. This goes to the heart of what the exemption at section 30 is designed to protect.
43. The Commissioner has also looked at the significance of the information. The significance of the information relates to both the subject of the investigation (ie the conclusions Durham Constabulary reached) and what the information reveals about the probity or integrity of the investigation. If the information reveals some faults with the investigation – that it was demonstrably flawed or inadequate - this will increase the weight of the public interest in disclosure.
44. The Commissioner has viewed the investigation report but she cannot discuss its contents in this decision notice without disclosing information which is itself exempt. However, she can see nothing which suggests the investigation of the allegations made against Mr Cummings was flawed

or inadequate. She has therefore accorded limited weight to the public interest in disclosure to serve this purpose.

45. With regard to Durham Constabulary's argument that it was necessary to protect a safe "thinking" space, the Commissioner accepts that this argument is particularly relevant while an investigation is still live. However, in this case the investigation had concluded by the time the request was submitted and so the risk identified by Durham Constabulary had largely passed. In line with her guidance on section 30, she has accorded limited weight to this argument in favour of withholding the information.
46. However, the Commissioner does have concerns that disclosing the investigation report could create a perception among the wider public that sensitive information about criminal investigations may be disclosed to the world at large, even where the evidence has not resulted in a prosecution. She considers that there is a real chance this may deter people (including witnesses, complainants and suspects) from coming forward and cooperating with prosecuting authorities, particularly where criminal offences have been alleged. There is a very significant public interest in avoiding that outcome and it is a factor of some weight in favour of maintaining the exemption in this case.
47. Taking all the above into account and having given due consideration to the arguments put forward by both parties, while the Commissioner accepts that disclosing the withheld information would be likely to promote transparency, she considers that the public interest in disclosure is outweighed by the public interest in ensuring that the investigation and prosecution of offences is not undermined. That no criminal offence was identified, and as the investigation does not appear, to the Commissioner, to have been flawed or inadequate, further strengthens the public interest in maintaining the exemption in this case.
48. The Commissioner is therefore satisfied that Durham Constabulary was entitled to rely on section 30(1)(a)(i) of the FOIA to refuse the request and that the public interest in maintaining the exemption outweighs the public interest in disclosure.
49. As the Commissioner has concluded that this exemption is properly engaged in respect of the investigation report in its entirety, she has not considered the other exemption cited.

## Right of appeal

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50. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

51. 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.

52. 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 .....**

**Gerrard Tracey  
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