**Appeal number: EA/2020/0126**
**V[1]**

**FIRST-TIER TRIBUNAL**
**GENERAL REGULATORY CHAMBER**
**INFORMATION RIGHTS**

**MICHAEL KEENAN** **Appellant**

**- and -**

**INFORMATION COMMISSIONER** **First Respondent**

**-and-**

**THE CABINET OFFICE** **Second Respondent**

**Heard at an oral hearing via the cloud video platform on 15 April 2021**

**TRIBUNAL:** **JUDGE LYNN GRIFFIN**
**TRIBUNAL MEMBER SUZANNE COSGRAVE**
**TRIBUNAL MEMBER MARION SAUNDERS**

**Appearances:** **The Appellant appeared in person.**
**The First Respondent did not attend and was not represented.**
**The Second Respondent was represented by Ms J. Thelen, counsel, instructed by the Government Legal Department.**

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[1] *V: video (all remote) with the Appellant joining by telephone*

## DECISION

1. The appeal is dismissed.

## MODE OF HEARING

2. The proceedings were held by the cloud video platform. All parties joined remotely, the Appellant joined by telephone. There was no objection to this course and no indication of any issues for the parties that would affect their participation. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

3. The hearing began at 10.03 and concluded at 12.28. The hearing was recorded by the clerk via the cloud video platform. Even though the Appellant had not indicated he required any steps to be taken to facilitate his participation in the hearing the Tribunal asked him at the beginning of the hearing and the Appellant said he did not need any steps to be taken.

4. The Information Commissioner had indicated she was not proposing to participate in the hearing. No direction was made requiring her to do so, see the case management directions of 10 February 2021 where such a direction was refused. The Appellant was concerned at her absence because he wanted to ask questions about the decision notice under appeal. However, the hearing is not a chance for questions to be asked between the parties. The Information Commissioner had set out her case in her response and the Appellant was able to comment on that in his oral submissions. It was in accordance with the overriding objective to proceed in the absence of the Information Commissioner or her representative in the circumstances of this case.

5. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 169 plus

a. A copy of a letter from the Second Respondent to the Appellant dated 29/12/2020
b. An email from the Appellant of 13 April 2021 at 22:33
c. A written note of the Appellant's verbal submissions
d. An open skeleton argument from the Second Respondent dated 15 January 2021
e. A bundle of authorities
f. Copies of the case management directions made in the appeal

6. At the start of the hearing the Tribunal raised an issue as regards the redactions within the open bundle [120, 124-6, 130-32, 134, 136, 138-141, 145-6

]. The Appellant's concern was to achieve transparency. The Second Respondent argued that the material had been redacted because it was not relevant. The Appellant responded that the material should be released in order to determine its relevance and that the appeal may need to be adjourned to allow that. Ms Thelen, counsel for the Second Respondent, resisted that submission on the grounds of cost and confirmed she had seen the material and there was nothing of relevance to the single part of the request that was in issue in this appeal, in answer to the Tribunal she stated that there was nothing that would undermine the case for the Respondents and nothing to assist the Appellant.

7. Having retired to consider the submissions and the over-riding objective, the Tribunal declined to call for the material, to adjourn the hearing or order the removal of the redactions. This was because

a. An extension of time had already been refused to challenge the Registrar's case management directions in this regard
b. As an independent member of the Bar Ms Thelen has an overriding duty to the Tribunal as well as the Respondent's duty of candour. She had provided her assurance, having seen the material that it was not relevant to the issues in this appeal, nor anything that would assist the Appellant
c. The context of the redactions within the document is secondary to the issues that fall to be decided about whether the information sought was personal data and if its processing by disclosure would be lawful.
d. The Tribunal would keep the issue under review throughout the hearing and revisit it if required.

8. In the event it was not necessary to revisit the topic.

## REASONS

*Background to Appeal*

9. This case concerns disclosure of the numbers of complaints made about Government Ministers for ministerial misconduct. The conduct of Ministers is guided by, amongst other things, the Ministerial Code ["the code"]. The code is a guidance document for government generally that sets out principles applicable to ministerial conduct and includes some material about how government business is conducted. The code should be read with the overarching duties on Ministers to comply with the law and to observe the seven Nolan principles of public life.

*The request*

10. On 25 January 2018 the Appellant submitted a request under the Freedom of Information Act 2000 [FOIA] to the Second Respondent for information [61], the request had four parts as follows, although not numbered in the original we have numbered each question for clarity,

> 1) *"How many Ministerial misconduct complaints did the UK government receive for each of the following years 2012, 2013, 201 4, 2015, 2016 & 2017?*
> 2) *Please provide a breakdown of how many complaints were made against each named minister for each of the following years 2012, 2013, 2014, 2015, 2016 & 2017?*
> 3) *How many ministerial misconduct complaints did the UK govern ment investigate for each of the following years 2012, 2013, 2014, 2015, 2016 & 2017?*
> 4) *How many ministerail (sic)misconduct complaints did the UK government uphold for each of the following years 2012, 2013, 2014, 2015, 2016 & 2017?"*

11. On 19 February 2018, the Cabinet Office responded that the information was not held centrally and maintained that position on internal review by letter on 2 May 2018 [63,68,149].

12. This appeal concerns the third decision notice by the Information Commissioner as regards the Appellant's request for information above. In November 2018 the First Respondent decided that the Cabinet Office did hold the information requested, see decision FS50736559 [70]. Then, after a further response from the Cabinet Office of 12 December 2018 [78] the Information Commissioner decided in March 2019, reference FS50810878 [82], that the Second Respondent could not rely on the cost of compliance, s12 FOIA, to refuse to provide the information requested.

13. Thus on 5 June 2019[2] the Second Respondent sent the Appellant information in response to the first and third requests in tabular form and referred him to information that was publicly available in relation to the question 4 stating that this part of the request engaged s21 FOIA. As regards the second question the Cabinet Office relied on s40(2) FOIA to withhold the information[94].

[2] Stated to be 6 June 2019 in para 11 of the decision notice, see page 94 of the bundle

14. The Appellant complained to the Information Commissioner on 6 June 2019 and in due course on 3 March 2020 the decision notice that is the subject of this appeal, reference FS50849464, was issued [1] to determine 3 issues as follows

> *a. Whether the Cabinet Office was entitled to rely on section 40(2) FOIA to withhold the information falling within the scope of request two.*
> *b. Whether the Cabinet Office had correctly interpreted request 3 in light of the responses to requests 1 and 3 being the same information.*
> *c. Whether the Cabinet Office was entitled to rely on section 21 FOIA to refuse to provide the information falling within the scope of request 4.*

15. The Commissioner's decision was that the Cabinet Office was entitled to rely on section 40(2) to withhold the information within the scope of question two, did not hold any further information within the scope of question three and was not entitled to rely on section 21 in relation to question four of his original request (para 10 above).

16. The Cabinet Office was required to disclose the information withheld under s21 within 35 calendar days. They did so on 7 April 2020 [98] setting out the number of upheld complaints where the Prime Minister has found that a Minister breached the code for each of the years 2012 to 2018 inclusive and providing hyperlinks to other information.

17. The Appellant was not satisfied with the decision notice from the Information Commissioner and appealed to the Tribunal.

*Appeal to the Tribunal*

18. The Appellant's Notices of Appeal dated 18 & 28 March 2020[3] [18,23] set out his reasons for appealing in the following terms

> "IN THE INTEREST OF TRANSPARENCY & ACCOUNABILITY (sic) THE CABINET OFFICE HAVE DISCLOSED THE TOTAL NUMBER OF MINISTERIAL MISCONDUCT COMPLAINTS FOR EACH YEAR.
>
> HOWEVER, THEY HAVE ABSURDLY HIDDEN BEHIND THE DATA PROTECTION ACT TO REFUSE TO DISCLOSE THE NUMBER OF COMPLAINTS AGAINST EACH MINISTER THEREFORE, I CLAIM THAT IT IS IN THE PUBLIC INTEREST OF TRANSPARENCY & ACCOUNTABILITY THAT THIS INFORMATION SHOULD BE DISCLOSED TO THE PUBLIC AS IN THE CASE OF MINISTER PRITI PATEL WHO HAS RECEIVED MANY

[3] There are two Notices of Appeal one dated 18 March 2020 on a permission to appeal to the Upper Tribunal form the other 28 March 2020 submitted on the First Tier Tribunal form, the grounds of appeal are the same

> MINISTERIAL MISCONDUCT COMPLAINTS FOR BULLYING CIVIL SERVANTS OUT OF THEIR JOBS."

19. The outcome he was seeking was the "truth about the number of ministerial misconduct complaints against each government minister" [24]. In support of his appeal the Appellant sent copies of complaints he had made in relation to ministerial misconduct.

20. The Commissioner's Response dated 29 July 2020 maintains her analysis as set out in the Decision Notice and she resists the appeal.

21. The Cabinet Office's Response dated 11 August 2020 supports the Commissioner's submissions on the applicable law, the approach to be taken and disputes the grounds of appeal.

22. The issue for the Tribunal to determine in this case relates to the second request for numerical information as follows

> *Please provide a breakdown of how many complaints were made against each named minister for each of the following years 2012, 2013, 2014, 2015, 2016 & 2017?*

23. The Appellant appealed on the basis that it was in the public interest of transparency and accountability that the numerical information requested in his second request should be disclosed.

*The Law*

24. Section 1(1) FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information relevant to their request, and if so, to have that information communicated to them, subject to any procedural sections or exemptions that may apply.

25. Section 40(2) FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester plus one of the conditions listed in section 40(3A), (3B) or 40(4A) is satisfied. The relevant condition in this case is contained in section 40(3A)(a), as amended, which 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 as set out in Article 5 of the GDPR.

26. The first question to determine is whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 [DPA18]. If it is not personal data, then section 40 FOIA cannot apply.

27. If satisfied that the requested information is personal data the second question is whether disclosure of that data would breach any of the Data Protection principles.

28. Section 3(2) DPA18 defines personal data as "any information relating to an identified or identifiable living individual". It is well established that information will relate to a person where it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting the individual or has them as its main focus.

29. Article 5(1)(a) GDPR sets out that "*Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subjects.*" Processing will include when data is disclosed in response to a request under FOIA, see s3(4)(d) DPA18. Thus, the information can only be disclosed if to do so would be lawful, fair and transparent.

30. Lawful processing not only includes the application of the general law but the application of one of the lawful bases within article 6(1) GDPR.

31. Article 6(1)(f) GDPR 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*." The article also states that it shall not apply to processing carried out by public authorities in the performance of their tasks but s40(8) FOIA, as amended, provides that when determining whether the requirement of article 5(1)(a) would be contravened by disclosure of information the decision maker does not have regard to that disapplication.

32. When considering the application of Article 6(1)(f) GDPR in this context the Tribunal needs to consider a three part test as follows

a. Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
b. Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;
c. Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject. The test of 'necessity' must be met before the balancing test is applied.

33. This approach is consistent with the Upper Tribunal cases of

- Goldsmith International Business School v Information Commissioner and Home Office [2014] UKUT 563 (AAC) that restates the Supreme Court's approach in South Lanarkshire

Council v The Scottish Information Commissioner [2013] UKSC 55, 1 WLR 2421

- Glenda Rodriguez-Noza v Information Commissioner and Nursing and Midwifery Council GIA/0433/2014,
- Information Commissioner v Colleen Foster and Nursing and Midwifery Council GIA/1626/2014
- Information Commissioner v Halpin GIA/2288/2018 [2019] UKUT 29 (AAC)

These authorities are binding on us as to the approach we should take to the issues arising in the appeal.

34. Necessary means that the interference with the data subject's rights as a result of the disclosure must be proportionate and "the least intrusive means of achieving the legitimate aim in question." The test is of reasonable necessity to meet a pressing social need, see South Lanarkshire Council v The Scottish Information Commissioner, per Baroness Hale at paragraph 27.

35. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

> *"If on an appeal under section 57 the Tribunal considers -*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
>
> *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*
>
> *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."*

36. We note that the burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

*Evidence*

37. The evidence was primarily provided in the form of documents in the bundle and under separate cover, see above. In addition the Tribunal heard oral evidence from Ms Helen Ewen, Director of Honours and Information at

the Cabinet Office since September 2019 who confirmed that her witness statement [148] was true and accurate.

38. The Tribunal accepted Ms Ewen's evidence about the different ways complaints are handled as follows

> *20.*
> *Complaints or concerns that a Minister has not acted in accordance with the Code may be raised in a number of ways (from a number of sources, including within government) and to a number of parties, including the Minister themselves, the Minister's department, the Prime Minister and/or the Cabinet Office. Not all complaints or concerns are passed to the Cabinet Office. The Ministerial Code sets out that "Ministers are personally responsible for deciding how to act and conduct themselves in the light of the Code and for justifying their actions and conduct to Parliament and the public." When a complaint is received by the Cabinet Office it is reviewed. On that initial review, it will be clear that some complaints do not relate to the Code. Some complaints may require further assessment in order to determine whether or not the Code is engaged. The level of assessment that each complaint receives will depend on the nature of the complaint.*
>
> *21. Allegations that the Code has been breached may be reported to the Prime Minister if they are sufficiently serious however some potential breaches may already be known to the Prime Minister, for example, if the matter is already in the public domain. If the Prime Minister, having consulted the Cabinet Secretary, feels the complaint warrants further investigation, he may refer the complaint to the Independent Adviser on Ministers' Interests.*
>
> 22.
> *Since changes to the Ministerial Code in August 2019, the Prime Minister may*
>
> *also ask the Cabinet Office to investigate the facts of the case and/or refer the matter to the Independent Adviser on Ministers' Interests. The Independent Adviser would consider the results of the fact finding investigation in order to establish the facts relating to the allegation and to provide advice to the PM whether the established facts support, or otherwise, the allegation/s that there has been a breach of the Code. In response to a question raised, the Prime Minister can determine that there has been a breach of the Code without referral to the Independent Adviser.*

39. We also noted her evidence about the types of information that are published in the spirit of transparency and accountability in addition to parliamentary scrutiny such as

a. the Reports of the Independent Adviser to the Prime Minister on

Ministers' Interests, examples of which are at exhibit HE/1
b. press releases through the Prime Minister's office
c. summaries of reports by the Cabinet Secretary such as that into Damien Green in December 2017
d. information related to the resignation of Sir Michael Fallon in November 2017
e. information related to the loss of confidence in Gavin Williamson MP by then Prime Minister Theresa May in May 2019.

40. Ms Ewen was cross examined by the Appellant and explained that the initial response to the request had been that the material was not held by the Cabinet Office because having considered the scope of the request as it was believed to be at the time that the information sought was not held centrally. After the iterative process with the Information Commissioner's office about the scope of the request the terms were clarified. Not all complaints about Ministers go through the Cabinet Office, there is no single track process. There is no general process for who will determine a complaint as this will depend on the nature of the case and the circumstances. In answer to the Appellant explaining to her that he was trying to establish that the information he sought was not personal information but was public information in the public domain, Ms Ewen said that some information about complaints made in relation to Ministers is made available publicly as an important part of the system in recognition of the public interest in accountability but not all information is released. The specific information requested by the Appellant was not placed in the public domain.

41. We found Ms Ewen to be a truthful and accurate witness, we do not accept the Appellant's criticism of her evidence as being non-specific or vague. Neither do we accept his assertions made without evidential foundation, but based on his interpretation of published material, of some form of cover-up.

*Submissions*

42. The Appellant submits that the information he seeks is not personal data. He points to the previous release of information by the government in cases such as that involving the Rt Hon Priti Patel MP and Rt Hon Damien Green MP, to demonstrate that a "precedent" has been set under FOIA and due to the fact that government Ministers are public figures.

43. Both Respondents submit that the numerical information requested amounts to personal data. The request is for a specific data set not comparable to the previous examples cited by the Appellant.

44. All parties are agreed that there is a legitimate interest in transparency and accountability and that the disclosure of the numerical information

requested in response to the Appellant's request would meet the first part of three stage test. The Tribunal agrees.

45. The Appellant provided a written note of his submissions to which he added in oral argument. Not all of his submissions were relevant to the issue before the Tribunal. In summary, he submits that disclosure is necessary and the balance should fall in favour of disclosure because

> a. It will prove that the Second Respondent has been ignoring and/or covering up ministerial misconduct complaints he has made, which they dispute.
>
> b. It will reveal which Ministers repeatedly breach the code.
>
> c. It is consistent with the disclosures made in previous cases which have "set a precedent" under FOIA

46. The Respondents suggest that neither the second nor third stage of the test should be resolved in favour of disclosure. They submit that disclosure of the numerical information is not necessary to meet the legitimate interests of transparency and accountability because

> a. it is limited to a figure of complaints made which would be incomplete, as it would not include complaints that were not dealt with by the Cabinet Office,
>
> b. that number is not a reliable indicator of there having been an actual breach of the ministerial code,
>
> c. the number is not indicative of the substance of the complaint, or its severity on a spectrum ranging from vexatious complaints to the most heinous transgressions of the code,
>
> d. all complaints whether upheld or not would be included in the numerical information indiscriminately,
>
> e. the request does not distinguish between those still serving in "front-line" politics and those that no longer have that role where there would be less public interest in holding them to account for historic acts.

47. The Respondents contrast the limited ways in which disclosure would further the legitimate interests of accountability and transparency with the other ways in which those interests are met to support their contention that the legitimate interests can be met by less intrusive means

> a. Publication of the outcome of complaints of serious breaches of the Code which have been upheld. [Decision Notice ¶42]

b. Information in the public domain which addresses complaints if the Prime Minister has lost confidence in a Minister due to their conduct as judged against the Code. [Decision Notice ¶43]

c. It is for Ministers justify their actions and conduct to Parliament and the public, and where the Minister successfully does so there may be no investigation

48. The Respondents submit that even if the necessity test is met the processing is not warranted by reason of the prejudice to the rights of the data subjects, being the minister who are the subjects of the complaints. They submit that while Ministers have an expectation that their conduct will be scrutinised, they continue to have a reasonable expectation that some personal data should not be disclosed and should remain confidential. In this case it is suggested that a minister would not expect inaccurate, incomplete or misleading information to be disclosed and that this could lead to unfairness due to targeting of those individuals and/or reputational damage.

49. The Appellant made an oral reply to the submissions made on behalf of the Second Respondent by Ms Thelen. He repeated that previous disclosures meant that a precedent was set and the information requested could not amount to personal data and submitted that in any event the disclosure sought would not damage Ministers in any way. He closed by submitting that it would be unjust to treat the data set he requested as different and that openness and transparency required the information was disclosed.

*Analysis and Decision*

50. The Cabinet Office relies on the qualified exemption contained in s. 40(2) FOIA. The Tribunal must therefore form a conclusion on the application of s40(2) to the information requested by Mr Keenan.

51. We first asked ourselves whether the information requested would amount to personal data. As the request is for the names of Ministers and the number of complaints made against them in the given years, the Tribunal is satisfied that the withheld information both identifies and relates to the specific Ministers within the scope of the request.

52. Every request under FOIA must be considered on its own terms and the earlier publication of information in relation to certain complaints will not form any binding precedent in relation to the nature of a different and specific data set. The fact that the information relates to public figures does not make it any less their personal data.

53. We find that the information requested falls within the definition of 'personal data' as set out in section 3(2) DPA18.

54. However, this is not the end of the matter and we went on to consider if disclosure of the information would contravene any of the DP principles.

55. We considered the second and third stages of the three stage test, there being no dispute about the existence of a legitimate interest being pursued in the request for information. For the sake of completeness we agree that the legitimate interest has been correctly identified as the interest in accountability and transparency.

56. We find that the Appellant had a legitimate interest in transparency and holding Ministers to account as recognised in paragraphs 37 to 40 of the Information Commissioner's decision notice, for the purposes of Article 6(1)(f) GDPR.

57. We then considered the necessity test and asked ourselves whether disclosure of the information requested is necessary to meet the legitimate interest in question. We concluded that it was not necessary because

a. Disclosure would not prove anything about the way that the Second Respondent has been handling ministerial misconduct complaints made by the Appellant

b. The data would not reveal which Ministers repeatedly breach the code, only how many complaints were made and not whether those complaints had any substance or how they were resolved. All complaints whether upheld or not would be included in the numerical information indiscriminately. Thus, the number of complaints made is not a reliable indicator of there having been an actual breach of the ministerial code, still less its severity.

c. The request must be considered on its own terms and it is not relevant to the question of necessity to consider whether the approach is consistent with any disclosures made in previous cases.

d. The numerical information requested would be incomplete, because it would not include complaints that were not dealt with by the Cabinet Office.

e. The request does not distinguish between those still serving in "front-line" politics and those that no longer have that role where there would be less public interest in holding them to account for historic acts.

58. Further, we consider that there is no pressing social need for the information requested to be disclosed in the light of the other information that is already published that meets the legitimate interest in transparency and accountability. We accept the Respondent's submissions that the legitimate interests can be met by less intrusive means and that it was not necessary for

the requested information to be disclosed to meet the legitimate interests because the information would not provide any effective scrutiny.

59. We find that disclosure of the information requested is not necessary to meet the legitimate interest of accountability and transparency.

60. In the light of our decision on the second stage of the three stage test we did not proceed to consider the balancing test. The test of 'necessity' must be met before the balancing test is applied.

61. In the course of his submissions the Appellant, who was acting without representation, made unsubstantiated allegations of dishonesty; we make it clear that we do not accept those allegations and regard them as misconceived. Neither do we accept his assertions made without evidential foundation, but based on the Appellant's speculative interpretation of published material, of some form of cover-up being perpetrated by the Cabinet Office or the Government more widely.

*Conclusion*

62. For the reasons given, we are satisfied that the Information Commissioner correctly found that s.40(2) FOIA was engaged and the information requested in question 2 of the Request was exempt from disclosure. The Decision Notice was in accordance with law, and there was no exercise of the Information Commissioner's discretion that should have been exercised differently.

**Date of Decision: 16 September 2021**

**Lynn Griffin**
**Tribunal Judge**