

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 April 2019

Public Authority: House of Commons
Address: London
SW1A 0AA

Decision (including any steps ordered)

1. The complainant has requested a list of MPs who sponsor spouse/partner passes for access to the House of Commons. The House of Commons refused to provide this citing section 40 (unlawful/unfair disclosure of personal data) as its basis for doing so. It upheld this at internal review.
2. The Commissioner's decision is that the House of Commons is entitled to rely on section 40 as its basis for withholding the requested information.
3. No steps are required.

Request and response

4. On 24 April 2018, the complainant had requested information of the following description:

"I would be grateful if you could provide me with a list of all MPs allocated parliamentary passes for their spouse/civil partner.

If possible I would also like a list of the individuals who hold these passes.

Please also provide a copy of any specific rules applying to MPs/the passholders in relation, to these passes".

5. Following an exchange of correspondence with the House of Commons, on 29 May 2018, which explained that the passes were for all types of

partner and did not indicate which type of partner a pass was for, the complainant clarified the scope of his request to the following description:

"[A] list of all MPs who sponsor these passes".

6. For the avoidance of doubt, it is the House of Commons' response to this request which is the subject of this decision notice.
7. It was agreed between the parties that there would be a slight delay in responding.
8. On 15 June 2018, the House of Commons responded. It gave the complainant the number of MPs who sponsored a pass but did not provide him with a list of names citing section 40 of the FOIA as its basis for doing so – unlawful/unfair disclosure of personal data.
9. The complainant requested an internal review on 24 July 2018. The House of Commons sent him the outcome of its internal review on 30 August 2018. It upheld its original position.

Background

10. The complainant made a similar request to the House of Lords and, while that public authority initially refused this on the same basis and upheld this refusal at internal review, it subsequently revised its position having conducted a consultation with Peers on this matter. It subsequently disclosed to the complainant under FOIA a list of all Peers who had sponsored a parliamentary pass for their spouse or civil partner. It explained that the list was accurate as at the date it was disclosed and that the existence of a pass did not necessarily mean that it had been used.
11. Page 18 of the House of Commons' Members' Handbook has more information about the passes in question.¹

Scope of the case

12. The complainant contacted the Commissioner on 4 September 2018 to complain about the way his request for information had been handled.
 13. The Commissioner has considered whether the requested information is exempt under section 40. It should be noted that by the time the
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¹ <https://www.parliament.uk/documents/foi/members-handbook.pdf>

request under consideration in this case was made, the General Data Protection Regulation ("GDPR") was the prevailing data protection legislation.

Reasons for decision

Section 40 personal information

14. 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.
15. In this case, the relevant condition is contained in section 40(3A)(a)². 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 set out in Article 5 of the GDPR ('the DP principles').
16. 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.
17. 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?

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

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

19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
 20. 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.
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² As amended by Schedule 19 Paragraph 58(3) DPA.

21. 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.
22. The House of Commons supplied the Commissioner with a copy of the withheld information. It clearly identifies current Members of Parliament by name and, in context, shows that they have sponsored a spouse/partner pass.
23. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the individual named MPs. She is satisfied that this information both relates to and identifies each MP concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
24. 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.
25. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

26. 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".

27. 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.
28. 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.

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

29. 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.
30. 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*³.

31. Before looking at the detail of the legislation and how it applies to this request, the Commissioner will now set out the arguments of the two parties.
32. The complainant explained that he was seeking "to ascertain to what extent the system is being left open to exploitation by passes being given to individuals who can profit from them in their professional work." He drew attention to the disclosure of this information by the House of Lords following a consultation with Peers.
33. In the course of his correspondence with the House of Commons he said:

"These passes clearly relate very strongly to the member's role in public life.

It should go without saying that having a spouse or civil partner is a matter of public record, and is a fact contained within publicly-available official records for any individual (at register offices)".

34. He added:

"The passes are a privilege afforded to MPs by virtue of their public office, and give spouses/civil partners privileged access to Parliament.

The House of Commons has previously recognised the legitimate interest in disclosure of information about non-MPs who have such privileged access to Parliament, including by disclosing the names of former parliamentarians who hold passes, as well as individuals who

³ 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".

hold passes sponsored by parliamentarians or political parties.

In this case I am not even seeking disclosure from the Commons of the names of the passholders - just the names of the MPs who sponsor the passes.

The passes in question allow spouses/civil partners access to restricted areas, which could also have a benefit in the working lives of their spouses/civil partners. Without some transparency over this, it is impossible for the public to make any judgement about whether the rules are being followed.

The lack of transparency over those who hold passes leaves open the possibility that passes may be open to misuse, particularly given that access to the passes is an automatic right, and is not subject to detailed checks over the applicants, other than security assessments.

There have been numerous examples of such misuse by non-parliamentarians, including this example last year: <https://order-order.com/2017/07/27/former-mp-abusing-parliamentary-pass-to-conduct-lobbying-activities/>

There is nothing in the circumstances in which the information was obtained which would suggest disclosure would be unfair. It would clearly be fair to process this personal data”.

35. The House of Commons noted that in a previous decision notice the Commissioner had ordered disclosure of parliamentary pass information⁴. However, it stressed that the information under consideration here was markedly different in that it was more related to the MPs’ private lives. It also explained that the requested information did not identify which individuals had such a pass, only which MPs had sponsored such a pass. Not all MPs, it added, chose to confirm or otherwise make public their relationship status. Disclosure would not therefore serve the purpose of providing more information about who had access to parliament in order to establish whether that access was being exploited in some way.
36. It explained that a purpose of the pass was to avoid the situation where MPs had to escort a spouse or partner around Parliament which may mean they are not available to attend votes. It pointed out that “As votes (Divisions) require Members to walk through the relevant lobbies

⁴ https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1623612/fs_50585951.pdf

within a specified time period of six minutes, they are required to stay in the Chamber or very close by at these times". It also explained that what it referred to as the "Estate" was a secure environment and it was important to ensure that those on the Estate without an escort had the appropriate security pass.

37. It also explained the limits of the pass and that, for example, the holder could not book a meeting room or access to the Members' Tearoom. It said that it could not see how the passes could be easily misused to assist lobbying activities or to promote personal business.
38. Having set out the main points in the two parties' arguments, the Commissioner will now consider how the legislation applies to this request.
39. Before doing so, the Commissioner would disagree with one of the complainant's assertions that the identity of an MPs' "partner" is a matter of public record. The Commissioner has been unable to find in the House of Commons' handbook any reference to "civil partner" where that means a person who has entered into a formal civil partnership with the MP which has been registered. It simply uses the word "partner". It is therefore not necessarily a matter of public record that an MP's partner is a person with whom they have entered into a formal civil partnership.⁵ It follows that it is not necessarily a matter of public record that an MP has a partner.
40. 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.
41. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

⁵ <https://www.gov.uk/marriages-civil-partnerships>

Legitimate interests

42. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
43. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
44. The Commissioner agrees that there is a legitimate interest in the public knowing more about spouse/partner passes that goes beyond prurient interest in an MP's personal life. A person with such a pass has access to the estate of Parliament and while there are restrictions upon such access, that is still above and beyond the access granted to an ordinary member of the public.

Is disclosure necessary?

45. '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.
46. The Commissioner recognises that there is a societal interest in knowing whether or not a Member of Parliament has sponsored a person for additional access to the Parliamentary estate. While the requested information does not cover the identity of spouses or partners, it does provide information about which Members have sponsored such passes which grant access that is not available to ordinary members of the public. Disclosure could be necessary to serve that societal interest.

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

47. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under 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.

48. 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.
49. 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.
50. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
51. The Commissioner notes that the application form for the pass (as supplied to her for background information) describes the information supplied as being treated "In Confidence". The Commissioner considers that there is a clear expectation for those completing the form that the information supplied to support the application would be treated in confidence. The Commissioner recognises that the fact an MP is married or has a civil partner is a matter of public record. However, the fact that an MP has a partner but is not in a formal civil partnership is not a matter of public record. Disclosure of an MP's name in response to this request would reveal information about their private life that may not have been made public before – the fact that they have a partner. While recognising the merit in disclosing the fact that an MP has sponsored a spouse/partner pass (and thus that they have supported greater access to the House of Commons for an individual), the Commissioner is sceptical as to the need to make public the fact that an individual MP has a partner.
52. The Commissioner has also considered the matter of an MP's personal security. This is of particularly acute concern following the murder of Jo Cox MP. MPs have an important public role. They must inevitably strike a balance between greater openness about the demands they make on the public purse and the need to maintain personal security. Making public the fact that they have a partner (if this was not previously made public) could identify further potential targets for physical attack that are connected to the MP and who may well be less protected. The Commissioner cannot dismiss this as a fanciful notion in the light of the murderous attack on Jo Cox MP.

53. The Commissioner is mindful of the risk of reducing transparency about MPs where security is used as an illegitimate excuse for doing so. However, she does not agree that this point applies in this case. The requested information will not disclose the name of the MP's spouse or partner. It will only disclose that they have one and that they have sponsored a parliamentary pass for someone. It will not allow the public to identify whether or not the person in question has used their pass inappropriately. It will, in essence, provide information about the private life of a public figure with little substantial benefit such as revealing more about how public money is spent or how access to the Parliamentary estate is granted. It is already a matter of public record that MPs can sponsor spouse/partner passes. This information is not greatly enhanced by disclosure in this case.
54. The Commissioner has also considered whether the decision by the House of Lords to disclose substantially similar information has any bearing on this case.
55. Clearly, the House of Lords has a number of crucial similarities to the House of Commons and is, in many ways, the most analogous public authority. However, this is a separate public authority for the purpose of FOIA. Further, members of the House of Lords are not elected representatives with constituencies. They perform a different role in the UK's parliamentary system and do not have the same direct connection with members of the public and any high profile policies which affect members of the public. That is not to say that the activities of House of Lords have no impact the public and that the House of Lords makes no demands on the public purse. Peers generally have a lower profile than MPs although a peer can be a member of the governing Cabinet. However, the Commissioner notes that a specific question as to disclosure was put to peers and they agreed to such disclosure where any request is made. There is no such approval in the case of Members of Parliament and, given the current climate of concern for MPs' personal security, the Commissioner considers it unlikely to be given in all cases.
56. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the MPs' rights and freedoms. There is insufficient legitimate interest in disclosing which MPs have spouses or partners and which do not. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
57. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

Reference: FS50782752



58. The Commissioner has therefore decided that the House of Commons was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

59. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

60. 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.

61. 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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