

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 April 2021

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office asking whether their Propriety and Ethics team held any information about non-disclosure agreements (NDAs) between Mr Dominic Raab, Secretary of State for Foreign Commonwealth and Development Affairs and First Secretary of State, and members of the civil service. The complainant was not seeking the details or contents of any such NDAs but rather whether such information was held and the number of such NDAs if held. The Cabinet Office relied on section 40(5) (personal data) of the FOIA 2000 to refuse to confirm or deny whether they held any information falling within scope of the request.
2. The Commissioner has concluded that the Cabinet Office was entitled to rely on section 40(5) to refuse to confirm or deny whether they held any information falling within scope of the request. However, the Commissioner also finds that, in failing to issue a refusal notice within 20 working days, the Cabinet Office breached section 17(1) of the FOIA.
3. The Commissioner does not require any further steps.

Background

4. On 30 January 2011, The Mail On Sunday published an article about Mr Dominic Raab MP, entitled '*Payout for Woman Who Claimed Workplace Bullying Under Raab*'. The article related to Mr Raab's time (2006 to 2010) working as Chief of Staff to Shadow Home Secretary David Davis. Mr Raab subsequently became a Member of Parliament in May 2010 and currently holds the position of Secretary of State for Foreign, Commonwealth and Development Affairs and First Secretary of State.
5. On 22 July 2011, Mr Raab issued proceedings for libel against Associated Newspapers Ltd¹ and during the subsequent court case it became public knowledge that Mr Raab had entered into a non-disclosure agreement (NDA) with a former female colleague in 2007. On 18 March 2012, The Mail On Sunday issued an apology for their article, stating that '*We accept that our allegations were unfounded and we apologise to Mr Raab for the damage, embarrassment and offence caused*'.
6. In July 2018, allegations about Mr Raab's alleged behaviour made by his former diary secretary were widely reported in the newspapers. She accused Mr Raab of being a bully and of an '*outright abuse of power*', in respect of how he behaved towards her and others². The claims concerned Mr Raab's time as Minister of State for Housing and Planning (9 January 2018 to 9 July 2018).
7. A Housing Ministry spokesman said, '*We do not recognise these claims and they do not reflect the department's experience – including those who worked directly with the Minister in his private office*'. A source close to Mr Raab was quoted as saying that she '*was dismissed according to an independent process* (following allegations reported in the press that the diary secretary had brought the government into disrepute by allegedly advertising herself on a 'sugar daddy' website). *This is an attempt to cash in by smearing with false and malicious claims*³.

¹ <https://www.bailii.org/ew/cases/EWHC/QB/2011/3375.html>

² <https://www.dailymail.co.uk/news/article-6004643/Dominic-Raabs-former-secretary-brands-Brexit-minister-bully.html>

³ <https://www.express.co.uk/news/politics/995985/brexit-news-dominic-raab-rebecca-tott-bully-allegation>

8. Speaking about the allegations on BBC Radio 5 Live, Mr Raab said:

'To be honest, the first thing I thought was this is a 20 year old young woman caught in a media storm. My initial concern was just to make sure that someone in a vulnerable position like that was properly looked after by us as the department, and me as the Minister for State. And that's something the Civil Service and I and my officials agreed on. Obviously, this was a sting on me by the Daily Mirror, with a substantial sum of money that went into it, and it seemed the most salacious thing that was disclosed was what I had for lunch. I feel a bit of a letdown to the rich tradition of political peccadillos that we have in this country. But actually, at the end of the day, a storm in a tea cup. It's fish and chip paper wrapping the next day'⁴.

Request and response

9. On 21 October 2019, the complainant wrote to the Cabinet Office and requested information in the following terms:

'I am asking whether Propriety and Ethics holds any of the following information concerning Mr Dominic Raab:

Non-disclosure agreement/s between Mr Raab and members of the civil service (or information pertaining to the existence of any NDAs to which Mr Raab is party). Specifically, if this information is held, I am not asking for the details or contents of any NDAs, but simply to know:

- A yes/no answer to whether the information is held'*
 - A yes/no answer to whether Propriety and Ethics is in possession of any NDAs involving Mr Raab (or to information pertaining to the existence of NDAs involving Mr Raab).*
 - The number of NDAs concerning Mr Raab that are held by Propriety and Ethics OR the number of NDAs concerning Mr Raab that Propriety and Ethics is aware of'.*
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⁴ <https://www.dailymail.co.uk/news/article-5682831/Tory-MP-finally-responds-claims-diary-secretary-offered-sex-sale.html>

10. The Cabinet Office acknowledged receipt of the request on 23 October 2019. On the same date the complainant emailed the Cabinet Office and asked them to confirm that his request had been understood in that his request concerned information held by a specific team in the department (Propriety and Ethics Team) rather than information across all teams in the department.
11. On 24 October 2019, the Cabinet Office emailed the complainant to confirm that they had understood his request and the specific information he was seeking.
12. Having not received a response within the required 20 working days, the complainant emailed the Cabinet Office on 25 and 26 November 2019 chasing the matter.
13. On 28 November 2019, the Cabinet Office provided the complainant with their substantive response to his request. They advised that they were neither confirming nor denying whether the Propriety and Ethics Team held the information requested *'as the information requested relates to Mr Raab's time as a government minister'*. In applying section 40(5) of the FOIA to the request, the Cabinet Office stated that they considered that confirming or denying whether they held the information requested would contravene one of the data protection principles under Article 5(1)(a) of the GDPR.
14. The Cabinet Office advised that, *'if such information were to exist, this would breach the data protection principle under principle A of Article 5(1)(a) of the GDPR requires that personal data should be processed lawfully, fairly and transparently'*. The Cabinet Office stated that in order to determine whether disclosure of such data is lawful then they would be required to consider whether there is a lawful basis for processing any such data under Article 6(1) of the GDPR, which provides that processing is necessary for the purposes of the legitimate interests pursued by the data requester, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data.
15. The Cabinet Office stated that they considered that there was a legitimate interest being pursued in the request for information of the nature requested, as they recognised *'the importance of transparency, especially in relation to Ministers and their conduct'*. However, the Cabinet Office stated that were they to confirm or deny whether the information requested is held *'would itself lead to the disclosure of personal data'*. Contending that to provide such confirmation or denial would contravene the data protection principles, the Cabinet Office advised that, *'the disclosure of personal data in this context would contravene the fairness principles as it would adversely impact Ministers as such information may inaccurately suggest that complaints have been*

raised where they have not or where the merely by fact of someone asserting they are making a complaint'.

16. The Cabinet Office contended that this may lead to damage to the Minister's reputation and speculative press reporting, particularly in light of their high profile status, which may lead to distress and anxiety, which would also be unfair. The Cabinet Office stated that it is the fairness aspect of the principle, which, in their view, would be breached by disclosure.
17. The Cabinet Office response concluded by stating that in light of the fact that they considered that the disclosure of the information requested *'would not meet the legitimate test under the GDPR'*, they considered it appropriate to rely upon the exemption at section 40(2) of FOIA. They advised the complainant that the fact that this exemption was being relied on, should not be taken as an indication that the information he had requested is or is not held by the department. The Cabinet Office stated that the terms of this exemption meant that they did not have to consider whether or not it would be in the public interest for them to reveal whether or not the information requested is held.
18. The Commissioner notes that the Cabinet Office response incorrectly referred to section 40(2) when in fact they were relying on section 40(5) in providing a neither confirm nor deny (NCND) response.
19. On 28 November 2019, the complainant requested an internal review of the decision. He asked the Cabinet Office to consider the following areas where he believed that they had reached a wrong conclusion on the case.
20. Citing ICO guidance which states that the consequences of disclosure may be less serious if the same or similar information is already in the public domain, the complainant stated that, *'the existence of one NDA involving Dominic Raab is already in the public domain and therefore is clearly a matter of public knowledge'*. He noted that the matter had been reported in the press⁵, had been referenced in publicly available court documents⁶, and Mr Raab had directly addressed the matter too⁷.

⁵ <https://www.buzzfeed.com/alexwickham/dominic-raab-confidentiality-agreement-female-colleague/>

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

⁷ <https://www.buzzfeed.com/albertonardelli/dominic-raab-nda-tory-leadership>

The complainant contended that these facts weakened and *'indeed makes redundant the core of the argument that the Cabinet Office are putting forward'* (specifically that disclosing the information requested may lead to damage to their reputation and speculative press reporting, particularly in light of their high-profile status which may lead to distress and anxiety which would also be unfair). The complainant contended that the fact that similar information was already in the public domain also diminished any hypothetical harm and possible reputational damage. The complainant proceeded to individually address the points made by the Cabinet Office, referencing ICO guidance where appropriate.

21. He contended that the risk of speculative reporting was moot and was a generic argument that could be used to block the disclosure of any information request. He stated that a responsible journalist would provide Mr Raab with ample opportunity to comment or provide relevant background or context to the information held before considering whether to publish any potential news story. The complainant reminded the Cabinet Office that he had not asked for the contents of any NDA or confidentiality agreement(s) but rather had asked whether Propriety and Ethics were in possession of or aware of any such materials, and if so, how many.
22. With regards to any potential distress or anxiety which disclosure might cause, the complainant stated that Mr Raab is a senior Minister in a public facing and stressful role. The complainant noted that none of the examples included in ICO guidance are comparable to his information request. He gave one example, a case study in which the ICO stated that *'disclosure of a compromise agreement or job application may adversely affect the individual's chances of promotion or employment'*. The complainant stated that, *'Mr Raab is not an employee applying for a job but an elected politician and senior minister that should be held to the standards expected of elected politicians and senior ministers'*. The complainant submitted that, in essence, given what information is already in the public domain, the substance of his request was asking whether Propriety and Ethics held information relevant to, or are aware of, the existence of NDAs/confidentiality agreements involving Mr Raab, other than the one already in the public domain.
23. The complainant noted that the Cabinet Office had acknowledged that there is a legitimate interest being pursued. He contended that *'it is self-evident that disclosure is necessary for that purpose as there is no other way to achieve that purpose if not by disclosing the requested information'*. In addition to the importance of transparency, especially in relation to ministers and their conduct, the complainant added that *'it is an overwhelmingly legitimate interest to know whether the foreign secretary and de facto deputy prime minister of the UK is party to more than one NDA/confidentiality agreement with current or former*

colleagues or members of the civil service – and whether the bit of government tasked with maintaining propriety and ethics is aware of this’.

24. Taking into consideration all of the above, when it came to the balancing test, the complainant considered that it was his view that the interests in disclosure *‘greatly outweigh Mr Raab’s right to privacy in this matter’.*
25. Following intervention from the Commissioner, the Cabinet Office provided the complainant with their internal review on 3 March 2020.
26. The Cabinet Office confirmed that they had considered the arguments which the complainant had made in respect of the balance of interests and they considered that he had *‘placed too much weight on the said existence of the NDA in the public domain and that this is the subject of newspaper articles’.*
27. The Cabinet Office stated that the NDA cited by the complainant was not related to Mr Raab’s time as a minister and related to his time as an MP. Furthermore, the Cabinet Office advised the complainant that they considered it *‘inappropriate to rely on press articles which you state rely on similar allegations where the contents of such articles cannot and have not been verified’.* The Cabinet Office stated that they considered that the complainant had placed too much weight on the (publicly known) NDA in respect of his argument in support of the public interest in the Secretary of State’s conduct and his political career when asserting that the legitimate interest in confirming or denying whether the information is held outweighs the Secretary of State’s right to privacy.
28. In addition, the Cabinet Office stated that it was their view that whether there was a pattern of misconduct or not *‘is not necessarily in the public interest’.* In this regard they noted that the information requested – the existence of an NDA(s) rather than the details of it/them – would not establish whether or not there is a pattern of misconduct so the information would be of limited value, if it were held.
29. For the above reasons, and those set out in their original response, the Cabinet Office stated that they believed that the balance of the public interest had been fully considered and that the decision to NCND the request under section 40(5) was upheld.

Scope of the case

30. The complainant contacted the Commissioner on 4 March 2020 to complain about the way his request for information had been handled.

31. The Commissioner considers that the scope of her investigation is to determine whether or not issuing a confirmation or a denial that information was held would breach the GDPR principles.

Reasons for decision

32. Section 40(5B)(a)(i) of the FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
33. Therefore, for the Cabinet Office to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether they hold information falling within the scope of the request the following two criteria must be met:
- Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

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

'Any information relating to an identified or identifiable living individual'.

35. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
36. 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.
37. In their response to the complainant's request the Cabinet Office confirmed that they were neither confirming or denying whether the Propriety and Ethics Team held the information requested, *'as the information requested relates to Mr Raab's time as a government minister'*. The Cabinet Office considered that were they to confirm or deny whether the information requested is held *'would itself lead to the disclosure of personal data'*.
38. The Commissioner agrees with the Cabinet Office's position. If the Cabinet Office did not hold any information, then confirmation of that

fact would reveal that the Propriety and Ethics Team do not hold any NDAs between Mr Raab and members of the civil service or other individuals. Conversely, if the Cabinet Office did hold any information, then confirmation of that fact would reveal that Mr Raab had been subject to NDAs held by the Propriety and Ethics Team. In either scenario, such information clearly relates to Mr Raab and is biographically significant to him and therefore is his personal data.

39. The fact that confirming or denying whether the requested information is held would reveal the personal data of Mr Raab does not automatically prevent the Cabinet Office from refusing to confirm whether or not they hold this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.

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

40. Article 5(1)(a) GDPR states that:

'Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject'.

41. 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 – or as in this case, the public authority can only confirm whether or not they hold the requested information – if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR, be fair, and be transparent.

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

42. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *'processing shall be lawful only if and to the extent that at least one of the'* conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

43. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:

'Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of

*the data subject which require protection of personal data, in particular where the data subject is a child*⁸.

44. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part test:
45. (i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

(ii) **Necessity test:** Whether confirmation as to whether the requested information is held (or not) is necessary to meet the 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.
46. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) *Legitimate interests*
47. In considering any legitimate interests in confirming whether or not the requested information is held in response to an FOI request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
48. 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.

⁸ 1 Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

49. In submissions to the Commissioner the Cabinet Office recognised that there is a legitimate interest in transparency around senior government figures and a legitimate interest '*in public access to information relating to the existence of NDA*'. The Commissioner agrees with this assessment and therefore considers this limb of the test to be met.

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

50. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.

51. In submissions to the Commissioner, the Cabinet Office noted that the complainant had contended that it is self-evident that disclosure is necessary to meet the legitimate interest as there is no other way to achieve that purpose other than by providing the confirmation or denial that the information requested is held by the Cabinet Office. The Cabinet Office acknowledged that this is correct, and that there is no obvious way of addressing the legitimate interest, other than by providing a confirmation or denial. The Commissioner again agrees with this assessment, and in her view it is necessary for the Cabinet Office to comply with section 1(1)(a) of FOIA in order to meet the legitimate interests identified above.

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

52. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to an FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.

53. In submissions to the Commissioner, the Cabinet Office noted that in his request for an internal review, the complainant had contended that Mr Raab should be held to '*the standards expected*' of elected politicians and senior ministers and that there was an overwhelmingly legitimate

interest in knowing *'whether the bit of government tasked with maintaining propriety and ethics'* is aware of any NDAs that Mr Raab may be party to. The Cabinet Office contended that this went *'to the heart of the request'*, as, hypothetically, a confirmation from the Propriety and Ethics team (P&E) could be taken as meaning the information had to relate in some way to impropriety or misconduct. They contended that, hypothetically, a confirmation that information is held would be likely to cause Mr Raab reputational damage.

54. The Cabinet Office noted that the complainant's assertions indicated that the (hypothetical) presence of an NDA(s) held by P&E would be taken to relate to misconduct or impropriety. A substantive confirmation or denial would therefore allow an inference to be drawn about the reason for P&E holding or not holding the information. In this respect the Cabinet Office did not accept the complainant's argument that media speculation was moot. The Cabinet Office noted that the existence of one NDA involving Mr Raab was already in the public domain *'only because a newspaper made allegations that they subsequently admitted were unfounded'*. The Cabinet Office contended that the speculative media reporting in relation to the NDA and the unfounded allegations by the Mail On Sunday are *'evidence of the effects of such speculation together with the reputational damage which may be caused by unfounded allegations and speculation'*.
55. The Cabinet Office noted that the complainant had not just focussed on the NDA which is a matter of public record, but had clearly requested information in addition to this. The Cabinet Office stated that the additional information which he had requested (i.e. the existence of any further NDAs pertaining to Mr Raab known to P&E), whether or not it exists, is not known to be the subject of any reporting in the public domain and they considered that a (hypothetical) confirmation would cause unnecessary harm.
56. The complainant had, the Cabinet Office contended, placed too much weight on the public interest in knowing about the existence of any NDAs. The Cabinet Office stated that, *'while there is a legitimate interest being pursued, and a general public interest in transparency around senior government figures, whether or not an NDA exists reveals very little of public interest, as opposed to of interest to the public'*. The Cabinet Office noted that NDAs may be entered into for numerous reasons and the mere fact that an NDA may or may not have been entered into *'reveals little about one's conduct'*. Therefore, whilst recognising that there is a legitimate interest in transparency means there is a legitimate interest in the historical conduct of senior public officials and members of the government, the Cabinet Office contended that providing a confirmation or denial in response to the request would not further these interests in any significant or meaningful way.

57. The Cabinet Office also maintained that the complainant had placed too much weight on the alleged relevance of the one NDA to which Mr Raab was a party, whose existence is in the public domain. The Cabinet Office noted that whilst the existence of the NDA was in the public domain, *'the details of it are not and have been subject to a good deal of press reporting and speculation which remains unverified'*. The Cabinet Office stated that *'it is therefore not incorrect to state that the NDA itself has been the subject of unverified speculation and allegations relating to conduct'*.
58. With regard to their statement in their internal review of 3 March 2020 that whether there was a pattern of misconduct or not *'is not necessarily in the public interest'*, the Cabinet Office clarified in submissions to the Commissioner that they did not mean to suggest that a pattern of misconduct is not necessarily in the public interest, but rather that, *'in the context of the information sought'*, the existence of an NDA(s) rather than the details of it/them, their view was that this would not establish whether or not there is a pattern of misconduct so the information would be of limited value, if it were held. The Cabinet Office acknowledged the legitimate interest in the public being made aware of the existence of the requested information if it were held and *if* it were evidence of a pattern of misconduct. However, the Cabinet Office did not consider that such information, if held, would evidence such a pattern of misconduct.
59. The Cabinet Office noted that the BuzzFeed News article cited by the complainant from 2018⁹ which had reported the NDA entered into by Mr Raab, had referenced Mr Raab having won an apology from The Mail On Sunday after it published *'unfounded'* allegations about his behaviour, and had stated, after stating that Mr Raab and Mr Davis had been approached by BuzzFeed News for comment – *'there is no suggestion of any misconduct'*.
60. The Cabinet Office contended that the above statement negated the complainant's claim that one or more NDAs would constitute a *'pattern of misconduct'*. The Cabinet Office submitted that any suggestion that confirmation or denial as to whether the requested information is held would provide evidence of such a pattern is *'spurious'*, given that an NDA may be agreed for a variety of reasons.
61. The Cabinet Office noted that during Mr Raab's court case against Associated Newspapers Limited, Mr Justice Tugendhat stated (at para 49

⁹ <https://www.buzzfeed.com/alexwickham/dominic-raab-confidentiality-agreement-female-colleague/>

of the judgement) that *'the fact that a claimant settles a claim on terms which include a confidentiality agreement does not imply that the defendant accepted what the claimant has alleged gives rise to a claim that would have succeeded if pursued in open court'*¹⁰.

62. Similarly, the Cabinet Office noted that NDAs can be entered into for a number of reasons and their attachment/association to an individual would not necessarily denote misconduct or impropriety. This being the case, the Cabinet Office contended that the consequences of disclosing personal information could be serious, *'as it seems to be the complainant's view that the existence of an NDA suggests misconduct or impropriety'*. The Cabinet Office advised the Commissioner that by limiting his request to information held by P&E, the complainant *'is inferring that any information held would likely relate to misconduct or impropriety (because of P&E's functions). So a substantive confirmation could lead to the conclusion that the content of an NDA has to do with such matters'*.
63. The Cabinet Office noted that the purpose of the FOIA is to provide access to recorded information, and they do not consider that the legislation exists *'as a means, intentional or otherwise, to place a public authority in the position of accepting the projected logic of a request by default in order to provide a response compliant with section (1)(1)(a) of the Act. This is another reason for the NCND – because a substantive confirmation or denial would allow an inference to be drawn about the reason for P&E holding information'*.
64. The Cabinet Office therefore submitted that *'it would be wholly wrong to assume that the existence of the NDA and a press allegation about bullying revealed anything of substance about Mr Raab's role in government prior to his arrival into politics'*. In addition, the Cabinet Office contended, it would be wrong to assume that the existence of multiple NDAs, as contended by the complainant, would demonstrate a pattern of behaviour. They (if they existed) do not, and in particular, they do not demonstrate a pattern of behaviour.
65. The Cabinet Office advised the Commissioner that given that they are subject to the DPA 2018 and the GDPR, they consider that Mr Raab would have a reasonable expectation that the information requested (his

¹⁰ Raab MP v Associated Newspapers Ltd [2011] EWHC 3375 (QB) (15 December 2011)

personal data) would not be disclosed by the Cabinet Office (by way of hypothetical confirmation) to the world at large under an FOI request.

66. The Cabinet Office noted that the NDA whose existence is publicly known dates from a time when Mr Raab was not an MP, or a civil servant, but when he was working as Chief of Staff to the then Shadow Home Secretary, Mr David Davis MP. The Cabinet Office submitted that *'whilst that fact is not determinative, it remains a significant factor to be taken into account when engaging in the balancing exercise. There is very limited public interest in the existence of any NDA due to the passage of time and the fact that Mr Raab was not in a government role at the time'*. As such, the Cabinet Office contended that these are further reasons that Mr Raab would not expect the Cabinet Office to disclose personal information, whether or not it is held.
67. The Cabinet Office also considered that as a Minister, Mr Raab has a reasonable expectation that his privacy will not be infringed as a result of a hypothetical confirmation concerning whether additional NDAs may or may not be in existence. They stated that Ministers *'are entitled to expect the same rights to privacy in respect of their personal data as anyone else'*.
68. The Cabinet Office acknowledged the Commissioner's decision in FS50854236 (6 January 2020) which concerned a request to the Foreign and Commonwealth Office (FCO) for information as to whether Mr Raab had been the subject of any complaints when he was employed by the FCO during the period 2000 to 2006. In that case the FCO had relied upon section 40(5) to refuse to confirm or deny whether they held any information falling within scope of the request. However, in that case the Commissioner had concluded that the FCO was not entitled to rely on section 40(5).
69. In FS50854236, the Commissioner agreed with the FCO that employees and ex-employees will have a reasonable expectation that details of any complaints that may be made against them would not be disclosed to the world at large under an FOI request. Moreover, the Commissioner accepted that disclosure of information concerning such matters could cause a significant invasion of privacy for such individuals, particularly in cases where any allegations proved to be unfounded. In the particular circumstances of that case, the Commissioner also recognised that Mr Raab left the employment of the FCO 13 years before the request was made.
70. However, the Commissioner stated in FS50854236 that each request has to be considered on its own merits. In the Commissioner's view there has to be some consideration of the role an individual played after they left the employment of the FCO. The Commissioner found, at paragraph 50 of her decision notice:

'In the particular circumstances of this case, in the Commissioner's opinion, the fact that Mr Raab, prior to the request being submitted, had served as Secretary of State for the DExEU means that there is a legitimate interest in previous matters relating to his employment with the FCO, albeit an employment that he left 13 years previously. Indeed, as the complainant has noted, in his life as a politician, Mr Raab has referred to his previous role as lawyer at the FCO. Consequently, in the Commissioner's view, to draw a complete and separate distinction between the two would be artificial. Moreover, in the Commissioner's opinion it can be legitimate to question the roles and actions of those who serve in government prior to their arrival into politics. Furthermore, the Commissioner notes that at the time of the request there was information in the public domain about an NDA Mr Raab had entered into in 2007 regarding allegations of workplace bullying and further similar allegations are set out in the newspaper article cited by the complainant at footnote 3'.

71. Taking the above factors into account, the Commissioner was persuaded that FS50854236 was *'an exceptional case'* which merited deviation from the FCO's standard approach, and where confirming or denying whether the information was held would meet a clear and significant legitimate interest. The Commissioner therefore concluded that the legitimate interests in the FCO confirming whether or not they held the requested information outweighed the interests of Mr Raab. In reaching that decision, the Commissioner emphasised that she had considered the circumstances as they existed at the time of the request, i.e. prior to Mr Raab's decision to stand for leader of the Conservative Party and prior to his appointment as Secretary of State at the FCO.
72. In submissions to the Commissioner, the Cabinet Office suggested that *'any conclusions arising from the circumstances of that specific case relating to information from 2000-07 should be put aside when considering the circumstances of another request'*. The Cabinet Office advised that they did not consider that a request for information covering a specific period of an individual's employment in relation to *'any complaints'* to be very similar to a request asking if P&E hold any information on any NDAs to which Mr Raab may be party.
73. The Cabinet Office confirmed that they had considered whether the legitimate interests in this case outweighed the interests and rights of Mr Raab and had concluded that they do not. Whilst acknowledging the legitimate interest in public access to information relating to the existence of NDAs, the Cabinet Office considered that, for the reasons set out above, including the fact that the mere fact of the existence of an NDA would not provide any information about conduct or otherwise demonstrate a pattern of behaviour, the legitimate interest was *'strongly outweighed by the interests and rights of the individual'*. In particular the Cabinet Office considered that the disclosure of the individual's

personal data had the potential to cause reputational damage in light of previous media interest in such matters.

74. The Cabinet Office noted that a confirmation or denial might satisfy public curiosity, but they were *'not persuaded that there is a reasonable necessity to confirm the existence or otherwise of the requested information that outweighs the public interest in protecting the individual's rights and freedoms'*.
75. In submissions to the Commissioner, the complainant noted that *'the existence of Mr Raab's NDA with a former female colleague is in the public domain'* and contended that *'this is not the subject of unverified speculation and allegations. The NDA's existence is a matter of fact recorded in publicly available court documents'*.
76. The complainant contended that the distinction drawn by the Cabinet Office *'between Mr Raab's previous roles as an MP (which he still is) and as chief of staff to a shadow minister (who is still an MP) and his current role of Secretary of State is artificial, given that the career path aspired to by the vast majority of MPs is ministerial office'*. He referenced the Commissioner's decision in the FCO case (FS50854236) in support of his view.
77. The complainant stated that he *'profoundly disagrees'* with the Cabinet Office's contention that whether there was a pattern of misconduct is *'not necessarily in the public interest'*. He contended that, *'a pattern of misconduct by one of the country's most senior politicians would be in the public interest. Indeed, I would argue that few matters are more in the public interest than the conduct and standards held by those in the public realm'*. As noted above, the Cabinet Office clarified their earlier statement in their submissions to the Commissioner, contending that knowledge of the existence of an NDA(s) rather than the details of it/them, would not establish whether or not there was a pattern of misconduct and so the information would be of limited value, if it were held.
78. Stating that holding multiple NDAs *'is a rare arrangement, particularly for an MP'*, the complainant contended that the information requested could *'greatly help to establish whether or not there is a pattern of misconduct'*. The complainant noted that he had not only asked whether the P&E team hold or are aware of any NDAs entered into by Mr Raab, but also the number of any such NDAs, *'or a ballpark figure, e.g. more than one, fewer than five NDAs'*.
79. The complainant acknowledged that he appreciated that NDAs can be entered into for a multitude of reasons and that Mr Raab may have other NDAs which are completely unrelated to the NDA in the public domain. However, *'if this were the case, I feel that the department*

could easily get around this point by stating so. As way of an example, they could say that the subject of an NDA is commercial/business related or that an agreement was entered into as part of ministerial duties. Doing so would not break these confidentiality agreements'.

80. In respect of the public interest, the complainant contended that *'this is an exceptional case that comes at a time when the behaviour of senior politicians is at the centre of the public debate, and the only way to find out whether there is a pattern to Mr Raab's past conduct, or whether the one NDA in the public domain was a unique incident, is by providing the requested information'*. The complainant contended that the Commissioner had taken a similar view in FS50854236.
81. In the FCO case referenced above, the Commissioner was of the view that it can be legitimate to question the roles and actions of those who serve in government prior to their arrival into politics. The Commissioner would also entirely agree with the complainant's contention that *'a pattern of misconduct by one of the country's most senior politicians would be in the public interest'*. However, any such pattern would need to be founded on facts and evidence, rather than on assumptions and rumour.
82. In this case, a central plank of the complainant's argument that Mr Raab may be guilty of such a pattern of misconduct is the NDA to which he was a party and which, due to Mr Raab's successful libel action against Associated Newspapers Ltd, is in the public domain. However, whilst the **fact** of that NDA is in the public domain, the contents and details of it are not. In this respect the complainant is incorrect to contend that the NDA is *'not the subject of unverified speculation and allegations'*. On the contrary, it has been subject to exactly such speculation (such as allegations of workplace bullying referenced by the Commissioner in FS50854236). Whilst such speculation is understandable and to be expected, especially given Mr Raab's subsequent rise to the position of Foreign Secretary, and the responsibilities and power he wields in that role, it is unverified speculation nonetheless.
83. As the Cabinet Office have noted, it appears to be the complainant's view that the existence of an NDA suggests misconduct or impropriety. However, it is not necessarily indicative of either. The Commissioner recognises that NDAs can be entered into for a variety of reasons and as Mr Justice Tugendhat noted in Mr Raab's court case, the existence of an NDA *'does not imply that defendant accepted what the claimant has alleged gives rise to a claim that would have succeeded if pursued in open court'*. Indeed, as the Cabinet Office noted, in a BuzzFeed News article which reported on the NDA (see footnote 9) it was stated that *'there is no suggestion of any misconduct'*. The NDA whose existence is in the public domain, cannot then be relied upon as evidence or basis for a finding of misconduct on the part of Mr Raab.

84. When that NDA is discounted as proven evidence of a '*pattern of misconduct*', the Commissioner considers it similarly important that other information surrounding Mr Raab is seen in the full and proper context. For example, the complainant reasonably references the Commissioner's decision in FS50854236, which concerned whether Mr Raab had been the subject of any complaints when he was employed by the FCO during the period 2000 to 2006. However, it is important to note that following the Commissioner's decision that the FCO were not entitled to rely on section 40(5) to refuse to confirm or deny whether they held such information, the FCO subsequently confirmed to the complainant in that case, and therefore the world at large, that no such complaint(s) information was held. That is to say, the outcome of that case was that there was no information which suggested misconduct or a pattern of misconduct, on the part of Mr Raab.
85. In respect of information in the public domain, the Commissioner notes that this leaves the allegations made by Mr Raab's former diary secretary from when he was Minister of State for Housing and Planning (see paras 6-8 of this notice). As noted, both Mr Raab and his former department have commented on the allegations, with sources close to Mr Raab asserting them to be false and malicious and his former department stating that the claims do not reflect their experience, including those who worked directly with Mr Raab in his private office. The Commissioner does not consider that these unsubstantiated allegations can or should be taken as evidence of any misconduct on the part of Mr Raab, particularly when viewed against the background and context in which they were made.
86. The Commissioner notes that Mr Raab has been no stranger to controversy in some of his past comments or views, such as opining that '*feminists are now amongst the most obnoxious bigots*'¹¹(whilst calling for a consistent approach to equality), and more recently, in respect of the symbolic Black Lives Matter action of 'taking the knee', '*I don't know, maybe it's got a broader history but it seems to be taken from the Game of Thrones – feels to me like a symbol of subjugation and subordination, rather than one of liberation and emancipation. But I understand people feel differently about it, so it's a matter of personal choice*'¹². A distinction should be drawn between such provocative comments, for which Mr Raab is fully and fairly responsible and from

¹¹ <https://www.theguardian.com/politics/2011/jan/24/tory-mp-dominic-raab-feminists>

¹² <https://www.theguardian.com/politics/2020/jun/18/dominic-raab-taking-the-knee-feels-like-symbol-of-subjugation>

which members of the public will form their own view, and unfounded allegations of misconduct or impropriety on his part.

87. In his submissions to the Commissioner, the complainant has stated that he acknowledges that NDAs can be entered into for a multitude of reasons but his information request to the Cabinet Office was not about whether the Department as a whole are aware of any such NDAs but whether the P&E Team **specifically** were aware of any such NDAs involving Mr Raab. Moreover the complainant has clearly taken the existence of the publicly known NDA as a negative mark against Mr Raab, stating that *'the only way to find out whether there is a pattern to Mr Raab's past conduct, or whether the one NDA in the public domain was a **unique incident** (Commissioner's emboldening) is by providing the requested information'*.
88. Since many members of the public might share the complainant's misconceived view that involvement by a senior political figure in an NDA is suggestive of impropriety or misconduct, then were (hypothetically) the Cabinet Office to confirm that the P&E Team were aware of one or more NDAs associated with Mr Raab then this would cause him significant prejudice.
89. The Commissioner considers that Mr Raab's reputation has already suffered significant damage as a result of unfounded and potentially malicious claims of misconduct or impropriety, most notably in the apology which he received from The Mail On Sunday for their printing of *'unfounded'* allegations and the damage, embarrassment and offence which had been caused to him. Seen in that context and background, the Commissioner considers that there is a real risk that requiring the Cabinet Office to provide a confirmation or denial as to whether the requested information is held by the P&E Team in this case would add further fuel to a fire of rumour and speculation.
90. As the Commissioner noted in FS50854236, it can be legitimate to question the roles and actions of those who serve in government prior to their arrival into politics, and certainly during their involvement in politics. The Commissioner also acknowledges and recognises that NDAs have acquired a particular public prominence and controversy in recent years, with some high profile individuals using them as a device to suppress or cover up criminal behaviour or impropriety¹³.

¹³ <https://www.theguardian.com/money/2018/oct/27/weinstein-ex-assistant-ban-workplace-non-disclosure-agreements>

91. However, for the reasons explained above, the Commissioner does not consider that information currently in the public domain provides any reasonable or reliable basis for establishing or inferring a pattern of misconduct or impropriety on the part of Mr Raab. The publicly known NDA is not in itself evidence of misconduct and the outcome of the Commissioner's investigation in FS50854236 (i.e. that no complaint(s) information pertaining to Mr Raab was held by the FCO for the period in question) weakens rather than strengthens any case for showing such a pattern or proclivity. The Commissioner does not therefore consider that it would be correct or appropriate for her '*exceptional*' decision in FS50854236 to be repeated in this particular case.
92. The fact that an individual may have a high and occasionally controversial profile does not mean that they give up their right to privacy or that they should not have a reasonable expectation that this right will be protected. For the reasons set out above, the Commissioner considers that a confirmation or denial that the Cabinet Office hold the requested information in this particular case would cause unjustified harm to Mr Raab, in that it would risk suggesting that he was guilty of misconduct or impropriety, and giving undue weight to a supposition.
93. The Commissioner therefore considers that, on the facts of this particular case, the legitimate interests in transparency around senior government figures and in public access to information relating to the existence of associated NDAs, are not sufficiently strong enough to override the fundamental interests of Mr Raab. She thus does not consider that there is a lawful basis for the processing of this personal data and, accordingly, confirmation or denial under the FOIA would be unlawful.
94. As confirmation or denial would be unlawful, such processing would breach the first data protection principle and therefore the Cabinet Office were entitled to rely on section 40(5B) of the FOIA in the manner that they did.

Section 17 – refusal notice

95. Section 17(1) of the FOIA explains that if a public authority refuses a request then it must provide the requester with a refusal notice citing which section of the legislation is being relied on and explain why this applies. A public authority must do this within 20 working days.
96. In this request the Cabinet Office failed to provide the complainant with a refusal notice citing section 40(5) within this time period and therefore breached section 17(1) of the FOIA.

Other matters

97. The Commissioner's guidance to public authorities is clear in that she would expect most internal reviews to be completed within 20 working days, with a maximum of 40 working days in exceptional cases. In this case the Cabinet Office took almost three months (allowing for the Christmas break) to provide the complainant with their internal review, and then only following intervention by the Commissioner. This period (28 November 2019 to 3 March 2020) predated the administrative and resource problems caused by the pandemic and was manifestly excessive and unreasonable. The Commissioner would urge and expect the Cabinet Office to comply with the established time-scales for the provision of internal reviews in future.

Right of appeal

98. 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

99. 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.

100. 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
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF**