

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

### **Decision notice**

**Date:** 5 November 2021

**Public Authority:** Department for Work and Pensions

**Address:** Caxton House  
Tothill Street  
London  
SW1H 9NA

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

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1. The complainant requested from Department for Work and Pensions ("DWP") information relating to a report on an investigation concerning an employee of the Home Office. DWP refused to confirm or deny whether it held the requested information and relied on section 40(5) (personal information) of the FOIA.
2. The Commissioner's decision is that DWP is entitled to rely on section 40(5B)(a)(i) of the FOIA to refuse to confirm or deny that it holds the information requested. Therefore, the Commissioner does not require DWP to take any steps as a result of this decision.

#### **Request and response**

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3. On 4 March 2020 the complainant wrote to DWP and requested information in the following terms:

*"I am writing the following to make a freedom of information request in relation to a recent report that an employee of the home office took an overdose in response to events which occurred at the home office.*

<https://www.dailymail.co.uk/news/article-8066611/Former-aide-Priti-Patel-took-overdoseclaiming-bullied-minister.html>

*It was also been reported that she took an overdose in response to events which occurred at the Department for Work and Pensions when the permanent secretary at that department was a Robert John Devereux.*

*Given that Priti Patel was not employed at the department for work at pensions during that period, it is reasonable to assume that her decision in both cases was in response to the actions of members of the civil service.*

*I would like to ask*

- 1) To what extent can the culture which exists within the department of work and pensions and the home office be determined as the cause of her decision.*
- 2) To what extent should the permanent secretaries of both departments bear responsibility for such a culture.*
- 3) Whether it is fair and objective under the circumstances for permanent secretaries not to address such a culture and to use such a complaint as part of a series of complaints against the home secretary."*
4. On 15 May 2020 DWP responded to the request and said *"if you ask a question, rather than requesting recorded information, we will provide you with the recorded information that best answers the question. Once we have provided the recorded information, we have met our obligations under the Act; interpreting the information provided is up to you."* DWP explained that in this instance new information would need to be created as the request asks questions which the complainant requires DWP to respond to.
5. On the same day the complainant replied to DWP's response and stated that his reply constitutes an appeal. He also stated the following:  
*"It is apparently possible for Priti Patel to be investigated for bullying but you state that the civil service cannot be because you apparently 'do not hold such information.'" The complainant reiterated his original questions to DWP in what he described as "in more simple terms."* He then also asked DWP for the following:  
*"If there has been no such investigation, then it would hardly be fair and just to conclude that Priti Patel had been responsible for bullying.*  
*Could you tell me whether there has indeed been such an investigation into the department."*

6. On 12 January 2021 DWP apologised to the complainant for the delay in responding to his internal review request. DWP explained that due to the current COVID-19 situation, it was unable to guarantee a response within the usual timescales. DWP however, provided its internal review response and maintained its original position. It said that its response was not that it does not hold the information requested, but stated that the complainant's request did not ask for recorded information. DWP also said that the request asked a series of questions in relation to a number of news reports. Therefore, DWP considered the request was not a valid request for information under section 1 of the FOIA. DWP further explained that in order to respond to the complainant's questions, it would require it to create information in the form of bespoke responses to his questions. DWP said that the internal review request raised a number of further questions which it considered not requests for recorded information, but requests for comment or explanation. In view of this, DWP said that it would not respond further to these points.
7. With regard to the complainant's subsequent question within his request for an internal review, DWP stated that it is not obliged under section 40(5) of the FOI to neither confirm nor deny that it holds the information requested.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 12 January 2021 to complain about the way his request for information had been handled. During the course of the Commissioner's investigation, the complainant was informed that she would only be investigating DWP's reliance of section 40(5) of the FOIA to his subsequent question of 15 May 2020:  
*"Could you tell me whether there has indeed been such an investigation into the department."*
9. With regard to the complainant's questions within his original information request (4 March 2020) the complainant was advised that these would not be investigated, and an explanation was given regarding recorded information. The complainant confirmed his understanding of this and asked the Commissioner to proceed with the case.
10. The following analysis focuses on whether DWP is entitled to rely on section 40(5B)(a)(i) of the FOIA to refuse to neither confirm nor deny whether it holds information falling within the scope of the request of 15 May 2020.

## Reasons for decision

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### Section 40 – personal information

11. Section 40(5B)(a)(i) of 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.
12. Therefore, for DWP 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?**

13. Section 3(2) of the Data Protection Act 2018 (the DPA 2018) defines personal data as:

*'Any information relating to an identified or identifiable living individual'.*
14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. 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.
16. In this case, the request is regarding an investigation concerning an employee of the Home Office and the employee's actions in response to events which occurred at the DWP and at the Home Office. DWP's position is that any information about a grievance is personal data relating to an individual.

17. DWP considers that any information relating to any grievances raised by the individual, whether a grievance was raised in the circumstances outlined in the press report or otherwise whether any grievance was investigated by the DWP, is the personal information of the individual concerned in its entirety. DWP also considered that to confirm or deny whether the information requested is held would be disclosure of personal information.
18. The Commissioner is satisfied that if DWP were to either confirm or deny it held the requested information, it would involve the disclosure of personal data of a third party i.e. it would be possible for an individual to be identified. Given the nature of the request, this would be a disclosure of personal data about that individual. The first criterion set out is therefore met.
19. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent DWP from refusing to confirm whether or not it holds this information.
20. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles. The Commissioner considers that the most relevant data protection principle is principal (a).

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

21. 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".*

22. In the case of a 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 it holds 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**

23. 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.

24. 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".<sup>1</sup>*

25. 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 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.

26. 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*

27. In considering any legitimate interests in confirming whether or not the requested information is held in response to a 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.

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<sup>1</sup> 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".

28. 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.
29. In this case, the complainant stated to the Commissioner that he had asked DWP for "*recorded information in relation to an investigation into the attempted suicide of one of their employees.* The complainant argued that "*As part of an investigation into the reasons for her [attempted] suicide, you will be able to state to what extent the department was at fault. If there has been no such investigation into that department and indeed other departments, then it would not be possible to conclude, if one is being impartial, that the fault lies with the minister.*" He clarified his question which is whether there is "*documentation in relation to an inquiry into the reasons for her [attempted] suicide.*" The complainant made it clear to the Commissioner that he wanted this information or for DWP to state that such information does not exist.
30. The complainant has not presented the Commissioner with any reasons as to why he has requested the information or what his interest in this is. However, there is the general principle of accountability and transparency for their own sake.
31. It is clear from the complainant's correspondence, that he is seeking information relating to an inquiry into the reasons for the attempted suicide of an employee, and whether or not an investigation was conducted.
32. The Commissioner is satisfied that there may be a wider legitimate interest in the transparency of the DWP's decisions during this specific incident. It is a matter of public interest for DWP to confirm whether or not there had been an investigation into the department.
  - (ii) *Is confirming whether or not the requested information is held necessary?*
33. '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; 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.

34. In submissions to the Commissioner, DWP noted that the complainant's initial requests indicated his intention to obtain information which revealed that a culture of bullying existed within the Civil Service, independent of any alleged actions of the current Home Secretary. However, disclosure under the FOIA is a disclosure to the world at large and that such disclosure would be a disproportionate and unwarranted level of interference with the individuals' right to privacy and family life under the Human Rights Act 1998.
35. DWP said it considered that there may be wider legitimate interests, even though the request relates largely to the private interests of the complainant. In this case, DWP believes that there was a wider legitimate interest in being assured that instances of alleged workplace bullying within the Civil Service are effectively addressed.
36. DWP is of the opinion that confirming or denying the existence of this information is not necessary to meet the legitimate interest for disclosure. It said that confirming the existence of the information; a report into the circumstances of a single instance of alleged bullying of an official, would not effectively meet the legitimate interest of providing an assurance that bullying in the Civil Service is effectively addressed.
37. DWP explained that *"As a Civil Service department we are subject to a high degree of scrutiny through the Work and Pensions Select Committee of Parliament and by the Civil Service Commission. Our policies and procedures for dealing with Bullying are transparent and we have released these policies on numerous occasions in response to Freedom of Information requests."* DWP also added that *"People Survey data is published annually, which includes information recording the number of individuals who have encountered bullying within their department and how effectively they perceived that it was resolved."*
38. Given the above submissions, the Commissioner is satisfied that disclosure would not be necessary in this case in order to meet the legitimate interest in confirmation or denial of whether the requested information was held.



*Balance of legitimate interests and the data subject's interests*

39. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject's interests, 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 a 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.
40. DWP considers that to confirm or deny the existence of the requested information may adversely affect the individual's wellbeing or mental health. This, it said, could cause a high degree of unwanted distress or harm to the individual. DWP also considered whether the information could be deemed to be already in the public domain. It said that although a number of press reports are cited by the complainant, these consist only of public speculation and are not from an authoritative source. DWP argued *"It would therefore be inappropriate for the Department to consider that this alters the balance in favour of confirming or denying the existence of the information."*
41. The Commissioner is satisfied that the data subject would have no reasonable expectation that DWP would confirm or deny whether it held the information that has been requested in this case. She is also satisfied that confirming or denying whether or not information is held may potentially cause damage and distress to the data subject. The Commissioner has therefore weighed this against the legitimate interests in disclosure in this case.
42. The Commissioner considers that there is some legitimate interest in disclosing whether or not an investigation was carried out. This information could inform the public of the full circumstances and reasons for the incident.
43. However, while the Commissioner considers there is a legitimate interest in maintaining public confidence in how DWP deals with these incidents and circumstances surrounding them, she is not persuaded that revealing under the FOIA whether there has been an investigation into the DWP is necessary in order to maintain public confidence.

44. Based on the circumstances of this case, the Commissioner has determined that there is insufficient legitimate interest in this case to outweigh the individual's fundamental rights and freedoms. She has therefore determined that confirming whether or not the requested information is held would not be lawful.

*Fairness/Transparency*

45. Given the above conclusion the Commissioner has reached on lawfulness, which included considerations of fairness, the Commissioner does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and/or transparent.

**Conclusion**

46. As confirmation or denial would be unlawful, such processing would breach the first data protection principle. The Commissioner has therefore determined that DWP was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5B(a)(i) of the FOIA.

## Other matters

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47. Since the end of the transition period following the UK's departure from the EU, the GDPR were replaced by the UK GDPR. As this request was received before the end of that transition period, the application of section 40(5B)(a)(i) has been decided by reference to the GDPR. However, the Commissioner is also satisfied that the disclosure of the personal data to which that exemption was applied would not contravene the UK GDPR for exactly the same reasons.
48. 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, DWP took almost 8 months from the date of the internal review request (15 May 2020 – 12 January 2021) to provide the complainant with its response. The complainant did not specifically refer to the time taken for DWP to respond to his request for internal review, and the Commissioner has not considered it formally within this notice.
49. There is no statutory requirement to conduct an internal review under the terms of the FOIA. However, the Commissioner notes that the response was significantly delayed. She does accept DWP's explanation for the delay at that time (Covid-19 climate), and she also notes its apology to the complainant (paragraph 6). The Commissioner though, would urge and expect DWP to comply with the established time-scales for the provision of internal reviews in the future.

## Right of appeal

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50. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk).

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

51. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
52. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Phillip Angell**  
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