



Neutral citation number: [2023] UKFTT 1025 (GRC)

Case Reference: EA/2022/0253

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Remote Hearing

**Heard on: 26 October 2023
Decision given on: 14 December 2023**

Before

**Judge Chris Hughes
Member Emma Yates
Member Stephen Shaw**

Between

CABINET OFFICE

and

INFORMATION COMMISSIONER

Appellant

Respondent(s)

Representation:

For the Appellant: Jason Pobjoy and Madelaine Clifford (counsel) instructed by Joanna Gilbert and Louise Marriott (Government Legal Department),
For the Respondent: Will Perry (counsel) instructed by Helen Wrighton (solicitor)

Decision: The appeal is Dismissed

Cases

R (FDA) v Prime Minister and Minister for the Civil Service [2021] EWHC 3279 (Admin)
R (Evans) v Attorney General [2015] AC 1787,
Montague v Information Commissioner and another Department for International Trade v Information Commissioner and another [2022] UKUT 104 (AAC)

REASONS

The request for information and its context

1. Mr Johnson became PM on 24 July 2019 and on the same date Ms Patel was appointed as Home Secretary. On 26 July the Guardian published the following article:

Priti Patel accused of breaching ministerial code for second time

Home secretary took up £1,000 an hour advisory role before getting watchdog's approval

The new home secretary, Priti Patel, is facing allegations of breaching the ministerial code for the second time in her parliamentary career for accepting a lucrative position with a global communications firm before receiving the all-clear from an anti-corruption watchdog.

Patel has been working for Viasat, a California-based company with a UK base in Farnborough, for the past three months as a strategic adviser on a salary of £5,000 a month for five hours' work – or £1,000 an hour.

The ministerial code states former ministers must seek guidance from the advisory committee on business appointments (Acoba) on taking up any business appointments within two years of leaving the role – and must not take up the position until advice has been received.

Patel did not approach Acoba to seek advice on the Viasat appointment until June 2019 – a month after she had started the role, in which she was advising on unspecified matters relating to India. She did not receive any guidance from the committee until earlier this month, by which time she had already earned £10,000.

Patel has been approached for comment by the Guardian.

The Essex MP was forced to resign from the cabinet in November 2017 as international development secretary when she was accused of breaching the ministerial code over unauthorised meetings with Israeli politicians. Patel conceded in her resignation letter that her actions fell below standards of transparency and openness required.

Jon Trickett, the shadow minister for the Cabinet Office, has written to the new prime minister, Boris Johnson, calling for an investigation into whether Patel has broken the ministerial code, and has called for her dismissal if this is found to be the case. Johnson himself has breached the code in the past; when he resumed writing for the Telegraph after resigning as foreign secretary he failed to declare the role with Acoba.

Trickett said: "Very few people will be surprised that Boris Johnson's cabinet is embroiled in scandal less than 48 hours after being appointed, yet it is still deeply worrying.

"It is an early sign that Johnson's hard-right government will have little regard for the standards expected of ministers, by the ministerial code and by the public.

"When she resigned in 2017, Patel spoke of her failure to uphold the necessary 'standards of transparency and openness'. It appears she has done so again.

“Clearly Patel does not think the rules apply to her, and the same could be said of many others in Johnson’s cabinet. Johnson must immediately sanction an investigation to confirm whether Patel has yet again broken the code, and reassure the public that his government will not tolerate those that disregard it so lightly.

“I have written to the prime minister to ensure that this course of action is taken immediately.”

Acoba approved the appointment but with strict conditions. The committee said given her seniority and profile as a secretary of state there was a risk that it could be perceived Patel’s contacts “might assist Viasat unfairly”.

As a result, Acoba said Patel could take up the appointment but should not draw on any privileged information available from her time as international development secretary, should not lobby the UK government on behalf of Viasat and should not provide advice on any contracts with the UK government.

Viasat provides products and services to the Ministry of Defence. It also works with the UK Space Agency, an executive agency sponsored by the Department for Business, Energy and Industrial Strategy.

Section 7.25 of the code states that ministers “must ... seek advice from the independent advisory committee on business appointments (Acoba) about any appointments or employment they wish to take up within two years of leaving office.”

This section of the code also states that “former ministers must ensure that no new appointments are announced, or taken up, before the committee has been able to provide its advice”.

2. The letter ACOBA sent to Ms Patel was dated July 2019 and published by ACOBA. This permitted her to take up the appointment and confirmed that she had approached the Committee in connection with the appointment in April 2019 and concluded by asking her to notify the Committee as soon as she took up the appointment or if it was to be announced that she was doing so to enable the Committee to deal with inquiries since it could not comment on appointments which had not been taken up or announced “This could lead to a false assumption being made as to whether you had complied with the Rules and the Ministerial Code”. However Ms Patel registered her appointment to that role in the Parliamentary Register of Members’ Financial Interests in June:

“From 1 May 2019 to 31 July 2019, Strategic Adviser, Viasat Inc, of 6155 El Camino Real, Carlsbad, California 92009, a global communications company. I will receive £5,000 a month for an expected commitment of approx. 5 hrs per month. (Registered 03 June 2019)”

3. At 11.36 on 3 August Mr Hislop made a comment via an internet application (Twitter):

'#PritiPatel accused of breaching #MinisterialCode for second time. Code adds: 'Retrospective applications will not normally be accepted. 'Again, she falls below 'high standards' of a current and former SoS. ??@cabinetofficeuk?? Will this go to ACOBA? #FOIA'.

Theguardian.com/politics/2019

4. At 11.59 the same day he emailed the FOI team at the Cabinet Office linked to the tweet and the Guardian article making a complaint and a FOI request:

'I wish to raise a complaint about the clear breach of the Ministerial Code by former and current Secretary of State, Ms Priti Patel MP.

The circumstances are outlined in the Guardian article linked in my tweet below. In addition, I note that the Code states clearly that retrospective applications will not normally be accepted. This was not the position adopted in Ms Patel's apparent second breach of the Code.

I am making, separately by this email, a freedom of information request about Ms Patel's original breach of the Code and this apparent new breach of the Code. Please provide all relevant information held by the Cabinet Office that is not covered by an exemption under the Act. If an exemption applies, please still provide what information you can and explain the use of the exemption.

I look forward to receiving an acknowledgement and full response to both this complaint and the separate FOI request. These are separate matters that suggest Ms Patel is not fit for the high office to which she has recently been appointed

...Please respond by email'

The handling of the request

5. The Cabinet Office had some difficulty in tracing and processing the request acknowledging receipt on 2 September and dating the request as 23 August. On 11 October it confirmed it held information in scope, considered that the information was exempt from disclosure under s36 and required further time to consider the public interest. On 31 January Mr Hislop complained to the Information Commissioner (the Commissioner) about the failure to provide a substantive reply, on 10 February the Commissioner requested the Cabinet Office to provide a reply in ten working days, when this had elapsed the complainant further contacted the Commissioner who issued a decision notice finding that the Cabinet Office had failed to comply with s17(3) FOIA by not dealing with the request within a reasonable time. On 23 March 2020 the Cabinet Office issued a substantive reply. This reply confirmed that the Cabinet Office held no information about "Ms Patel's original breach of the Code" and information about her recent engagement with ACOBA was being withheld on the basis of s36(2)(b)(i) and (ii) and s36(2)(c). In weighing the public interest the Cabinet Office stated:

The Cabinet Office recognises there may be a public interest argument in favour of disclosing information where this could increase trust in government, increase confidence in the decision making process, or inform the public debate on important matters. However, there is also a public interest argument in favour of non-disclosure, in particular to allow the free and frank exchange of views between officials for the purposes of deliberation of advice and to protect

against the disclosure of information that might otherwise prejudice the effective conduct of public affairs. The Cabinet Office has weighed these competing interests, and has concluded that the balance of public interest is in favour of withholding this information.

6. On 16 April Mr Hislop replied:

I am most certainly unhappy with the service I received in relation to my request:

- you make no reference to taking over seven months to respond to a request on 3 August*
- you make no reference to my repeated chasers and appeals for your internal review process, including via your team, the Permanent Secretary, my MP, the PHSO and the ICO*
- you make no reference to the fact that the ICO issued a decision in my favour requiring you to respond to my request*
- you provide an (as anticipated) evasive response to my request, simply stating statutory exemptions without explaining how they apply specifically to this request*
- the link you provide under the section 21 exemption returns 'Page not found', so the information is not accessible.*

The exemption has been misapplied.

You also insist that the Cabinet Office - presumably including ACOBA, to whom my original request was also addressed - holds no information about Ms Patel's original breach of the Ministerial Code. This suggests the Cabinet Office is not exercising properly its functions under the Code.

Finally, you failed even to spell my name correctly.

I would therefore like: (a) a review of this request; and (b) an explanation of your failure to provide a full and timely response.

7. Although that communication was stamped (apparently on 21 April) ("request for urgent review") the internal review was communicated (with an apology for having "inadvertently overlooked it") on 16 September 2020. The reply re-affirmed the position previously adopted. Mr Hislop pursued his concerns with the Commissioner who in her initial letter to the Cabinet Office commented (open bundle D8):-

In his request for an internal review, the complainant specifically highlighted the inadequacy of the substantive response of 23 March 2020, in that it had failed to explain how or why the exemptions cited applied to the specific information which he had requested.

Despite this, the Cabinet Office internal review of 16 September 2020 again, as noted above, completely failed to provide an explanation as to how or why the exemptions applied to the specific information requested and the public interest test was entirely generic and therefore inadequate.

...

Conversely, ignoring such points or arguments and simply providing what essentially amounts to a rubber stamp of a previous defective response, all but guarantees a complaint being made to the ICO and the greater expenditure of public authority time and resources which that process will entail.

The Commissioner would not expect to see internal reviews of such poor quality or value in respect of future Cabinet Office cases. It is essential that both substantive response and

internal review focus on the specific information being requested, and provide information specific arguments both in respect of the exemption(s) applied and the public interest test (where relevant) rather than inadequate and unhelpful generic arguments and explanations.

8. In the light of the concerns raised the Cabinet Office apologised for the delay explaining that the material was highly sensitive and the delay was occasioned by the transition to the new Prime Minister and the run-up to the General Election. In the light of the concerns it indicated that it was seeking a further qualified person's opinion in connection with the reliance on s36 (it confirmed that the previous opinion was sought on 6 February and received on 12 February 2020). It robustly rejected the approach of the Commissioner in connection with comments about alleged breaches of the Ministerial Code by Ms Patel stating:-

"There has never been any finding that the Home Secretary committed a breach of the Ministerial Code. Either in her position as International Development Secretary or in any other Ministerial post. Only the Prime Minister may determine whether a minister has acted in breach of the Ministerial Code, and no such determination has been made.

It is clearly not a matter for the ICO, and it is plainly not appropriate for the ICO to make assertions of this nature, particularly in circumstances where such matters fall well outside the ICO's statutory remit. Nor is it appropriate for the ICO to interrogate why the Cabinet Office does not hold certain information (particularly information relating to a non-existent "breach")"

9. On 25 March 2021 (DN para35) the Cabinet Office wrote to Mr Hislop and the following day to the Commissioner setting out its position at that time in the light of the new qualified person's opinion and confirming that it continued to rely on s36 (together with s21 and 40(2) for some of the information in scope). It acknowledged some arguments in favour of disclosure

In considering the public interest test and arguments for disclosing the information requested, there will always be a general public interest in the disclosure of information from a public body and it is also true that openness and transparency is beneficial to public confidence in Government, and may increase public trust in and engagement with the Government. Furthermore, there is an argument that disclosure of the information may deepen public understanding of the way in which allegations around compliance with the Business Appointment Rules, and the Ministerial Code are treated and therefore lead to more informed public consideration of, and assurance around, the same.

The following factors may also be relevant when considering the public interest in disclosure: (i) civil servants are expected to be impartial and robust when exchanging views and ought not to be easily deterred from expressing their views by the possibility of disclosure; and (ii) the information in question is now almost two years old.

However it concluded decisively in favour of withholding information:

“...just because the application received media coverage does not automatically mean that there is a public interest in disclosing the requested information. It is also important to recognise that the information sought relates to an issue which remains live, notwithstanding the passage of almost two years. The Ministerial Code remains in place as an important document setting out the standards of conduct expected of Ministers, and the information relates to a serving Minister.

In addition, there is a stronger public interest that ministers and senior officials are able to receive free and frank advice from officials. There is no compelling factor in this case that overrides the very strong public interest in maintaining the confidentiality of this information. In order to be valuable to ministers and senior officials, the Cabinet Office requires a ‘safe space’ to consider and respond to allegations around compliance with the Business Appointment Rules and Ministerial Code. Any advice provided must be free from any inhibitions that might preclude provision of free and frank advice. Release of this information could deter officials from engaging with and recording information in respect of such complaints.

This ‘safe space’ is even more important given that allegations that Ministers, or former Ministers, have acted in breach of the standards of behaviour expected of them can cause significant reputational damage to Ministers, who are public figures, and to the Government.”

10. On 4 August 2022 the Commissioner issued her decision notice. It confirmed that the Cabinet Office correctly applied s36 to the withheld information, but that the balance of public interest lay in disclosure and directed the disclosure of the information subject to redaction of the names of more junior civil servants.

11. S36 provides exemption where disclosure would cause prejudice to effective conduct of public affairs:-

(1) This section applies to –

(a) information which is held by a government department ... and is not exempt information by virtue of section 35,

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –

...

(b) would, or would be likely to, inhibit –

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

(3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).

....

(5) In subsections (2) and (3) “qualified person” –
(a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,

12. In considering the Cabinet Office’s submissions as to the effect of disclosure the Commissioner concluded that while it had been established that there would be prejudice arising from the inhibition of the free and frank provision of advice and exchange of views; the basis for relying on s36(2)(c) “otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs” had not been established because the prejudice claimed must be different to that claimed under section 36(2)(b) – the free and frank exchange of views and provision of advice and this had not been established.

13. The Commissioner noted the arguments of the Cabinet Office (DN 49-57) and the conclusion in 57 and 58:

“...finding of breach are various, up to and including resignation. Therefore, in order to provide free and frank advice and exchange views for the purposes of deliberation as to the appropriate response to allegations relating to the Code, the Cabinet Office contended that officials require a space free from the external pressures exerted by the risk of public disclosure.

58. The Cabinet Office contended that the considerations relating to the need for a ‘safe space’ were especially strong under section 36(2)(b)(ii) ‘as it is the frank exchange of views which plays an essential role in determining an appropriate response to complaints in which it is alleged that there has been a breach of the BARs and/or the Code’. The Cabinet Office contended that disclosure of the withheld information would be likely to substantially inhibit future deliberations as to whether the BARs or Code is engaged. ‘It follows that the opinion of the Minister on this issue is plainly a reasonable one’.”

14. The Commissioner also noted the vigorous denial by the Cabinet Office that there had ever been a breach:

60. During the course of his investigation, and in correspondence with the Cabinet Office, the Commissioner had referred to Ms Patel having breached the Ministerial Code, prior to her resignation as Secretary of State for International Development in November 2017. This reference was based upon the wording of Ms Patel’s resignation letter dated 8 November 2017, the FOI request of 3 August 2019, the Cabinet Office refusal notice of 23 March 2020, and the internal review response of 16 September 2020. The Cabinet Office strongly objected to this and stated that ‘there has never been any finding that the Home Secretary has committed a breach of the Code’. The Cabinet Office emphasised that ‘the Code itself makes clear that only the Prime Minister is entitled to make any determination of a breach. No such finding has been made in respect of the Home Secretary, whether in November 2017 or since’.

15. In setting out his position the Commissioner reviewed the recent history of issues raised by the Ministerial Code/Business Appointment Regulations including (paragraph 62-64):

“64. In her resignation letter to Mrs May, which was widely disseminated in the public domain, Ms Patel stated that, ‘I accept that in meeting organisations and politicians during a private holiday in Israel my actions fell below the standards that are expected of a Secretary of State’. Ms Patel added that ‘while my actions were meant with the best of intentions, my actions also fell below the standards of transparency and openness that I have promoted and advocated’. In her reply, Mrs May informed Ms Patel that, ‘now that further details have come to light, it is right that you have decided to resign and adhere to the high standards of transparency and openness that you have advocated’.”

63. Ms Patel’s actions prompted her immediate resignation. There may not have been any formal finding by Prime Minister May as to whether Ms Patel had breached the Ministerial Code but arguably that was only because Ms Patel’s resignation made a formal finding superfluous.

64. To be clear, in referencing Ms Patel’s ministerial history, the Commissioner does not seek in any way to encroach upon the jurisdiction and remit of the Prime Minister as sole arbiter as to determining breaches of the Ministerial Code, but is recognising the public interest which lies behind the complainant’s request and is referenced in the same.

16. The Commissioner referenced a previous decision on questions relating to the compliance of a former minister with the requirements of the rules of the Advisory Committee on Business Appointments from October 2019 (FS507959018):

15. On 9 July 2018, Boris Johnson MP resigned as Foreign Secretary, having been in that office for two years. He remained a backbench Member of Parliament for Uxbridge and South Ruislip. It became public knowledge that Mr Johnson would be taking up a role as columnist for The Telegraph when the newspaper started advertising his column on the weekend of 14 and 15 July 2018. Mr Johnson signed a contract with The Telegraph on 12 July 2018 but ACOBA did not receive his application (for advice) until 26 July 2018.

16. In a letter to Mr Johnson dated 8 August 2018, and published on ACOBA’s website, the Committee stated that they considered ‘it to be unacceptable that you signed a contract with The Telegraph and your appointment was announced before you had sought and obtained advice from the Committee, as was incumbent on you on leaving office under the Government’s Business Appointment Rules’. On 24 July 2019 (seven months after the complainant’s request) Mr Johnson took office as Prime Minister of the United Kingdom.

17. In the decision notice the Commissioner addressed the submissions of the Cabinet Office concerning the propriety of the Commissioner’s approach:

68. In submissions to the Commissioner, the Cabinet Office contended that the Commissioner’s consideration of allegations against the Home Secretary and information in the public domain concerning the same ‘represents a serious departure from its proper remit’. The Cabinet Office further asserted that ‘it is not appropriate for the ICO to undertake any detailed engagement with party political statements or to speculate about allegations of misconduct against senior Ministers’.

69. *There is a clear and strong public interest in knowing that Ministers abide by and respect the Ministerial Code, and where there are grounds for suspecting that they may not have done, there is an important and obvious public interest in transparency and accountability as to what the consequences are (if any) for any Minister who has not abided by their obligations under the Code. In stating this, the Commissioner is absolutely clear that it is not for him to determine whether or not Ms Patel breached the Ministerial Code, that determination being for the Prime Minister alone as the Cabinet Office has correctly stated.*

70. *However, the Commissioner considers that it is not only appropriate, but essential, that in the context of this case, he recognises and considers the public interest attached to the withheld information. This is in no way a 'serious departure' from the Commissioner's well established and consistent approach.*

71. *It is a fact that Ms Patel accepted her role at Viasat before seeking advice from ACOBA. It is also a fact that the Ministerial Code is very clear that departing ministers (as Ms Patel was at that time) must seek advice from ACOBA about any appointments or employment which they intend to take up within two years of leaving office before accepting any such role(s). It is therefore unsurprising that questions should be asked as to whether Ms Patel was in breach of the Code.*

72. *That public interest is given particular prominence in the present case because of the wider context and history in which Ms Patel's adherence to the standards required of Ministers has been called into question. The Commissioner has already addressed the circumstances of her resignation as Secretary of State for International Development above. More recently, on 29 February 2020 Home Office Permanent Secretary, Sir Philip Rutnam, resigned and alleged that he had been subject to a 'vicious and orchestrated campaign' for challenging alleged mistreatment of civil servants by the Home Secretary.*

73. *As the Upper Tribunal recently confirmed in *Montague v The Information Commissioner and The Department of Trade* (UA -2020-000324 & UA- 2020-000325) [13 April 2022], the time for judging the competing public interests in a request is at the date of the public authority's decision on the request under Part 1 of the FOIA and prior to any internal review of the initial decision.*

74. *On 29 February 2020, Sir Philip Rutnam resigned from his post for the reasons set out above. On 2 March 2020, the then Minister for the Cabinet Office, Michael Gove, confirmed that his department would investigate alleged breaches of the Ministerial Code by the Home Secretary. The Commissioner therefore considers that at the time of the Cabinet Office initial refusal notice on 23 March 2020, there was a strong and legitimate public interest in transparency and accountability concerning Ms Patel's compliance with the Ministerial Code.*

18. In distinguishing between Mr Johnson's breach of the framework for business appointments the Commissioner noted that in that case there had been transparency (DN paragraph 81) and Ms Patel's (DN82):

"ACOBA's letter to Ms Patel of July 2019 does not criticise her for making a retrospective application because at the time that they provided their advice, they were clearly unaware that

she had done so. It is concerning that the Cabinet Office should contend that the published correspondence from ACOBA satisfies much of the public interest in this case when it cannot possibly do so."

19. From inspection of the material the Commissioner concluded there had been a breach of the Business Appointment Rules, recognised the need for a safe space for civil servants to consider and advise without being subject to public pressure, the risk of reputational harm to Ministers and the government from unsubstantiated and baseless allegations but "*The public rightly expect Ministers to behave in a manner which respects the rules and codes of conduct to which Ministers agree to follow and adhere to. Therefore, where evidence suggests that a Minister may not have followed or adhered to the BARs or the Ministerial Code, they should expect a certain degree of legitimate and necessary transparency and accountability in relation to their actions or conduct*". Given her central role in government and her previous acknowledgement to Mrs May that she had fallen below the proper standard, the lack of transparency to ACOBA about her appointment and the bullying issue raised by the Permanent Secretary to the Home Office "*tend to suggest an inconsistent approach to compliance by Ms Patel with the behavioural standards expected of Ministers. Importantly, this approach is founded on demonstrable facts and evidence, rather than rumour and speculation.*" (DN83-90) The Commissioner continued:

91. Whilst it is a matter for the Prime Minister of the day to decide whether a Minister has breached the Ministerial Code, there is an important and entirely legitimate public interest in transparency and accountability as to the outcome of any serious and credible complaints made against a serving Cabinet Minister, especially where, as here, there is a history of an inconsistent approach to compliance with the behavioural standards expected of Ministers by that Minister.

20. The Commissioner acknowledged the significance of the chilling effect, especially if an issue is live – (it is perhaps intriguing that the Cabinet Office took the view that a case was live for as long as a Minister served and therefore the chilling effect remained for those providing the advice and in future cases). He gave weight to the qualified person's opinion and recognised the importance of it for officials having discussions and exchanges about an ongoing issue noting that *in this particular case, the Commissioner considers that the content and sensitivity of the withheld information is the key factor which has a bearing on both sides of the respective public interest arguments*. He disagreed with the Cabinet Office contention that there was no substantial interest in disclosure on the basis that there had been no transparency and accountability about the failure to approach ACOBA before taking up the appointment. He emphasised that questions of ministerial reputation were not the concern of s36.
21. He concluded (DN 104-105) that for very senior officials in public facing roles the chilling effect was insufficient to withhold their names and for the information itself: *the Commissioner considers that the public interest arguments both for and against disclosure of the information in this case are strong and quite finely balanced. However, in the Commissioner's view, what tips the balance decisively in favour of disclosure is the lack of public transparency and accountability in respect of the serious allegation made against Ms*

Patel, when seen in the relevant and important context of the two previous examples, referenced above, when the Home Secretary's behaviour did not accord with the high standards and conduct required and expected of Ministers, albeit it is accepted that there was no formal finding of a breach of the Ministerial Code in either case.

Relevant codes of conduct

22. The tribunal was supplied with two versions of the Ministerial code, that approved by Mrs May and in force until August 2019 and that approved by Mr Johnson and in force after that date. While the foreword by the Prime Minister differs between the two (with Mrs May saying, "*Parliament and Whitehall are special places in our democracy, but they are also places of work too, and exactly the same standards and norms should govern them as govern any other workplace. We need to establish a new culture of respect at the centre of our public life: one in which everyone can feel confident that they are working in a safe and secure environment*" and Mr Johnson saying, "*there must be no bullying and no harassment; no leaking; no breach of collective responsibility*" and making explicit reference to the intention to leave the European Union and emphasising his policy imperative – "*Crucially, there must be no delay - and no misuse of process or procedure by any individual Minister that would seek to stall the collective decisions necessary to deliver Brexit and secure the wider changes needed across our United Kingdom.*" The operative provisions of the Code (which in both cases annexes the principles of Public Life and the Business Appointments Rules) appear to be the same. The code sets out the ten principles of Ministerial conduct and then provide for the central role of the Prime Minister:

1.3...

- a. The principle of collective responsibility applies to all Government Ministers;*
- b. Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and agencies;*
- c. It is of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister;*
- d. Ministers should be as open as possible with Parliament and the public, refusing to provide information only when disclosure would not be in the public interest, which should be decided in accordance with the relevant statutes and the Freedom of Information Act 2000;*
- e. Ministers should similarly require civil servants who give evidence before Parliamentary Committees on their behalf and under their direction to be as helpful as possible in providing accurate, truthful and full information in accordance with the duties and responsibilities of civil servants as set out in the Civil Service Code;*
- f. Ministers must ensure that no conflict arises, or appears to arise, between their public duties and their private interests;*
- g. Ministers should not accept any gift or hospitality which might, or might reasonably appear to, compromise their judgement or place them under an improper obligation;*
- h. Ministers in the House of Commons must keep separate their roles as Minister and constituency Member;*
- i. Ministers must not use government resources for Party political purposes; and*

j. Ministers must uphold the political impartiality of the Civil Service and not ask civil servants to act in any way which would conflict with the Civil Service Code as set out in the Constitutional Reform and Governance Act 2010.

1.4 It is not the role of the Cabinet Secretary or other officials to enforce the Code. If there is an allegation about a breach of the Code, and the Prime Minister, having consulted the Cabinet Secretary feels that it warrants further investigation, she will refer the matter to the independent adviser on Ministers interests.

23. The first annex sets out the principles of public life formulated under Lord Nolan's guidance at the request of the then Prime Minister in 1995:

1 Selflessness

Holders of public office should act solely in terms of the public interest.

2 Integrity

Holders of public office must avoid placing themselves under any obligation to people or organisations that might try inappropriately to influence them in their work. They should not act or take decisions in order to gain financial or other material benefits for themselves, their family, or their friends. They must declare and resolve any interests and relationships.

3 Objectivity

Holders of public office must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias.

4 Accountability

Holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this.

5 Openness

Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.

6 Honesty

Holders of public office should be truthful.

7 Leadership

Holders of public office should exhibit these principles in their own behaviour and treat others with respect. They should actively promote and robustly support the principles and challenge poor behaviour wherever it occurs.

24. The Civil Service Code issued under s7 of the Constitutional Reform and Governance Act 2010 requires civil servants to act with integrity, honesty, objectivity and impartiality and explains the importance of these values:

“'integrity' is putting the obligations of public service above your own personal interests

'honesty' is being truthful and open

'objectivity' is basing your advice and decisions on rigorous analysis of the evidence

'impartiality' is acting solely according to the merits of the case and serving equally well governments of different political persuasions

These core values support good government and ensure the achievement of the highest possible standards in all that the Civil Service does. This in turn helps the Civil Service to gain and retain the respect of ministers, Parliament, the public and its customers."

The appeal

25. The Cabinet Office based its appeal on two grounds –

- the Commissioner's finding that s36(2)(c) was not engaged was inadequate since it did not justify that reasoning in the face of the finding of the qualified person that it was and the existence of a distinct prejudice in the form of *prejudice to the processes for handling complaints by officials of the Cabinet Office and the quality of discussions and advice was identified by the qualified person.*
- In assessing the balance of public interest the Commissioner
 - (1) failed to give "appropriate weight" to the views of the qualified person in carrying out the public interest assessment.
 - (2) erred in failing to take into account at all the broader evidence as to the impact on the effective conduct of public affairs (including by reason of the 36(2)(c) error.
 - (3) erred in basing his conclusion on a finding that disclosure of this information would not "have a significant chilling effect in future such cases", which was inconsistent with the (accepted) view of the qualified person and the submissions of the Cabinet Office.
 - (4) erred in basing his conclusion on a finding that the present case "is exceptional and in most cases senior officials could have reasonable confidence that their advice and exchanges would not be publicly disclosed" created uncertainty in the circumstances in which such confidence could reasonably be held by senior officials, thereby increasing the risk of a "chilling effect".
 - (5) The IC erred in giving inappropriate weight to the earlier decision of the IC in FS50795091 concerning the appointment of Boris Johnson as a columnist at the Telegraph (at §§65-66) in circumstances where the IC in fact refused to order disclosure of information withheld by the Cabinet Office in that case and other similar cases (see §27(5) above).
 - (6) The IC erred in giving inappropriate weight to purported previous breaches of the Ministerial Code in circumstances where no such breaches have ever been found against Ms Patel, and the responsibility for finding such breaches is solely within the remit of the Prime Minister under the Ministerial Code.
 - (7) erred in giving inappropriate weight to an apparent view that the Prime

Minister and/or ACOBA had not done enough to ensure transparency, and that publishing the frank and candid views of civil servants would provide the “transparency and accountability ... that is currently missing”.

26. Simon Madden, Director of Propriety and Ethics in the Cabinet Office since August 2022 gave evidence on behalf of the Appellant. He had no involvement with the decision-making which led to this case. He has policy responsibility for the Business Appointment Rules, is sponsor for the Advisory Committee on Business Appointments and oversees the casework for which the Cabinet Office is responsible.
27. In setting out the background to the case he confirmed that the Ministerial Code “is not, and is not intended to be, a source of any legal rights or duties.” Furthermore The Prime Minister does not act judicially or quasi-judicially; the decisions under the Ministerial Code are for him and him alone to take as he sees fit in the circumstances of the case: "Ministers only remain in office for so long as they retain the confidence of the Prime Minister. The Prime Minister is the ultimate judge of the standards of behaviour expected of a Minister and the appropriate consequences of a breach of those standards" (Ministerial code §1.6). He set out the general arrangements for dealing with questions under the Business Appointments Rules:

“When there has been a suspected breach of the BARs by a former Minister or senior civil servant, ACOBA will write to the Minister for the Cabinet Office. Alternatively, if the relevant Government department identifies a potential breach by a former Minister or senior civil servant, it will write to ACOBA with any relevant information, which will then write to the Minister for the Cabinet Office. The Propriety and Ethics Team will provide advice to the Minister for the Cabinet Office on the correspondence from ACOBA. It is then up to the Minister to determine if such a breach has in fact occurred, and if further action (such as writing to the individual in question) is required.”

28. In discussing the exemptions the Cabinet Office relied upon he confirmed that he agreed with the view of the qualified person that the material should be withheld. He emphasised the importance of being able to conduct investigations into the questions of possible breaches of the Ministerial Code and BARs. The effectiveness of this function depends on the provision of free and frank advice from and to those involved in gathering and assessing relevant facts to determine appropriate responses to potential breaches:

“The process of developing and determining appropriate responses to potential breaches in each individual case will often involve exploring possible responses in a candid way, even where those responses are unpalatable, for the purpose of generating better advice. It is easy to see why individuals sharing such advice which is, sensitive or politically which is, sensitive or politically controversial would be concerned about it being publicly disclosed. Such individuals would not wish to harm their own career prospects or otherwise have their advice become the subject of public dissemination or media or parliamentary scrutiny. Practically, there is a risk that such individuals will censor themselves when discussing cases or record less information in writing.”

29. He made related points in respect of the free and frank exchange of views (paragraphs 25-26) and the effective conduct of public affairs where he indicated

“For the purposes of the Ministerial Code, it is vital that the Prime Minister is placed in the best position possible to make a judgement about such allegations and then to decide whether he continues to have confidence in that Minister. It is essential to, the proper functioning of the highest levels of His Majesty's Government and to the Prime Minister's ability to exercise his constitutional function in determining the composition of the Government that this opportunity both exists and operates effectively”

30. For this to happen people needed to come forward and co-operate, providing candid information. He generalised this to the importance of the ability to receive information under an assurance of confidentiality across a wide range of public bodies and departments and for officials to be able to give candid advice clearly setting out and considering the issues.
31. In response to the exploration of the impact of possible disclosure under FOIA on how he would have advised in similar circumstances he confirmed that he would not have provided materially different advice.

Consideration

32. The first ground of appeal is that the Commissioner erred in law in considering that s36(2)(c) did not apply. The argument advanced by the Cabinet Office based on the evidence of Mr Madden is that for the proper investigation of breaches of such as those under consideration there needs to be the confidence that people coming forward with information will have their confidentiality protected and if this was not the case individuals would be aware that their contributions could be publicly disclosed and may fear reprisals or other personal or professional ramifications:

“it is essential that the Cabinet Office is able to make effective enquiries whenever issues about Ministerial conduct are raised, and to assemble a comprehensive and well-informed picture of the circumstances surrounding such issues in order to effectively handle and respond to them. Any diminution in the candour or quality of advice and views provided to support such processes resulting from the risk of disclosure will prejudice their overall effectiveness”.

33. However, on this occasion there is no issue of a need for witnesses to come forward. The information was in the newspapers and the only issue on this occasion was how the Civil Service would handle the issue and what the Prime Minister would do with the advice of the Civil Service. It is important to recognise that the question raised by s36 is whether the processes would be inhibited in future by the disclosure of the requested information; rather than the specific information itself. The question is whether the proper processes of government – the free and frank exchanges of views and advice and other matters relating to the conduct of public affairs would be

impeded by the disclosure. In other circumstances there could well be a need for a careful collection of information and the chilling effect of disclosure in this case (where for example less senior civil servants might not be fully apprised of the specifics of what was disclosed and might consider it was directly relevant to them) would foreseeably have some negative impact on that ability to gather relevant information.

34. The tribunal is therefore satisfied that disclosure in this case would be likely to inhibit the provision of advice, the exchange of views and the ability to gather evidence and weight.
35. In considering the public interest weight must be given to the opinion of the qualified person who was consulted on 6 February and opined on 12 February finding that the tests with respect to inhibition and prejudice were met. It is clear that the ability of officials to gather information on the conduct of Ministers, evaluate and discuss such material and formulate advice for the purpose of upholding the Ministerial code has significant weight. The exercise of consulting the qualified person was conducted again with like effect a year later.
36. The passing of time has had a significant impact on the issues raised by this case. The request was made immediately after Mr Johnson became Prime Minister and the request referred to a breach of the Business Appointment Rules by him after ceasing to be Foreign Secretary.
37. It may be noted that the Cabinet Office appears to have misunderstood the Commissioner's reference to it in the decision notice which was that there was a significant and strong public interest in a former Foreign Secretary acting in breach of the rules of conduct. While the Commissioner had not ordered disclosure in that case the significance of the issue of Mr Johnson's compliance was in the Commissioner's view clear. Point 5 of the Cabinet Office's public interest ground of appeal is without substance.
38. Point 6 of the Cabinet Office's case – the Commissioner erred in giving weight to purported breaches of the ministerial code when only the Prime Minister may determine whether there has been a breach has been illuminated by the decision in the *FDA* case where the Divisional Court considered the status of the Ministerial code and the question of justiciability and made a clear distinction:

“42. We recognise that in certain instances, a dispute about the interpretation of something in the Ministerial Code may be so closely connected with a decision to dismiss or retain a minister that it may not be possible to separate out the issue of interpretation from the position of the minister. In those circumstances, the dispute may not be justiciable. But that is not this case. This case concerns the question of whether the Prime Minister has mis-interpreted the Ministerial Code by interpreting the words in paragraph 1.2 as not including conduct which is offensive where the perpetrator was unaware of, or did not intend to cause, upset or offence. We are satisfied that that particular issue is justiciable.”

39. The distinction is inherent in the Code and arises out of the conflict between normative values and political choice. In this case it is a simple distinction between facts and expediency. Paragraph 1.4 of the Code (see above) makes clear that the Prime Minister makes the decision whether there is to be an investigation of an alleged breach and paragraph 1.6 reserves the right to decide whether there has been a breach to the Prime Minister. A Prime Minister may wish to retain a Minister no matter what the Minister has done on the LBJ principle of the relative locations of Mr J Edgar Hoover and the tent. However, that does not debar an observer from properly and fairly coming to a conclusion on the facts since proverbially “a cat may look at a king” or as Hans Christian Andersen’s little boy said “the emperor has no clothes”. The public may examine the facts (if it has access to them) and decide properly whether a Minister has broken the Code. That is very different from a Prime Minister’s decision to dispense with a Minister. However for the Cabinet Office to place weight on the suggestion that absence of an explicit decision by the Prime Minister is as disingenuous as asserting that Parliament may legislate that black is white. The argument is without substance.
40. Some six months passed between the request and the formulation of the qualified person’s opinion. During that period there was the unlawful prorogation of Parliament by the Prime Minister, a general election and the withdrawal from the EU. There was however no accountability with respect to the question of the conduct of the Home Secretary. A letter from Mr Trickett (an Opposition spokesman) to the Prime Minister on the matter went unanswered. There had been no effective parliamentary scrutiny and accountability.
41. After the qualified person gave the opinion on 12 February 2020 the decision of the Cabinet Office was not communicated for 40 days. During this period of quarantine, the pandemic took hold and the restrictions on social contact took effect on the same day as the decision was sent (while this was no doubt in a clearing of the desks exercise it was communicated on “a good day to bury bad news”).
42. However, the delay in announcing the decision was a further delay in making the decision. It is settled law that the date the public interest is weighed is the date of the refusal by the public authority (*Evans, Montague*). While on 12 February the public interest issues raised by the Guardian article on which the request was based could have been formulated as raising questions as to:-

“the commitment of the Prime Minister to a Ministerial Code which he has breached who appointed a Minister dismissed by Mrs May apparently for breaching the Ministerial Code who has now apparently breached the Ministerial Code a second time shortly before re-appointment to the Cabinet by failing to comply with BAR provisions which her appointing Prime Minister failed to comply with appears to have taken no action on the matter over a protracted period”.

The issue was of far greater salience after the almost unprecedented resignation of the Permanent Secretary alleging misconduct by the Home Secretary of such gravity that there was no alternative to his resignation. In his resignation letter he stated:

“One of my duties as Permanent Secretary was to protect the health, safety and wellbeing of our 35,000 people. This created tension with the Home Secretary, and I have encouraged her to change her behaviours. This has been a very difficult decision but I hope that my stand may help in maintaining the quality of government in our country, which includes hundreds of thousands of civil servants loyally dedicated to delivering this government’s agenda”

43. An inquiry to be conducted by the Prime Minister’s adviser had been announced however questions of the commitment of the Prime Minister and Home Secretary to the Ministerial Code and the Nolan principles were now of far greater salience, enhancing the public interest in whatever light the disclosure of withheld material as requested by Mr Hislop could cast on the handling of the matters raised by the Guardian article.
44. In addition to those issues in the article the circumstances of the resignation of Sir Philip Rutman who, acting with the integrity required by the Civil Service Code had resigned to protect the health and safety of his staff and the quality of government also put into sharp focus the conduct of the civil servants who had handled the issue in the Cabinet Office and whether they had acted with integrity, honesty, objectivity and impartiality in handling the matter, whether they had (in the traditional formulation of the duty of a civil servant) spoken truth to power. This is particularly enhanced since Sir Philip’s resignation brought into public concern bullying of civil servants by Ministers and raised the question of whether civil servants would have felt exposed to the risk of bullying if they were to advise the Prime Minister in such circumstances. This point was well explored by Mr Madden in his evidence.
45. While the issues identified by the Guardian article were highly significant, the resignation of Sir Philip Rutnam made the case (at that time) wholly exceptional and all civil servants would have appreciated it. This would significantly reduce the chilling effect emphasised as point 3 of the Cabinet Office’s public interest arguments – indeed it is a factor which the qualified person who made the operative decision on 12 February 2020 (Oliver Dowden) could not have been aware of in coming to his conclusions. The opinions of Chloe Smith (2021) and Baroness Neville-Rolfe (2023) did not inform that decision and in the circumstances add little. It is notable that the letter reflecting the Chloe Smith opinion (paragraph 9 above) fails to engage with the gravity of the issues around Ms Patel in March 2020 and references the tired platitude that “what the public is interested is not necessarily in the public interest” by stating “media coverage does not automatically mean that there is a public interest” while making no reference to the issue of the practical and specific issue of the conduct of that Minister and the resignation of the Permanent Secretary or the resignation of Sir Alexander Allan in November 2020 arising out of the handling of the third breach of the Ministerial Code.

46. The tribunal places weight on the evidence of Mr Madden which fairly set out the challenges which civil servants face. However it is important to recognise the evolution of thinking about candour set out in the recent Upper Tribunal decision of Lewis:

“Historically the candour argument was advanced in support of both class and contents claims for PII and LPP. The common law on these issues diverged with the result that LPP is based on a right and so a guarantee of non-disclosure, whereas no such right exists in the context of PII claims or duties of confidence. The lack of a right guaranteeing non-disclosure of information, absent consent, means that that information is at risk of disclosure in the overall public interest (i.e. when the public interest in disclosure outweighs the public interest in non-disclosure). As soon as this qualification is factored into the candour argument (or the relevant parts of the safe space or chilling effect arguments), it is immediately apparent that highlights a weakness in it. This is because the argument cannot be founded on an expectation that the relevant communications will not be so disclosed. It follows that if he is properly informed, a person taking part in the discussions will appreciate that the greater the public interest in the disclosure of confidential, candid and frank exchanges, the more likely it is that they will be disclosed. In general terms, this weakness in the candour argument was one that the courts found persuasive and it led many judges to the view that claims to PII based on it (i.e. in short that civil servants would be discouraged from expressing views fully, frankly and forcefully in discussions relating to the development of policy) were unconvincing.”

47. The tribunal also recognises the exceptional circumstances of this case; places weight on the integrity of civil servants seeking conscientiously to discharge their duties in accordance with the Nolan principles and their statutory code of conduct; and on the evidence of Mr Madden as to how he would have approached the issue aware of the possibility of disclosure (discussed above). While there are some harms flowing from disclosure the exceptional circumstances arising out of Sir Philip’s resignation dramatically reduces those harms since the public interest in the proper management of the Ministerial Code and accountability around that was even more significant than before, the public interest is decisively in favour of disclosure. The tribunal is satisfied that the Commissioner correctly concluded that there was a lack of transparency and accountability and dismisses the appeal.

Signed Hughes

Date: 5 December 2023