

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 September 2021

**Public Authority:** Cabinet Office

**Address:** 70 Whitehall  
London  
SW1A 2AS

#### Decision (including any steps ordered)

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1. The complainant wrote to the public authority seeking information regarding an investigation by the public authority into the unauthorised disclosure of information in relation to telecoms firm Huawei and the UK's 5G phone network following a National Security Council meeting.
2. The public authority withheld the information held within the scope of the request (the disputed information) relying on the exemptions at sections 31(1)(g), 35(1)(b) and 41(1) FOIA.
3. The Commissioner's decision is that the public authority was entitled to withhold the disputed information on the basis of the exemptions at sections 31(1)(g) (by virtue of 31(2)(b)) and 35(1)(b) FOIA.
4. No steps required.

## Request and response

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5. The complainant submitted a request for information to the public authority on 26 April 2019 in the following terms:

"BACKGROUND:

<https://www.theguardian.com/technology/2...>

"Cabinet members who were at Tuesday's National Security Council (NSC) have been sent an ultimatum by Whitehall's most powerful official to confess or deny whether they leaked a controversial decision to allow Chinese telecoms firm Huawei to help build the UK's 5G phone network. Cabinet secretary Sir Mark Sedwill is understood to have written to those present and demanded that they tell him by 2pm on Thursday whether they were involved and would be willing to cooperate with an inquiry, prompting the five prime suspects to scramble to "categorically deny" that they were behind the leak."

REQUEST: Disclose the ultimatum letters sent, and all replies."

6. Later on the same day (26 April 2019) the complainant wrote to the public authority again in the following terms:

"I would like to resubmit the request as of 7.30pm today as the deadline for submitting responses was 2pm and I made my request before 2. My bad. Also, I would like a full list of all those who attended the meeting.

"Cabinet secretary Sir Mark Sedwill is understood to have written to those present and demanded that they tell him by 2pm on Thursday whether they were involved and would be willing to cooperate with an inquiry, prompting the five prime suspects to scramble to "categorically deny" that they were behind the leak." "

7. In a series of emails on 28 May 2019, 24 June 2019 and 31 July 2019, the public authority advised the complainant that it was extending the time for responding to his request by virtue of the provision in section 10(3) FOIA. Under section 10(1) FOIA, public authorities are required to comply with a request for information promptly and in any event no later than 20 working days following the date of receipt. By virtue of section 10(3), a public authority may extend the time limit in section 10(1) until such a time as is reasonable in the circumstances in order to consider where the balance of the public interest lies; ie whether the public interest is in favour of disclosing the requested information or in favour of maintaining the exemption(s) cited.

8. The complainant initially requested an internal review of the public authority's response on 24 June 2019 and subsequently on 6 August 2019 regarding the delay in issuing a substantive response to his request.
9. The public authority issued a substantive response to the request on 15 August 2019. It explained that it considered the information held in relation to the first part of the request for "the ultimatum letters sent, and all replies" exempt from disclosure on the basis of sections 31(1)(g) by extension 31(2)(b) (Law Enforcement) and 41(1) (Information provided in confidence) FOIA. In addition, it considered the information held in relation to the request for "a full list of all those who attended the meeting" exempt from disclosure on the basis of sections 35(1)(a) (Formulation of government policy) and (b) (Ministerial communications) FOIA.
10. The complainant requested an internal review of this decision on 15 August 2019.
11. On 28 October 2019 the public authority wrote to the complainant with details of the outcome of the internal review. The review upheld the original decision.

### **Scope of the case**

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12. The complainant contacted the Commissioner on 28 October 2019. He said, "I apply for a s50 DN...I do not agree that the exemptions can be applied. I will not be making further representations to IC."
13. The public authority subsequently withdrew its reliance on the exemption at section 35(1)(a) in response to the Commissioner's enquiries.
14. The scope of the Commissioner's investigation was therefore restricted to whether the public authority was entitled to rely on the exemptions at sections 31(1)(g), 35(1)(b) and 41(1) FOIA as the basis for withholding the information requested by the complainant on 26 April 2019 (the disputed information).

### **Reasons for decision**

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#### Background

15. The public authority provided the information below by way of background.

16. The request relates to an investigation conducted while The Rt Hon Gavin Williamson MP (currently serving as Secretary of State for Education) served as Secretary of State for Defence between 2 November 2017 and 1 May 2019. In that role, Mr Williamson had been a member of the National Security Council (NSC). The NSC is the main forum for collective discussion of the government's objectives for national security and how best to deliver them. It meets on a regular basis and is chaired by the Prime Minister. The National Security Adviser, who at the time of the request was Sir Mark Sedwill, acts as secretary to the NSC. Other Cabinet Ministers attend as required. The Chief of Defence Staff and Heads of Intelligence Agencies also attend when required.
17. An unauthorised disclosure of information occurred from the NSC meeting on 23 April 2019. Sir Mark Sedwill who was also the Cabinet Secretary conducted an investigation. The outcome of the investigation led to former Prime Minister The Rt Hon Theresa May MP losing confidence in Gavin Williamson and he was dismissed as Defence Secretary on 1 May 2019. The complainant's request relates to the investigation conducted by Sir Mark Sedwill.

#### The Disputed Information

18. The public authority considers the information held within the scope of the request for "the ultimatum letters sent, and all replies" exempt on the basis of section 31(1)(g) and by extension 31(1)(2)(b) and section 41(1).
19. The public authority considers the information held within the scope of the request for "a full list of all those who attended the meeting" exempt on the basis of section 35(1)(b).

#### **Application of sections 31(1)(g) and 31(2)(b) FOIA**

20. Section 31(1)(g) states:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2)."

21. Section 31(2)(b) states:

"the purpose of ascertaining whether any person is responsible for any conduct which is improper..."<sup>1</sup>

### Submissions to the Commissioner

22. The complainant did not make any representations to the Commissioner in support of his view that the public authority ought to have disclosed the disputed information. The Commissioner notes that when the complainant requested an internal review of the public authority's response to his request, he did not include any supporting arguments either. In addition, it would appear from that correspondence that the complainant was only disputing the public authority's response in relation to the first part of his request for "the ultimatum letters sent, and all replies". The review however addressed the public authority's response to both parts of the request. In any event, the complainant did not disagree with the scope of the Commissioner's investigation which considered the public authority's response to both parts of his request.
23. The public authority's submissions in support of engaging the exemption at sections 31(1)(g) and 31(2) are summarised below.
24. The disclosure of the disputed information would be likely to prejudice the public authority's function of investigating unauthorised disclosures of information (which could also constitute alleged breaches of the Civil Service Code, Code of Conduct for Special Advisers or Ministerial Code) which it issues and maintains. Such unauthorised disclosures could also constitute criminal acts if they relate to material covered by the Official Secrets Acts. The disclosure of the disputed information would be likely to prejudice the exercise of the public authority's function of conducting investigations in order to identify who (to use the terminology of the exemption) may be responsible for improper conduct. In this case, the investigatory function concerned the unauthorised disclosure of information, an example of 'improper conduct'.
25. The disputed information contains details about the investigation which would assist a person to avoid detection in the future. It is important in upholding requirements of confidentiality and of the Official Secrets Act that investigations into the unauthorised disclosure of sensitive information can have the confidence of the intelligence agencies, officials and Ministers.

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<sup>1</sup> The full text of [section 31](#)

26. Investigations of unauthorised disclosures of information rely upon the willing participation and cooperation of people in the investigation process. The effectiveness of the investigation process is maintained by the understanding among those who participate in it that any information which they provide about the leaked information and the circumstances surrounding the leak is kept in confidence. It is vital that participants provide their information freely and openly and in an environment where they can trust that their information will not be prematurely disclosed.
27. If participants did not trust that their information would be kept in confidence then it would deter them from cooperating with investigations (and leak investigations in particular). This would be likely to prejudice the exercise of the public authority's function in investigating alleged unauthorised disclosures and, it follows, would undermine its maintenance of the various legal requirements about confidentiality of information.
28. Disclosure of the disputed information is also likely to have a prejudicial effect more generally on future investigations across government. If future investigations were to be rendered less effective because persons who commit wrongdoings were able to avoid detection, it would undermine not only those future investigations, but the requirements of confidentiality, especially in relation to classified material. The value of investigations, such as those which are conducted into unauthorised disclosures of information and alleged breaches of the relevant Codes of conduct, rely on discretion, full cooperation and frankness from individuals involved. To be fully effective, such investigations require the relevant public authority to be able to conduct the investigation in a manner it deems most appropriate without having to consider how its methods might be perceived if released out of context.
29. In circumstances where other government departments are investigating a leak or similar potential improper conduct, individuals who are questioned as part of that process would have reason to believe that the information they provide might be published inappropriately in response to a request for information. This could make them more circumspect and less open in their responses, damaging the effectiveness of any investigation.
30. In relation to the relevant investigation in this case, the Cabinet Secretary provided a means for attendees to acknowledge their cooperation but also to provide useful information or personal feeling on the matter to the Cabinet Secretary. This exchange of correspondence is the first step in the investigation of an unauthorised disclosure of confidential information. Releasing this information would likely lead to further responses being less open, frank or detailed.

## Commissioner's considerations

31. The Commissioner's considerations on whether the public authority was entitled to engage the exemption at sections 31(1)(g) and 31(2)(b) are set out below.
32. A public authority may rely on the exemption at sections 31(1)(g) and 31(2)(b) on the grounds that disclosing requested information would be likely to prejudice the exercise by the public authority of its function for the purpose of ascertaining whether any person is responsible for any conduct which is improper.
33. The Commissioner first considered whether the public authority has been entrusted with a function for the purpose of ascertaining whether any person is responsible for any conduct which is improper.
34. As the lead Ministerial department which supports the Prime Minister and ensures effective running of government, the Commissioner is satisfied that the public authority has been entrusted with a function to investigate unauthorised disclosures of official information.
35. The Commissioner next considered whether the public authority has been entrusted with the function of investigating unauthorised disclosures for the purpose of "ascertaining" whether any person's conduct is improper. In the Commissioner's view, to "ascertain" is to make certain or prove. The public authority with the function must have the power to determine the matter in hand with some certainty. In this case, the public authority must have the authority to make a formal decision as to whether any person's conduct is improper. The Commissioner is satisfied that the public authority had the authority to determine whether there had been an unauthorised disclosure of official information in relation to Chinese telecoms firm Huawei.
36. Finally, the Commissioner considered whether disclosure of the disputed information "would be likely to prejudice" the exercise by the public authority of its function for the purpose of ascertaining whether any person is responsible for any conduct which is improper.
37. The Commissioner shares the Information Tribunal's observations that "would be likely to prejudice" means that there must have been a real and significant risk of prejudice to the relevant interests.<sup>2</sup>

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<sup>2</sup> John Connor Press Associates Limited v The Information Commissioner EA/2005/0005



38. The timing of the request is crucial here. The request was submitted while the investigation was ongoing and certainly before the outcome was published on 1 May 2019 in a letter from the previous Prime Minister Theresa May MP to former Defence Secretary Gavin Williamson MP. In light of this, the Commissioner's shares the public authority's view that there was a real and significant risk that releasing the disputed information would prejudice the Cabinet Secretary's ongoing investigation of the unauthorised disclosure.
39. In addition, the Commissioner considers that there was also a real and significant risk that releasing the disputed information prematurely would undermine the effectiveness of future investigations across government. There is a real risk that individuals and politicians, particularly those still serving in government, would not provide information freely and openly in similar investigations if they felt that the information provided is likely to be revealed prematurely.
40. The Commissioner accepts that a consequence of undermining the effectiveness of investigations of unauthorised disclosures of official information is that this is likely to also undermine adherence to legal requirements about confidentiality of official information.
41. For the above reasons, the Commissioner finds that the public authority was entitled to engage the exemption at sections 31(1)(g) and 31(2)(b) FOIA.

### **Public interest test**

42. The exemption at sections 31(1)(g) and 31(2)(b) is subject to the public interest test set out in section 2(2)(b) FOIA. Therefore, the Commissioner must also consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the disputed information.
43. The public authority's submissions on the balance of the public interest are summarised below.
44. In favour of disclosure. There is a general public interest in disclosure and openness in government. There is a public interest in giving assurance to the public that effective arrangements are in place for preventing and detecting improper conduct. More specifically, the unauthorised disclosure received significant media coverage, particularly following the exchange of letters between the former Prime Minister and Gavin Williamson. There is therefore a public interest in disclosing the disputed information as it would provide background and context to the matter.



45. In favour of maintaining the exemption. There is a strong public interest in assuring the public that effective arrangements are in place for the prevention and detection of any conduct that is improper and in particular, for the investigation of unauthorised disclosures of information.
46. Information handled by the NSC is important to the UK's national security. It is therefore vital that investigations into alleged unauthorised disclosures of such information are not undermined. There is a very strong public interest in not disclosing information relating to the NSC precipitately and in there being a sound investigative process to accomplish this. If investigations into unauthorised disclosures were undermined and their effectiveness compromised as a consequence, it could result in such disclosures going without sanction, an outcome which would not be in the public interest.
47. There is a clear public interest in there being confidence in investigations across government generally. The disclosure of the disputed information would have a wider impact on the investigation of unauthorised disclosures, setting a public expectation as to how such investigations are run. This could establish a comparator for how future investigations should or should not be conducted, which would detract from the need to conduct the investigation according to the most appropriate method rather than with an eye to the public perception of the process.
48. On balance, the public interest in maintaining the exemption heavily outweighs the public interest in disclosing the disputed information.

### **Commissioner's considerations**

49. The Commissioner's considerations on the balance of the public interest are set out below.
50. It is necessary in this case to mention from the outset that when assessing the balance of the public interest, the Commissioner will consider the circumstances as they stood at the time when the public authority finally refuses a request, usually following the completion of the authority's internal review. This reflects the position taken by the

Upper Tribunal in *APPGER v ICO*<sup>3</sup> and endorsed more recently by the Upper Tribunal in *Maurizi v ICO CPS*<sup>4</sup>.

51. In addition to the general public interest in disclosure, the Commissioner considers that the disputed information could have provided the public with some context to the previous Prime Minister's letter of 1 May 2019 to Gavin Williamson and Mr Williamson's widely reported reaction to the contents of the letter<sup>5</sup>. The public interest in not undermining the effectiveness of the Cabinet Secretary's investigation of the unauthorised disclosure had somewhat waned by October 2019 when the internal review of the public authority's response to the complainant's request was completed. On 2 May 2019, it was [reported](#) by the BBC that the Prime Minister considered the investigation closed.
52. However, the Commissioner considers that there was still a strong public interest in not undermining the effectiveness of investigations across government, particularly in relation to unauthorised disclosures. The disputed information was still fairly recent following the internal review and the risk, a significant one, therefore remained that individuals would be less willing to participate freely and openly in similar investigations for fear that information they provide to assist with an investigation could be disclosed prematurely. Politicians in particular are likely to consider the ramifications of publishing information that they have provided in confidence to assist with an investigation albeit following the conclusion of the investigation.
53. Consequentially, there is also a strong public interest in not undermining the maintenance of the various legal requirements about confidentiality of official information by diminishing the effectiveness of investigations of unauthorised disclosures.
54. For the above reasons, the Commissioner has concluded that on balance, the public interest in maintaining the exemption outweighed the public interest in disclosure.
55. In light of this decision, the Commissioner has not considered the applicability of the exemption at section 41(1) FOIA.

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<sup>3</sup> [2015] UKUT 0377 (ACC)

<sup>4</sup> [\[2019\] UKUT 262 \(AAC\)](#)

<sup>5</sup> <https://www.bbc.co.uk/news/uk-politics-48129280>

### Application of section 35(1)(b) FOIA

56. As noted, the public authority withheld the information held within the scope of the request for “a full list of all those who attended the meeting” on the basis of the exemption at section 35(1)(b).

57. Section 35(1)(b) states:

Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to Ministerial communications<sup>6</sup>.

58. The public authority’s submissions in support of engaging the exemption at section 35(1)(b) are summarised below.

59. The disputed information (a list of attendees at the NSC meeting) constitutes information relating to Ministerial communications. Cabinet minutes (or minutes of Cabinet committees) which includes the list of attendees fall within the scope of the exemption because they relate to the communications taking place between Ministers at the Cabinet (or committee) meeting.

60. The membership of the NSC is published. However, attendance at NSC meetings (including by officials who are not members) is not fixed and is flexible to ensure effective discussions on issues.

61. Section 35(5) FOIA states that Ministerial communications include “proceedings of the Cabinet or of any committee of the Cabinet”. Details of NSC meetings, given that the NSC is a Cabinet committee, clearly satisfies this definition. The list of attendees is therefore related to Ministerial meetings and engages the exemption at section 35(1)(b).

### **Commissioner’s considerations**

62. The Commissioner’s considerations on whether the public authority was entitled to engage the exemption at section 35(1)(b) are set out below.

63. The request is for a full list of all those who attended the NSC meeting in question.

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<sup>6</sup> The full text of [section 35](#)

64. The exemption covers information which 'relates to' Ministerial communications. This means that information does not have to be a Ministerial communication itself to be covered. The exemption can be interpreted broadly to include other information. Cabinet minutes or minutes of Cabinet committees fall within the scope of the exemption. They are communications taking place between Ministers at the Cabinet or Cabinet committee meeting.
65. The Commissioner considers that the full list of all those who attended the NSC meeting in question relates to Ministerial communications within the broad interpretation of the exemption.
66. The exemption is class-based. This means there is no need to show any harm in order to engage the exemption. The disputed information simply has to relate to Ministerial communications.
67. For the above reasons, the Commissioner finds that the public authority was entitled to engage the exemption at section 35(1)(b) FOIA.

### **Public interest test**

68. The exemption at section 35(1)(b) is subject to the public interest test set out in section 2(2)(b) FOIA. Therefore, the Commissioner must also consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the disputed information.
69. The public authority's submissions on the balance of the public interest are summarised below.
70. In favour of disclosure. There is a strong public interest in the transparency of government work relating to high profile national security policies to ensure the resilience of the United Kingdom. There is a clear public interest in assurance that the relevant ministers attended, to ensure a full discussion in a proportionate and evidence based manner. There will always be some public interest in disclosure to promote transparency and accountability, greater public awareness and understanding and management of national security risks across all parts of the public sector.
71. In favour of maintaining the exemption. It is strongly in the public interest that Ministers are able to discuss national security policy formulation in confidence, allowing for a free and frank exchange of views, essential to decision making.

72. In particular, disclosing a specific attendance list (other than in a controlled manner in agreed circumstances) would give rise to commentary in respect of the appropriateness of the involvement (or non-involvement) of particular ministers in particular cases and would undermine ministers' discretion in how they organise themselves to formulate policy options in a national security context.
73. On balance, the public interest in maintaining the exemption far outweighs the public interest in disclosing the disputed information.

### **Commissioner's considerations**

74. The Commissioner's considerations on the balance of the public interest are set out below.
75. In the context of the complainant's request for information relating to the investigation of an unauthorised disclosure of part of the discussions at a NSC meeting, there is a public interest in revealing the list of attendees at the relevant meeting.
76. There was however a real risk that publishing this specific attendance list shortly after the conclusion of the investigation which led to the dismissal of a Cabinet Minister would have had a chilling effect on discussions at Ministerial level in relation to government policy on Huawei and the UK's 5G phone network. There was therefore a stronger public interest in preventing a chilling effect on free and frank debates between Ministers on an issue with relevance to national security.
77. For the above reasons, the Commissioner has concluded that on balance, the public interest in maintaining the exemption outweighed the public interest in disclosing the disputed information.
78. The Commissioner has considered the application of section 35(1)(b) alone to the full list of all those who attended the relevant NSC meeting. The list was not withheld on the basis of sections 31(1)(g) and 31(2)(b). However, had that been the case, the Commissioner would have found the list equally exempt on the basis of the exemption at sections 31(1)(g) and 31(2)(b) for the reasons set out above in her consideration of the applicability of that exemption.

## **Procedural Matters**

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79. By virtue of section 17(1)(b) FOIA a public authority is required to issue a refusal notice to an applicant within 20 working days following receipt of a request specifying the exemption in question.
80. A public authority relying on section 10(3) FOIA to extend the 20 working days limit must have identified the exemption(s) it considers is engaged. The additional time cannot be used to determine whether an exemption is engaged.
81. In the correspondence of 28 May 2019, 24 June 2019 and 31 July 2019 issued to the complainant pursuant to the application of section 10(3), the public authority advised that it considered the disputed information exempt on the basis of section 24 FOIA (National Security).
82. It was only when it issued its substantive response on 15 August 2019, 77 working days following the request, that the public authority first relied on the exemptions at sections 31(1)(g), 35(1)(a), 35(1)(b) and 41(1).
83. The Commissioner therefore finds the public authority in breach of section 17(1)(b) for failing to issue a refusal notice specifying the application of the above exemptions within 20 working days following the request.

## **Other Matters**

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84. The FOIA does not define what might constitute a 'reasonable' extension of time pursuant to the application of section 10(3). In the Commissioner's view, a public authority should take no more than an additional 20 working days to consider the balance of the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days save in exceptional circumstances.
85. It took the public authority a total of 77 working days to issue a substantive response. In the Commissioner's view, it should have taken the public authority no more than 40 working days to issue its response. The Commissioner considers that an additional 37 working days in order to consider the balance of the public interest was not justified in the circumstances of this case.

## Right of appeal

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86. 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: 0203 936 8963

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)

87. 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.
88. 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 FOI**  
**Information Commissioner's Office**  
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