

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 August 2022

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information concerning the Cabinet Office inquiry into bullying allegations made against the Home Secretary, Priti Patel. The Cabinet Office withheld the requested information on the basis of the following exemptions under the FOIA, section 31(1)(g)(law enforcement), section 41(information provided by a third party in confidence) and section 40(2)(third party personal data).
2. The Commissioner's decision is that the Cabinet Office is entitled to withhold all of the withheld information under section 31(1)(g) and that the balance of the public interest favours maintaining the exemption. However, the Commissioner finds that the Cabinet Office breached section 10(1) of FOIA, in that they failed to provide a valid response to the request within the statutory time frame of 20 working days.
3. The Commissioner does not require the Cabinet Office to take any steps in respect of this matter.

Request and response

4. On 15 September 2020, the complainant wrote to the Cabinet Office and requested information in the following terms:

'Please provide a full copy of the investigation into harassment or bullying by Home Secretary Priti Patel, carried out by Helen MacNarama and Alex Allan'.

5. The Cabinet Office acknowledged receipt of the request on the same date but had not provided a response by 14 October 2020. On that date the complainant chased up the matter with the Cabinet Office, advising them that he would refer the matter to the Commissioner if he did not receive the outstanding response by 16 October 2020.
6. On 14 October 2020 the Cabinet Office emailed the complainant and apologised for not having provided him with a response to his request. The complainant was informed that his case was *'still under consideration'* and that the Cabinet Office hoped to be able to provide him with a response shortly. On 23 October 2020 the complainant wrote to the Cabinet Office and advised that, *'as you clearly have no intention of responding to my request I will refer this to the Information Commissioner'*.
7. The complainant duly referred the matter to the Commissioner on 24 October 2020. The Commissioner wrote to the Cabinet Office on 12 November 2020 and asked them to provide a response to the request. On 26 November 2020 the Cabinet Office wrote to the Commissioner and apologised for the delay in providing a response to the complainant. The Cabinet Office provided the Commissioner with a copy of the belated response to the request, which had been provided to the complainant on that same date.
8. The Cabinet Office response to the request apologised to the complainant for the delay in replying and simply stated as follows:

'As you may be aware, on 20 November the Government published Sir Alex's findings on the Home Secretary's conduct and an accompanying government statement. They can be found at the link below'

[https://www.gov.uk/government/news/ministerial-code-investigation'](https://www.gov.uk/government/news/ministerial-code-investigation)
9. On 27 November 2020 the complainant wrote to the Cabinet Office and requested an internal review. He stated that, *'The Cabinet Office stonewalled my request for ten weeks, only responding after the Information Commissioner wrote and have provided a response which does not relate to the request'*.
10. Having not received an internal review by 29 January 2021, the complainant again contacted the Commissioner and asked him to intervene in the matter.
11. The Cabinet Office provided the complainant with their internal review on 3 February 2021. The Cabinet Office stated that, *'in your request for an internal review you state that our response does not relate to your request but you do not explain why you consider the response should be reviewed'*. The review found that section 21 had been correctly applied to the request, although the Cabinet Office response of 26 November

2020 had not explicitly stated that exemption. The Cabinet Office apologised for the length of time which the complainant had waited to receive a response to his request and stated that, *'at the point you received a reply the information you requested was published in the public domain and therefore Section 21 applied and we referred you to where you could find the information requested'*.

12. On 3 February 2021 the complainant wrote to the Cabinet Office and stated that his request had been very clear:

'After delaying for 10 weeks the Cabinet Office eventually pointed me at a press release written by an unknown author. That is very clearly not the information I requested and I assume this was a deliberate attempt to prevent disclosure. 20 weeks after I first requested the information, the Cabinet Office refused it under s.21. Section 21 allows a public authority to withhold information which is reasonably accessible to the applicant. I can confirm I do not have access to the full unredacted copy of this report which I requested in September 2020. Please let me know where I can download a copy'.

13. Unusually, the Cabinet Office provided the complainant with a second internal review on 9 March 2021 (this second internal review post-dated the complainant's complaint to the Commissioner). The Cabinet Office again provided the complainant with a link to the findings of Sir Alex Allan, the Prime Minister's (former) Independent Adviser on Ministerial Standards, on the Home Secretary's conduct and an accompanying Government statement. They advised that Sir Alex's findings had been published in full and the link contained the full findings and not a summary. The Cabinet Office stated that they were therefore satisfied that the complainant's request had been answered appropriately.

14. The Cabinet Office then stated that:

'There is no such document which can be described as a report carried out by Helen MacNamara. However, if you mean that you would like to obtain the fact finding work of the Cabinet Office, we can confirm that this is material held by the Cabinet Office but it is not possible to provide you with this information for the following reasons'.

15. The Cabinet Office went on to advise that information held relating to the investigation was exempt from disclosure under section 31(1)(g) of the FOIA, and that the purpose which would be prejudiced would be that at section 31(2)(b), ascertaining whether any person is responsible for any conduct which is improper. This includes ascertaining whether or not conduct falls below standards of proper conduct set for public office holders, MPs, ministers or civil servants as set out by the ministerial, special adviser and civil service codes.

16. The Cabinet Office stated that:

'The effectiveness of the investigation process is maintained by the understanding among those who participate in it that any information which they provide relating to the conduct under investigation is kept in confidence. It is vital that participants provide their information freely and openly in an environment where they can trust that their information will not be disclosed. Due to this being a high profile matter, and the department and minister involved, it would be possible to assume the identity of individuals. If participants did not trust that their information would be kept in confidence then it would deter them from coming forward and cooperating with any future investigations (and investigations in relation to Ministers, particularly where individuals find it difficult to come forward). This would be likely to prejudice the exercise of the Cabinet Office function in investigating ministerial conduct and, it follows, would undermine its maintenance of the various legal requirements about confidentiality of information. The release of information into the public domain in connection with an internal investigation would have a serious impact on all future investigations across Government'.

17. The Cabinet Office also contended that the disclosure of the information requested would be likely to have a prejudicial effect more generally on future investigations across government. They stated that, *'the value of investigations rely on discretion, full cooperation and frankness from individuals involved. 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'.*
18. With regard to the public interest test, the Cabinet Office stated that there is a general public interest in disclosure of information and recognised that openness in government may increase public trust in and engagement with the Government. The Cabinet Office also took into account *'that the investigation regarding the Home Secretary received significant media coverage means that there is a public interest in this matter'.* However, the Cabinet Office contended that just because the investigation had received significant media coverage it did not automatically mean that there is a public interest in disclosing the requested information.
19. The Cabinet Office stated that they had also taken into account the 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 ministerial conduct. The Cabinet Office contended that *'if investigations into ministerial conduct were undermined and their effectiveness compromised as a consequence, it could result in conduct not being appropriately addressed, which would not be in the public interest'.*

20. Stating that there was a clear public interest in there being confidence in these investigative processes, and taking into account all of the circumstances of the case, the Cabinet Office concluded that the public interest balance favoured withholding the requested information.
21. The Cabinet Office advised that information held relating to the investigation was also being withheld under section 40(2)(third party personal data) and section 41 (information provided in confidence) and provided detailed explanations for the application of these additional exemptions. The second internal review also advised the complainant that *'the exemption at Section 21 was properly applied in the context of your initial request'*.

Scope of the case

22. The complainant contacted the Commissioner on 3 February 2021 to complain about the way his request for information had been handled.
23. At the point of complaining to the Commissioner the complainant had not been provided with the detailed second internal review of the Cabinet Office, which confirmed the application of the above exemptions to his request.
24. In submissions to the Commissioner, the Cabinet Office accepted that it was not appropriate to rely on section 21 (information reasonably accessible to the applicant by other means) in their second internal review of 9 March 2021, and withdrew their reliance on this exemption.
25. The scope of the Commissioner's investigation has been to determine whether the Cabinet Office correctly applied the aforementioned exemptions to the complainant's request.
26. During the course of his investigation, the Commissioner had sight of the information within scope of the complainant's request and withheld by the Cabinet Office.
27. The Cabinet Office provided the Commissioner with detailed submissions in support of their position. Some of the information provided in the submissions was sensitive and is therefore contained in a Confidential Annex to this notice.

Reasons for decision

Section 31: Law enforcement

28. Section 31(1)(g) of the FOIA states that information is exempt information if its disclosure under the 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).
29. In submissions to the Commissioner, the Cabinet Office confirmed that the relevant purpose in this case is that at section 31(2)(b) – the purpose of ascertaining whether any person is responsible for any conduct which is improper.
30. Asked to explain on what basis the Cabinet Office has the authority to undertake the aforementioned purpose, the Cabinet Office advised as follows:

'Upon taking office, each Prime Minister draws up a Ministerial Code. The Cabinet Office authority to undertake the fact finding comes from that Code and the Prime Minister. Specifically, if there is an allegation about a breach of the Ministerial Code which the Prime Minister feels, having consulted the Cabinet Secretary, warrants further investigation, he may ask the Cabinet Office to investigate the facts of the case. The Prime Minister may also refer the matter to the independent adviser on Ministers' interests.

The Ministerial Code is a guidance document for Ministers which sets out broad principles and guidance for Ministers on how they should act and arrange their affairs in order to meet the high standards of behaviour expected of them. It is for the Prime Minister alone to enforce the Code. Ministers are appointed by the Prime Minister and must retain the confidence of the Prime Minister and he is the ultimate judge of the standards of behaviour expected of his Ministers, whether they have fallen short of those standards and the appropriate consequences for any breach of those standards. The decisions under the Code are for him and him alone to take as he sees fit in the circumstances of the case. As such, the Prime Minister must be in a position to exercise his judgement on any question of Ministerial conduct with the benefit of the fullest possible information. These are questions that may affect the composition of Her Majesty's Government, which are of obvious importance and which it is his constitutional responsibility to determine'.

31. The Cabinet Office stated that in relation to the bullying allegations made against the Home Secretary, the Prime Minister asked the Cabinet Office to investigate and establish the facts. The then Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office, Michael Gove MP, confirmed this in a statement to the House of Commons on 2 March 2020. Sir Alex Allan, the then Independent Adviser to the Prime Minister on Ministerial Standards, was asked to provide advice, having considered the Cabinet Office fact finding, to the Prime Minister in relation to the Home Secretary's adherence to the Ministerial Code.

32. Noting that section 31 can be claimed by any public authority, and not just those with law enforcement functions, and that the function in section 31(1)(g) does not have to be statutory one, the Cabinet Office confirmed that for the purpose of section 31(1)(g) of the FOIA, the relevant function in this matter is the function which the Cabinet Office has to investigate complaints relating to ministers' conduct in order to assist the Prime Minister in determining conduct matters raised under the Ministerial Code.
33. In order to engage a prejudice based exemption such as section 31, there must be the likelihood that disclosure would, or would be likely to, cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption:
- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance, and:
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
34. In relation to the lower threshold ('would be likely') the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility. Rather, there must be a real and significant risk. The Commissioner considers that the higher threshold places a stronger evidential burden on a public authority to discharge. The chances of the prejudice occurring should be more probable than not.
35. Consideration of the exemption at section 31 is a two-stage process. Even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
36. In submissions to the Commissioner, the Cabinet Office maintained their position, as set out in their detailed second internal review of 9 March 2021, that the disclosure of information held within scope of the request would be likely to prejudice the exercise of the Cabinet Office's function

of conducting investigations in order to identify who (to use the terminology of the exemption) may be responsible for improper conduct.

37. In addition to their detailed rationale set out in the second internal review of 9 March 2021, the Cabinet Office provided the Commissioner with detailed submissions as to how and why disclosure of the withheld information would prejudice the relevant function of the Cabinet Office.
38. The Cabinet Office stated that it is of significant importance that the Cabinet Office and the Independent Adviser are able to conduct an effective investigation into allegations about a Secretary of State or any Minister under 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 also essential to the proper functioning of the highest levels of Government and to the Prime Minister's ability to exercise his constitutional function in determining the composition of the Government that this opportunity exists and can operate in the most effective way possible. The Cabinet Office stated that, *'the interests that are at stake in the Prime Minister's judgement rank very high'*.
39. The Cabinet Office stated that, *'the effectiveness of such investigations depends on people being willing to come forward and participate, and then on their full cooperation and frankness. The ability to give assurances to individuals that they will remain anonymous and that anything they say will remain confidential is important, both in securing their participation and in giving them the confidence to speak candidly, without fear or reprisals should their evidence become known'*. They contended that this is particularly important in the context of the civil servant and Ministerial relationship, which relies on Minister's retaining confidence in civil servants. The Cabinet Office highlighted that the difficulty in feeling able to come forward was recognised and publicly acknowledged by the Prime Minister himself in his written statement of 20 November 2020, *'The Prime Minister takes this issue very seriously and recognises that it is always difficult for individuals to come forward and raise concerns and is grateful to those who have done so'*¹.
40. The Cabinet Office contended that without the ability to give such assurances, there is a real risk that the effectiveness of the process would be seriously impeded, individuals would be less likely to agree to participate and, even if they did, evidence would be highly unlikely to be forthcoming in anything like the same form or with the same candour. The Cabinet Office stated that *'it is particularly important to preserve*

¹ [Ministerial Code investigation - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/ministerial-code-investigation)

relations between Ministers and between Ministers and civil servants which are dependent on Minister's retaining trust and confidence and in civil servants'.

41. The Cabinet Office contended that if the information were disclosed there is a real risk that it would seriously damage the Independent Adviser and the Cabinet Office's abilities to conduct effective investigations under the Ministerial Code in the future, because potential participants would be aware that their contributions could be made public as a result of disclosure in any related legal proceedings. The Cabinet Office stated that *'the value of investigations relies on discretion, full cooperation and frankness from individuals involved'* and suggested that disclosure would give individuals who are questioned as part of that process reason to believe that the information they provide might be published inappropriately in response to a request for information. The Cabinet Office contended that this could make them more circumspect and less open in their responses, damaging the effectiveness of any future investigation.
42. The Cabinet Office confirmed that they were relying on the lower threshold of prejudice, i.e. that disclosure of the withheld information would be likely to prejudice the exercise of the Cabinet Office's function of conducting investigations in order to identify who may be responsible for improper conduct.

Commissioner's considerations

43. 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.
44. As the lead Ministerial department which supports the Prime Minister and ensures effective running of government, the Commissioner is satisfied that the Cabinet Office has been entrusted with a function to support the Prime Minister in deciding whether any Secretary of State or Minister is responsible for any conduct which is improper and which is a breach of the Ministerial Code.
45. The Commissioner has also considered whether the Cabinet Office has been entrusted with the function of investigating any alleged breaches of the Ministerial Code, for the purpose of 'ascertaining' whether any Minister'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.

46. The Ministerial Code is the set of rules and principles which outline the standards of conduct by government ministers. There are separate codes for ministers for the UK government and devolved administrations in Scotland, Wales and Northern Ireland. The codes all include the 'overarching duty' of ministers to comply with the law and to abide by the 'Seven Principles of Public Life, a set of ethical standards which apply to all holders of public office.
47. The UK government Ministerial Code predates the others and it mirrors constitutional rules and conventions set out in other documents, including the Cabinet Manual and civil service code. As such, it has no legal basis, though there is increasing pressure for it to be placed on a statutory footing².
48. In their review of the effectiveness of standards regulation in England, published in June 2021, the Committee on Standards in Public Life findings noted that the Ministerial Code serves a dual purpose; *'it exists not only to ensure the highest standards of conduct in government as a matter of procedure, but also to give the public confidence that ministers will uphold high standards and will be held to account if they do not'*³. The Committee noted that under current arrangements, *'the Independent Adviser, on examining the facts of a case, reports to the Prime Minister on whether or not they believe a minister's actions amount to a breach of the Code. It is the Prime Minister, however, who makes the final determination on whether or not a breach of the Code has occurred'*.
49. As the Prime Minister chairs the Cabinet and selects its Ministers, it is a decision for him or her alone as to whether any Minister has breached the Ministerial Code. However, the Cabinet Office will often carry out an investigation in any instance where there are allegations or concerns about a Minister's conduct, to furnish the Prime Minister with the factual background prior to him/her making a decision in the matter. Whilst the Cabinet Office itself does not have the power to determine issues of alleged improper conduct on the part of a Minister, as the lead Ministerial department which supports the Prime Minister and ensures effective running of government, the Commissioner is satisfied that the Cabinet Office can rely on sections 31(1)(g) and 31(2)(b) in this case.

² [Ministerial code | The Institute for Government](#)

³ [Committee on Standards in Public Life - Standards Matter 2 - Report of Findings.pdf \(publishing.service.gov.uk\)](#)

50. In *WS v (1) Information Commissioner and (2) North Lancashire PCT* [2013] UKUT 0181 (AAC), Judge Charles Turnbull, held that, in respect of section 31 of the FOIA:

'The words 'law enforcement' were, in my judgement, intended as a broad summary or indication of the scope of and reason for the exemptions in section 31. It is plain from reading the activities listed in s.31(1), and the purposes specified in s.31(2) that they include activities and purposes which go beyond actual law enforcement in the sense of taking civil or criminal or regulatory proceedings. They include a wide variety of activities which can be regarded as in aid of or related to the enforcement of (i) the criminal law, (ii) any regulatory regime established by statute, (iii) professional and other disciplinary codes, (iv) standards or fitness and competence for acting as a company director or other manager of a corporate body (v) aspects of the law relating to charities and their property and (vi) standards of health and safety at work'.

51. The Commissioner considers that the Ministerial Code, though lacking statutory force, constitutes the professional and disciplinary code governing the conduct of Ministers (albeit one which is enforceable by the Prime Minister alone). As such it comes within the ambit of section 31(1).
52. Improper conduct relates to how people conduct themselves professionally. For conduct to be improper, it must be more serious than simply poor performance. It implies behaviour that is unethical. The Commissioner will generally expect there to be a formal code of conduct that members of a profession are expected to adhere to and a recognised definition of improper conduct. Although in many cases such a code is likely to be supported by statute, this is not a prerequisite. As noted above, the Ministerial Code does not have statutory force and improper conduct on the part of a Minister in potential breach of the Ministerial Code can take many forms (i.e. in the present case, allegations of bullying). Section 31(2) applies if disclosure of information would, or would be likely to, prejudice a public authority's ability to ascertain whether elements of the code falling within the definition of improper conduct have been breached.
53. The Commissioner has considered whether disclosure of the withheld information 'would be likely' to prejudice the exercise by the Cabinet Office of its function for the purpose of ascertaining whether any person is responsible for any conduct which is improper.

54. 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 interests⁴.
55. The Commissioner notes that the complainant made his request on 15 September 2020. The Cabinet Office inquiry into the allegations concerning the Home Secretary had begun in March 2020 and was conducted by Helen MacNamara, then Director General of Propriety and Ethics. It was reported in the media that the inquiry was completed at the start of summer 2020 and forwarded to Number 10 for the attention (and decision) of the Prime Minister⁵. On 20 November 2020 the Government published the findings of Sir Alex Allan and an accompanying Government statement confirming that *'the Prime Minister's judgement is that the Ministerial Code was not breached'*⁶.
56. Therefore, whilst it is possible that the Cabinet Office inquiry into the bullying allegations may have been concluded by the time of the complainant's request, the outcome of the inquiry and the Prime Minister's decision had not been made public at that point (15 September 2020). Consequently, the Commissioner considers that disclosing the requested information at that time would have posed a significant risk to the investigation into whether or not the Home Secretary's alleged behaviour had breached the Ministerial Code.
57. The Commissioner recognises and accepts that the effectiveness of such investigations into serious allegations made against a Minister depends on individuals being willing to come forward and participate, and to do so cooperatively and with candour and frankness. The Commissioner recognises and appreciates that key to such cooperation is the ability to give assurances to individuals that they will remain anonymous and that their evidence will remain confidential. The Commissioner accepts the Cabinet Office contention that this is particularly important in the context of the civil servant and Ministerial relationship, which relies on Ministers retaining confidence in civil servants. They noted that the Prime Minister had himself publicly acknowledged and recognised the difficulty in feeling able to come forward, as referenced in the aforementioned government statement of 20 November 2020. *'The Prime Minister takes this issue very seriously and recognises that it is*

⁴ John Connor Press Associates Limited v The Information Commissioner EA/2005/0005

⁵ [Priti Patel bullying inquiry: why was it held and what did it find? | Priti Patel | The Guardian](#)

⁶ [Ministerial Code investigation - GOV.UK \(www.gov.uk\)](#)

always difficult for individuals to come forward and raise concerns and is grateful to those who have done so'.

58. Without the ability to give such assurances, the Commissioner agrees that there is a real risk that the effectiveness of the process would be seriously impeded, in that individuals would be less likely to agree to participate, and even if they did, their evidence would be unlikely to be as forthcoming or have the same degree of candour. The Commissioner recognises and accepts that the value of investigations relies on discretion, full cooperation and frankness from the individuals involved. The Commissioner considers that disclosing the requested information at the time of the complainant's request would have ran the real risk of undermining the effectiveness of future such investigations. There would be a real risk that officials and politicians, particularly those still serving in government, would not provide information as freely or as openly in similar future enquiries/investigations if they felt that the information provided was likely to be revealed.
59. For the above reasons, the Commissioner finds that the Cabinet Office was entitled to engage the exemption at sections 31(1)(g) and 31(2)(b) FOIA.

Public interest test

60. 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.

Complainant's position

61. In his complaint to the Commissioner, the complainant contended that *'the government are determined to suppress this report, which caused the resignation not of the guilty party, the Minister who broke the Ministerial Code, but of its author who dared to tell the truth'*. Stating that democracy dies in darkness, the complainant contended that *'it is of paramount public interest that the report into Priti Patel's alleged bullying is released into the public domain as soon as possible'* and he called for the Commissioner to do everything possible to achieve that end.
62. In submissions to the Commissioner, the complainant stated that:
- 'It has been suggested that Priti Patel's behaviour breached the Ministerial Code. Prime Minister Johnson, the ultimate arbiter of this matter, has judged the Code was not breached. However, there is a very clear conflict of interest when the government 'marks its own homework' and refuses to disclose the evidence on which it is based. In*

the words of Pericles, 'Although only a few may originate a policy, we are all able to judge it'.

63. The complainant contended that there is considerable public interest in understanding:

- *'Whether the government are, in general, acting lawfully in the way they respond to requests for information;*
- *The evidence on which the Prime Minister concluded that a member of his government did not breach the Ministerial Code;*
- *The decision making behind using £370,000 of taxpayers money to avoid a Tribunal hearing which would also have placed in the public domain the allegations against the Secretary of State⁷.*

64. The complainant stated that *'democracy dies in darkness, and the public have a right to know the full facts about how its elected representatives behave'.*

Cabinet Office position

65. In submissions to the Commissioner, the Cabinet Office maintained their position as confirmed in their detailed second internal review of 9 March 2021. The Cabinet Office recognised that there is a general public interest in disclosure of information and that openness in government may increase public trust in and engagement with the Government. Addressing the specific information requested, the Cabinet Office stated that:

'We also take into account that the investigation regarding the Home Secretary received significant media coverage, meaning there is some interest in this matter. However, we consider that just because the investigation has received significant media coverage it does not automatically follow that there is a public interest in disclosing the requested information. We consider that the public interest is satisfied by the publication of the findings of Sir Alex Allan and the Prime Minister's decision given the detail that was set out in each of those documents'.

⁷ This references newspaper reports on 9 July 2021 post-dating the complainant's request in which it was reported that the Home Office had spent more than £370,000 to settle a claim for constructive dismissal brought by former Home Office Permanent Secretary, Sir Philip Rutnam

66. The Cabinet Office also advised that they had taken into account the 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 ministerial conduct. The Cabinet Office contended that if investigations into Ministerial conduct were undermined and their effectiveness compromised as a consequence, it could result in conduct not being appropriately addressed, which would not be in the public interest. The Cabinet Office stated that the disclosure of the withheld information would, as they had argued above, *'prejudice the investigation process and the Cabinet Office's ability to investigate whether any person may be responsible for improper conduct. There is a clear public interest in there being confidence in these investigative processes'*.
67. In respect of the complainant's call to see the evidence on which the Prime Minister concluded that the Home Secretary did not breach the Ministerial Code, the Cabinet Office stated that the Prime Minister's decision as published makes clear the matters he took into account when reaching his decision. The Cabinet Office contended that *'the fact that the Prime Minister did not determine that the Home Secretary had breached the code does not undermine the integrity of the investigation process'*.
68. The Cabinet Office also contended that if the requested information were to be disclosed, *'then there is a real risk that it would seriously damage the Independent Adviser and the Cabinet Office's abilities to conduct effective investigations under the Ministerial Code in the future, because potential participants would be aware that their contributions could be made public as a result of disclosure in any related legal proceedings'*.
69. The Cabinet Office contended that the public interest factors favouring maintaining the exemption carry very significant weight, as *'they affect the effectiveness of the Prime Minister's ability to assess Ministerial conduct and decide whether a minister accused of misconduct retains the Prime Minister's confidence and should continue to serve in Her Majesty's Government'*.
70. As noted, some of the information provided by the Cabinet Office in support of this exemption was sensitive and cannot be referenced in this notice. This information is contained in the Confidential Annex.
71. Taking into account all the circumstances of the case, the Cabinet Office maintained that the balance of the public interest favoured withholding the information requested.

Commissioner's consideration

72. The Commissioner considers that the public interest in disclosure of the withheld information in this matter carries a greater value and weight

than the 'some interest' ascribed to it by the Cabinet Office. The Commissioner is not aware of a previous instance whereby the decision of the Prime Minister of the day following an investigation into alleged improper conduct by a Minister has differed so markedly from the advice of his/her Independent Advisor on Ministerial Standards.

73. In an article for the Institute for Government on 20 November 2020, 'The Handling of the Priti Patel Bullying Inquiry Has Fatally Undermined the Ministerial Code'⁸, Dr Catherine Haddon observed:

The Prime Minister's chosen defence for his decision, and the fact that it is so clearly against the advice of his Ministerial Code adviser, is extraordinary. Every Ministerial Code investigation brings its own drama and there have been past inquiries where the conclusions were finely balanced, but it is hard to think of one where a prime minister has concluded differently from his own ministerial standards adviser, and said so.

It is the manner of Johnson's defence that will now cause even greater problems. Patel has kept her job because Boris Johnson does not believe she broke the Code. As such, and by disagreeing with Sir Alex's verdict, the Prime Minister is effectively deciding his own interpretation of what constitutes bullying. He has opened up much wider questions about how the Government handles bullying complaints and whether the Ministerial Code is fit for purpose as a check on the conduct and actions of ministers'.

74. The Commissioner entirely recognises that it is only the Prime Minister who has the power to decide whether a minister has breached the Ministerial Code. However, where the decision of the Prime Minister is strikingly different than the advice of his independent advisor, the matter clearly carries a strong and objective legitimate public interest, as opposed to being information that the public might be interested in.
75. 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. That is especially the case where, as here, there is a history of an inconsistent approach to compliance with the behavioural standards expected of Ministers by that Minister.

⁸ [The handling of the Priti Patel bullying inquiry has fatally undermined the Ministerial Code | The Institute for Government](#)

76. On 8 November 2017, Priti Patel, then Secretary of State for International Development, resigned from Prime Minister Theresa May's government after it was revealed that she had had unofficial meetings with Israeli ministers, business people and a senior lobbyist. The Guardian newspaper reported at the time that it appeared that Ms Patel *'had broken ministerial rules when the BBC disclosed on Friday that she met politicians and businessmen from Israel while on holiday in August without informing departmental officials, the FCO (Foreign and Commonwealth Office) or Downing Street in advance'*⁹. Ms Patel resigned after it became clear that she had not been entirely candid with Mrs May about the number and extent of the unofficial meetings when she was questioned about the same by the Prime Minister.
77. Whilst the Commissioner entirely accepts that it is only the Prime Minister who has the power to decide whether a minister has breached the Ministerial Code, the Commissioner considers that the specific wording of Ms Patel's own resignation letter makes perfectly clear that she herself considered her conduct fell below expected standards and that is also accepted and reflected in Mrs May's response.
78. 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'*.
79. 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.
80. On 24 July 2019, Ms Patel returned to the Cabinet when she was appointed Home Secretary by incoming Prime Minister Boris Johnson. Two days later the Guardian newspaper reported that Ms Patel was *'facing allegations of breaching the ministerial code for the second time in her parliamentary career'* for accepting a position as Strategic Adviser with Viasat, a California-based global communications company, before

⁹ [Priti Patel's resignation letter and Theresa May's response – in full | Priti Patel | The Guardian](#)

seeking advice from the Advisory Committee on Business Appointments (ACOBA)¹⁰. The newspaper reported that Ms Patel did not approach ACOBA for advice on the Viasat appointment until June 2019, a month *after* she had started the role. The newspaper reported that Jon Trickett, then Shadow Minister for the Cabinet Office, had written to the Prime Minister, calling for an investigation into whether Ms Patel had broken the Ministerial Code and calling for her dismissal if that was found to be the case. This matter was the subject of the Commissioner's decision in IC-46882-Q9V9.

81. 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.
82. 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 (in any of the instances cited), that determination being for the Prime Minister alone.
83. 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.
84. 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 decision¹¹.
85. On 29 February 2020, Sir Philip Rutnam resigned from his post as Home Office Permanent Secretary, alleging that he had been subject to a '*vicious and orchestrated campaign*' for challenging alleged

¹⁰ [Priti Patel accused of breaching ministerial code for second time | Priti Patel | The Guardian](#)

¹¹ [IN THE UPPER TRIBUNAL \(publishing.service.gov.uk\)](#)

mistreatment of civil servants by the Home Secretary. 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 26 November 2020, there was a strong and legitimate public interest in transparency and accountability as to the outcome of the inquiry into the bullying allegations against the Home Secretary.

86. However, the Commissioner is mindful that several days earlier, on 20 November 2020, that necessary and essential transparency and accountability had to a considerable extent been appropriately met by the Government having published Sir Alex Allan's advice in full and, crucially, the Prime Minister's decision in respect of Ms Patel's conduct.
87. Sir Alex was clear that he found that Ms Patel had not consistently met the high standards expected of her under the Ministerial Code. The accompanying Government statement was equally clear that as the arbiter of the Ministerial Code, *'having considered Sir Alex's advice and weighing up all the factors, the Prime Minister's judgement is that the Ministerial Code was not breached'*¹².
88. Whilst the Prime Minister's decision caused much political and media controversy, differing as it did from the findings of his independent adviser, it provided the necessary outcome to the matter and satisfied much of the public interest in transparency and accountability which had been absent at the time of the complainant's request on 15 September 2020.
89. The Commissioner recognises and accepts that there are also public interest grounds for disclosure of the information obtained or generated during the Cabinet Office investigation into the allegations made against the Home Secretary, especially since such information will have played a key role in the published findings of Sir Alex.
90. A finding (even a contextualised one in this case) that a Secretary of State in one of the key offices of State had engaged in bullying behaviour of civil servants is clearly a very serious matter and manifestly improper conduct. Disclosure of the internal investigation information would provide further transparency and accountability in that it would place the independent adviser's findings and the Prime Minister's decision in an evidential context.

¹² [Ministerial Code investigation - GOV.UK \(www.gov.uk\)](https://www.gov.uk/ministerial-code-investigation)

91. However, the Commissioner considers that there was a strong public interest in not undermining the effectiveness of investigations across government, particularly in relation to sensitive matters such as complaints of serious improper conduct on the part of a Minister. The Commissioner recognises that the effectiveness of such investigations depends on the willingness of individuals to come forward and provide information which is frank and candid.
92. The Commissioner agrees with the Cabinet Office contention that the ability to give assurances of confidentiality to individuals is important, both in securing their cooperation and encouraging them to speak candidly, without the fear of reprisals should their evidence become known. The Commissioner accepts that without the ability to provide such assurances, there is a real risk that the effectiveness of the investigation process would be seriously impeded, with individuals being less likely to agree to participate, or doing so with less candour and detail than would otherwise be the case.
93. The Commissioner is mindful that the withheld information was very recent at the time of the request, and this lent a particular sensitivity to the information and strengthened the case for maintaining the exemption. The Commissioner also accepts that disclosure of the information in this case would be likely to have wider effects and consequences, in that there is a real risk that it would seriously damage the Independent Adviser and the Cabinet Office's abilities to conduct effective investigations under the Ministerial Code in future. The Commissioner recognises and accepts that the value of investigations, as the Cabinet Office have contended, *'relies on discretion, full cooperation and frankness from individuals involved'*. Any action which would present a real risk of prejudicing such sensitive investigations, would not be in the public interest.
94. Though the Commissioner considers that the withheld information carries a substantial and legitimate public interest in transparency and accountability, particularly in respect of the conduct of a Secretary of State whose history of adherence to the standards expected of Ministers has been called into question, he considers that this very important public interest was appropriately and proportionately met by the disclosure of the full advice of the Independent Adviser and the Prime Minister's decision. The publication of both allows the public to have their own informed views on the matter. This crucial transparency and accountability is what distinguishes this case from the Commissioner's recent decision in IC-46882-Q9V9, which also concerned a request for information about the Home Secretary and issues surrounding compliance with the Ministerial Code. As the Cabinet Office have recognised, *'the interests that are at stake in the Prime Minister's judgement rank very high'*.

95. The Prime Minister's decision attracted considerable scrutiny and public debate, particularly as to the fitness for purpose of the Ministerial Code, but the disclosure of the internal Cabinet Office investigation into this specific matter will not appreciably advance such wider and important public interest questions. By contrast, the Commissioner is satisfied that the disclosure of information concerning a recent and highly sensitive matter would be likely to significantly and seriously prejudice the exercise of the Cabinet Office's (or other government department) function of conducting investigations into alleged improper conduct on the part of ministers. Such an outcome would clearly not be in the public interest.
96. For the above reasons, and taking into account information provided in confidence by the Cabinet Office, the Commissioner has concluded that on balance, at the time of the Cabinet Office's initial substantive response to the request, the public interest in maintaining the exemption outweighed the public interest in disclosure of the requested information.
97. Having found that the withheld information is exempt in its entirety under sections 31(1)(g) and 31(2)(b) of FOIA, the Commissioner has not considered the applicability of sections 41(1) and 40(2).

Section 10(1)

98. Section 1(1) of FOIA states that:

'Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) If that is the case, to have that information communicated to him'.

99. Section 10(1) of FOIA states that a public authority must respond to a request promptly and *'not later than the twentieth working day following the date of receipt'*.
100. The complainant made his information request to the Cabinet Office on 15 September 2020, but the Cabinet Office did not provide the complainant with a substantive response until 26 November 2020, more than two months later, following intervention from the Commissioner. The Cabinet Office therefore breached section 10(1) of FOIA.
101. The Commissioner recognises and appreciates the resource and staffing challenges posed to public authorities by the pandemic, and some

degree of delay in responding to some requests received at that time would be inevitable and not unreasonable. However, in this case the Cabinet Office response of 26 November 2020 simply directed the complainant to the publication of Sir Alex Allan's findings and the accompanying Government statement, which had been published six days earlier. That is to say, the Cabinet Office waited more than two months before information (though not the information requested by the complainant) happened to be published. This delay was therefore neither reasonable nor necessary. In submissions to the Commissioner the Cabinet Office accepted criticism of the delay and that this was in breach of section 10(1) of FOIA.

Other matters

102. In submissions to the Commissioner, the Cabinet Office stated that they *'did not rely on the section 21 exemption at the time of responding to the request'*, yet their internal review of 3 February 2021 found that this exemption was correctly applied to the request.
103. Whilst it is true that the Cabinet Office response of 26 November 2020 did not specifically cite section 21 (information reasonably accessible to the applicant by other means) it is clear that by referring the complainant to a link on the government website containing Sir Alex Allan's full findings and the accompanying Government statement, the Cabinet Office were in effect relying on section 21 to respond to the request.
104. The Commissioner recognises that the Cabinet Office have accepted that they should not have relied on section 21 in their second internal review of 9 March 2021. However, the Commissioner is critical of the Cabinet Office for relying on this exemption at all in this case.
105. The complainant's request was for *'a full copy of the investigation into harassment or bullying by Home Secretary Priti Patel carried out by Helen MacNamara and Alex Allan'*. In submissions to the Commissioner, the Cabinet Office advised that, *'In circumstances where (i) there was no information which could be described as an investigation carried out by Helen MacNamara and (ii) the term 'investigation' is sometimes used interchangeably with 'findings' (the descriptor applied to Sir Alex Allan's report as well as being 'advice' to the Prime Minister), the Cabinet Office considered that this request was not clear. By the time the request was answered, we considered that the request was best answered with reference to Sir Alex Allan's findings which by that stage had been published in full'*.

106. The Commissioner does not accept the Cabinet Office explanation. If the Cabinet Office considered the request to be unclear, then it was incumbent upon them to seek clarification from the complainant.
107. However, the Commissioner considers that no such clarification should have been needed in any event. At the time of the complainant's request it was publicly known that the Cabinet Office were conducting an investigation into the allegations concerning the Home Secretary and Helen MacNamara was Director General of Propriety and Ethics at that time. Ms MacNamara may not have been personally carrying out the investigation but her position was synonymous with the Cabinet Office in the context of the complainant's request.
108. Given that the complainant requested 'a **full** (Commissioner's emboldening) *copy of the investigation*', he considers that it should have been clear to the Cabinet Office that the complainant was seeking a copy of the Cabinet Office's internal investigation into the matter. Indeed, given that no information in respect of the outcome of the investigation had been published by the Government at the time of the complainant's request, he could not have been seeking any other information.
109. It is both disappointing and unsatisfactory that the subsequent Cabinet Office internal review of 3 February 2021 failed to identify the misapplication of section 21 to the request, especially as the complainant had notified the Cabinet Office (in his request for a review) that they had provided him with information (the link) which was not the information which he had requested. The defective initial response and internal review in this case suggest a lack of proper care and attention being applied to what was a clearly worded request (and which the Cabinet Office should have clarified with the complainant if they had been in any doubt).
110. However, the Commissioner recognises that without his intervention or prompting, the Cabinet Office undertook a second internal review of their initial poor response, which not only correctly identified the information which the complainant had requested, but provided very detailed and commendably clear arguments and rationale for the substantive exemptions applied in this case.

Right of appeal

111. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

112. 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.

113. 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
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