IN THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER) **Appeal No. UA-2024-000236-GIA NCN. [2025] UKUT 114 (AAC)**

On Appeal from the First-tier Tribunal (General Regulatory Chamber) (Information Rights) EA/2022/0253

BETWEEN

Appellant THE CABINET OFFICE

and

Respondent THE INFORMATION COMMISSIONER

BEFORE UPPER TRIBUNAL JUDGE WEST

Decided after an oral hearing on 4 December 2025: 28 March 2025

DECISION

The decision of the First-tier Tribunal dated 5 December 2023 (after an oral hearing on 26 October 2023) under file reference EA2022/0253 involves errors on a point of law. The appeal against that decision is allowed and the decision of the Tribunal is set aside.

The decision is remade.

The decision is that the Cabinet Office correctly applied s.36(2)(b)(i) and (ii) of the Freedom of Information Act 2000 to the withheld information, but that the public interest balance favours disclosure of the information.

The Cabinet Office is required to disclose the withheld information to the complainant, with all names redacted except the three individuals specified in the Confidential Annex to the decision notice of the Information Commissioner dated 4 August 2022, within 35 calendar days of the date of the issue of this this decision to the parties.

This decision is made under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

Representation: Mr Jason Coppel KC, counsel, and Mr Leo Davidson, counsel, for the Appellant
(instructed by the Government Legal Department)

Mr Will Perry, counsel, for the Respondent
(instructed by the Information Commissioner)

REASONS

Introduction

1. This is an appeal, with my permission, against the decision of the First-tier Tribunal (Judge Chris Hughes, Tribunal Members Emma Yates and Stephen Shaw) which sat on 26 October 2023 and which issued its decision on 14 December 2023.

2. In its decision the Tribunal dismissed the appeal of the Cabinet Office from the decision of the Information Commissioner ("the ICO") dated 4 August 2022 to the effect that the Cabinet Office had correctly applied s.36 of the Freedom of Information Act 2000 ("FOIA") to the withheld information which was the subject matter of a request for information dated 3 August 2019, but that the public interest balance favoured disclosure of the information.

3. The ICO required the Cabinet Office, within 35 calendar days of the date of the decision notice to disclose the withheld information to the complainant, with all

names redacted, except the three individuals specified in the Confidential Annex to the decision notice.

4. The request sought information concerning the circumstances in which the then Home Secretary, Mrs Priti Patel MP, had accepted a position as strategic adviser with Viasat, a California-based global communications company, before seeking advice from the Advisory Committee on Business Appointments ("ACOBA"). The Guardian newspaper alleged that she did not approach ACOBA for advice on the Viasat appointment until June 2019, a month *after* she had started the role and alleged that that was a breach of the Ministerial Code.

Background

5. In his decision notice of 4 August 2022 (IC-46882-Q9V9) the ICO explained that

> "5. 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'*[1]. 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.
>
> 6. On 24 July 2019, Ms Patel returned to the Cabinet when she was appointed Home Secretary by incoming Prime Minister Boris Johnson.
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> 7. The Ministerial Code[2] (last updated 23 August 2019) provides that, on leaving office, Ministers (and senior civil servants) must seek advice from the Advisory Committee on

[1] https://www.theguardian.com/politics/2017/nov/08/priti-patels-resignation-letter-and-theresa-mays-response-in-full

[2] [This was a link to the August 2019 version of the Ministerial Code]

Business Appointments (ACOBA) about any appointments or employment which they wish to take up within two years of leaving office, and that they must abide by that advice. ACOBA is a non-departmental public body, sponsored by the Cabinet Office. The Code is characterised as a code of honour. Thus, ACOBA has no power to compel former ministers either to seek advice before taking up appointments or to accept the advice given.

8. On 26 July 2019, 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 seeking advice from ACOBA[3]. 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.

9. 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.

10. It is apparent that the reportage in the Guardian is what prompted the complainant to make his information request in this case.

Request and response

11. On 3 August 2019, the complainant wrote to the Cabinet Office and requested information in the following terms:

> *'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*

[3] https://www.theguardian.com/politics/2019/jul/26/priti-patel-accused-of-breaching-ministerial-code-for-second-time

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'.

12. On the same date, the complainant sent a tweet, including the Cabinet Office's twitter handle, in the following terms:

'#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'.

13. The tweet referenced a link to the aforementioned article in the Guardian newspaper. As noted, The Ministerial Code requires ministers to consult ACOBA before taking on paid work for a period of two years after they leave office.

14. The Cabinet Office acknowledged receipt on 2 September 2019 but gave the date of the request as 23 August 2019. The complainant replied to the Cabinet Office on 2 September and advised them that his request was submitted on 3 August, not 23 August and that section 10 of the FOIA required a public authority to provide a response within 20 working days.

15. The Cabinet Office wrote to the complainant on 3 September 2019 and informed him that they had no record of receiving an FOI request from him directly. They confirmed that they received a copy of his request that was passed to them from ACOBA and had decided to log and process it as a direct request, even though they had not received direct correspondence from the complainant. The Cabinet Office confirmed that they would provide a response from the date that they received the request – 23 August 2019.

16. The complainant wrote back to the Cabinet Office and advised them that he submitted his request to ACOBA on 3 August 2019, and they had copied it to the Propriety and Ethics Team at the Cabinet Office on 6 August 2019. In addition, the complainant advised that he raised a similar

FOI request via Twitter on 3 August, which was copied directly to the Cabinet Office. He stated that it was the responsibility of organisations to monitor social media for FOI requests.

17. The Cabinet Office wrote to the complainant on 11 October 2019 and confirmed that they held information within scope of his request but that they considered that the information was exempt under section 36 (prejudice to the effective conduct of public affairs) of the FOIA. They advised that they needed further time to consider the balance of the public interest test.

18. On 31 January 2020, the complainant complained to the ICO about the failure of the Cabinet Office to provide him with a substantive response to his request.

19. The Commissioner wrote to the Cabinet Office on 10 February 2020 and requested that the Cabinet Office provide the complainant with the outstanding response within 10 working days. That correspondence was neither acknowledged nor responded to. The complainant contacted the Commissioner on 25 February 2020 and requested that the Commissioner issue a decision notice to ensure the Cabinet Office's compliance with the Act.

20. The Commissioner issued a decision notice (FS50906944)[4] on 4 March 2020, finding that the Cabinet Office received the complainant's request on 3 August 2019, as the request was clearly directed at an email address carrying the Cabinet Office's domain name and the fact that the complainant received an automated response.

21. The Commissioner noted that his guidance states that a 'reasonable' extension of time to consider the balance of the public interest attached to a request will normally be an additional 20 working days. In this case the Cabinet Office had had an additional six months to consider the request and the Commissioner was not aware of any circumstances which would be likely to justify such a lengthy delay. The Cabinet Office had been unable to offer any justification for the delay. The Commissioner found that the Cabinet Office had failed to complete their public interest test considerations within a reasonable timeframe and had therefore not complied with section 17(3) of the Act. The decision notice ordered the Cabinet Office to issue a

[4] https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617422/fs50906944.pdf

substantive response to the complainant within 35 calendar days.

22. The Cabinet Office subsequently provided the complainant with their substantive response on 23 March 2020. They informed the complainant that in relation to his request for information about *'Ms Patel's original breach of the Code'*, they did not hold any relevant information. The Cabinet Office did not rebut the complainant's assertion about Ms Patel's original breach of the Ministerial Code. In relation to Ms Patel's engagement with ACOBA, the Cabinet Office confirmed that they held some information within scope of the request.

23. The Cabinet Office advised that the information held was exempt from disclosure under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of the FOIA. The response provided no explanation as to why or how the exemption applied to the specific information requested and gave an entirely generic and inadequate consideration of the public interest test. This was particularly unsatisfactory, given that the Cabinet Office had taken more than six months to provide the response.

24. The Cabinet Office recognised that 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, the Cabinet Office stated that there was also a public interest argument in favour of non-disclosure of the information, *'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'.* Having weighed these competing interests, the Cabinet Office advised that they had concluded that the balance of the public interest lay in favour of withholding the information.

25. In addition to section 36, the Cabinet Office advised the complainant that 'some' of the information he had requested was exempt under section 40(2) (third party personal data) of the Act. The Cabinet Office stated that disclosure of the information would contravene the first data protection principle, which provides that processing of personal data is lawful and fair. The Cabinet Office stated that section 40(2) is an absolute exemption and they were not therefore obliged to consider whether the public interest favoured disclosing the information.

26. Finally, the response advised that 'some' of the information in scope of the request was exempt under section 21(1) (information reasonably accessible to the applicant) of the Act. The Cabinet Office explained that this exemption applied to correspondence from ACOBA to Ms Patel and provided him with a link to this information[5]. The Cabinet Office noted that this was an absolute exemption and therefore not subject to the public interest test.

27. On 16 April 2020 the complainant wrote to the Cabinet Office and advised that he was, 'most unhappy with the service I received in relation to my request'. He stated:

> *'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 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'.*

The complainant copied his request for an internal review to both the Commissioner and his Member of Parliament.

28. Having not received the internal review requested, the complainant notified the ICO and on 30 June 2020 the Commissioner wrote to the Cabinet Office and requested that, if they had not already done so, that they provide the

[5] https://www.gov.uk/government/publications/patel-priti-secretary-of-state-the-department-for-international-development-acoba-advice

complainant with the outstanding internal review within 10 working days.

29. On 19 July 2020, the complainant wrote to the ICO and advised that he had not received the internal review from the Cabinet Office and *'noting the previous action you have taken in relation to this matter, please will you advise what action the Commissioner proposes to take in relation to the Cabinet Office's continued breach of your directions'.* The complainant noted that he found it particularly concerning that the Cabinet Office's responsibility, as stated on their website, is to ensure the effective running of the government. He stated that*, 'I would simply be content with it ensuring the Government complies with its own legislation'.*

30. On 16 September 2020 the Cabinet Office provided the complainant with their internal review. The Cabinet Office apologised for the delay in response, which they advised was *'as a result of the case having been inadvertently overlooked for action'.* The Cabinet Office advised that they were 'improving processes within the relevant team to address this issue' and were sorry for any inconvenience that the late response had caused.

31. The Cabinet Office confirmed that they did not hold information relating to *'Ms Patel's original breach of the Code'* but that they did hold some information concerning Ms Patel's application to ACOBA. Again, the Cabinet Office did not rebut the complainant's assertion about Ms Patel's original breach of the Ministerial Code. They advised that ACOBA is a separate body to the Cabinet Office. The review provided no further explanation as to why the specific held information was exempt under section 36, simply stating that *'this is because the information you have requested would, or would be likely to, inhibit the free and frank provision of advice or exchange of views, or would otherwise prejudice the effective conduct of public affairs if disclosed'.*

32. There was no mention of the reasonable opinion of the qualified person, which is required in order to engage section 36, with the review simply stating that the decision to withhold the information under the exemption was 'appropriate'. Consideration of the public interest test was again generic, with no reference to the actual information requested. The review also upheld the applications of sections 40(2) and 21, noting that the complainant had written to advise that he had subsequently been able to access the link previously provided.

Scope of the case

33. The complainant contacted the Commissioner on 21 November 2020 to complain about the way his request for information had been handled.

34. Upon being advised of the Commissioner's investigation in this matter, the Cabinet Office contacted the Commissioner on 26 February 2021 to advise that in light of the concerns which had been raised about the handling of the complainant's request, they had decided to undertake a further internal review. The Cabinet Office noted that although an internal review of a decision under section 36 of the FOIA would not ordinarily be undertaken at Ministerial level, in light of the handling of the request to date, they had decided, exceptionally, that it was appropriate for an internal review to be undertaken at that level on this occasion.

35. The Cabinet Office subsequently wrote to the complainant with their further internal review on 25 March 2021. The (second) internal review maintained the decision of the first, in that it found that the information requested was exempt under section 36 and that some of the information in scope would in any event be withheld on the basis of sections 21 and 40(2). The Cabinet Office confirmed the outcome of the second internal review in submissions to the Commissioner on 26 March 2021.

36. In the course of his investigation, the Commissioner has had sight of the withheld information and detailed supporting submissions from the Cabinet Office.

37. The Commissioner considers that the scope of his investigation is to determine whether the Cabinet Office correctly withheld the requested information under the exemptions applied."

The Legislation

6. S.36 of FOIA provides, so far as material, that

> **"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, and

(b) information which is held by any other public authority.

(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—

(a) ...

(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".

The ICO's Reasons

7. Given that neither party now seeks to uphold the decision of the Tribunal (and both are agreed that it should be set aside and remade), it is appropriate to set out the original decision of the ICO at some length (some, but not all, of the salient paragraphs were set out in paragraphs 12 to 21 of the Tribunal's decision)

"39. In deciding whether section 36(2)(b) is engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one.

40. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the matter. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. Nor does the qualified person's opinion have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

41. In submissions to the Commissioner the Cabinet Office advised that the necessary reasonable opinion in this matter was originally sought from the then Minister for the Cabinet

Office, Oliver Dowden, on 6 February 2020 and was given on 12 February 2020. The Cabinet Office subsequently provided the complainant with their substantive request response on 23 March 2020.

42. However, as noted above, following notification of the Commissioner's investigation, the Cabinet Office, unusually, undertook a further internal review into their decision in this case, which included a second reasonable opinion being obtained from the qualified person. As the Commissioner's guidance notes, section 36 can still be engaged if the qualified person gives their reasonable opinion by the completion of the internal review.

43. In this case the Cabinet Office sought the reasonable opinion of the qualified person, Chloe Smith, the then Minister of State for the Constitution and Devolution on 11 March 2021, and the Minister gave her reasonable opinion on 12 March 2021. The Minister was provided with a rationale as to why section 36(2)(b) and (c) could apply and copies of the withheld information. The Minister's reasonable opinion was that the exemption was engaged as disclosure of the information in scope of the request would be likely to inhibit the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation, and would otherwise prejudice, or would be likely to otherwise to prejudice, the effective conduct of public affairs.

44. The Minister stated that:

> *'It is necessary that officials are able to consider and discuss arguments as to whether the requirements set out in the Business Appointment Rules and the Ministerial Code have been complied with in a particular case in a free and frank manner. Such free and frank discussions allow them to come to a position so that they may provide advice to Ministers. This is important when discussions relate to a serving Minister. Disclosure, or fear of disclosure, of such conversations may deter officials from taking part in these deliberations frankly, which is likely to be harmful to the quality of such discussions. I am satisfied that there is a real risk that this is likely to happen'.*

45. Having considered the content of the withheld information on the basis of this exemption, and taking into account the qualified person's above opinion, the Commissioner is satisfied that both sections 36(2)(b)(i) and (ii) are engaged to the withheld information. However, in

order for section 36(2)(c) to apply, the prejudice claimed must be different to that claimed under section 36(2)(b) (i.e. must 'otherwise prejudice')[6]. As the qualified person's opinion has not identified what 'other' prejudice (i.e. other than that covered by section 36(2)(b)), would be caused by disclosure of the withheld information, the Commissioner does not consider that section 36(2)(c) is engaged in this matter."

8. The ICO then considered the public interest test:

> *"Public interest test*
> 46. Section 36 is a qualified exemption and in accordance with the requirements of section 2 of the Act the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption cited outweighs the public interest in disclosing the information.
>
> 47. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to occur but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
>
> 48. It is important to be clear that the exemptions contained in section 36 focus on the processes that may be inhibited, rather than what is in the withheld information. The issue is whether disclosure would inhibit the processes of providing advice or exchanging views. In order to engage the exemption, the information requested does not necessarily have to contain views and advice that are in themselves notably free and frank. On the other hand, if the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could inhibit the provision of advice or the exchange of views."

9. He then set out the position of the Cabinet Office:

> *"The position of the Cabinet Office*

[6] ***Evans v Information Commissioner and the Ministry of Defence*** (EA/2006/0064).

49. In their further (second) internal review provided to the complainant on 25 March 2021, the Cabinet Office acknowledged that *'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'.*

50. However, the Cabinet Office contended that there was a very strong public interest in withholding the information which outweighed the public interest in disclosure of the same. The Cabinet Office stated that in considering the public interest test, it is important to note that the test is not necessarily the same as what interests the public. The Cabinet Office stated that, *'the fact that a topic is discussed in the media does not automatically mean there is a public interest in disclosing the information that has been requested'.* The Cabinet Office noted that this position is recognised and outlined by the ICO in the Commissioner's published guidance online. The Cabinet Office contended that, *'there is no compelling factor in this case that overrides the very strong public interest in maintaining the confidentiality of this information'.*

51. In submissions to the Commissioner the Cabinet Office acknowledged 'the existence of a public interest in disclosing the information in issue'. The Cabinet Office stated that the following considerations would support disclosure of the requested information:

• Ministers are public figures in respect of which certain standards of propriety are rightly expected. The importance of transparency is recognised, especially in relation to Ministers. It is important that Ministers remain accountable and that they conduct themselves in accordance with the rules and/or the Code. There is consequently a public interest in disclosing information around how allegations against Ministers were treated.

• Transparency in relation to the handling of complaints which may engage the Code may increase public confidence in the way in which such allegations are handled within government.

• The information in question is now almost two years old, and so might not be thought to relate to a live issue.

• Civil servants are expected to be impartial and robust when exchanging views and giving advice, and ought not to

be easily deterred from expressing their views by the possibility of future disclosure.

52. The Cabinet Office provided more detail as to the public interest arguments in favour of maintaining the exemption in their submissions to the Commissioner on 26 March 2021. The Cabinet Office stated that:

> • Appropriate weight should be accorded to the reasonable opinion of the Minister, who has relevant expertise and has determined that disclosure would be likely to prejudice the effective conduct of public affairs.
>
> • The present context is one where the chilling effect of disclosure is likely to be especially strong. This is because the information sought relates to the enquiries, deliberations, and advice of officials in relation to allegations of misconduct against very senior figures in government. The personal and political consequences of any finding of a breach of the Code can be severe. In those circumstances, the effect of disclosure in deterring civil servants from freely expressing their views on such acutely sensitive matters is readily understandable.
>
> • Any benefits to public confidence in the way in which such allegations are handled within government are likely to be outweighed by the cost of undermining the effective operation of the Code and, by extension, Ministerial accountability before the Prime Minister and Parliament.
>
> • The information sought relates to an issue which was live at the time that the request was made and remains so. The individual against whom the allegations are made remains a serving Minister, and so the operation of the Code remains in place as an important document setting out the standards of conduct expected of Ministers.
>
> • Much of the public interest in disclosure has been satisfied by the information that is already in the public domain, namely, the letters of advice published by the Advisory Committee on Business Appointments

(ACOBA) in respect of the Home Secretary's business appointments[7] .

53. In their submissions to the Commissioner, the Cabinet Office advised that the Ministerial Code sets out the standards of conduct expected of Ministers, offering guidance as to how Ministers should act and arrange their affairs in order to uphold those standards. The Code *'should be read against the overarching duty on Ministers to comply with the law and to observe the seven principles of public life'.* The Cabinet Office highlighted Paragraph 1.6 of the Code, which states that, *'Ministers are personally responsible for deciding how to act and conduct themselves in the light of the Code and for justifying their actions and conduct to Parliament and the public'.* Paragraph 1.6 also makes clear that the Prime Minister is the ultimate arbiter of any breach.

54. Pursuant to Paragraph 1.4 of the Code, if the Prime Minister considers that an allegation warrants further investigation, he may ask the Cabinet Office to investigate the facts of the case and/or refer the matter to the independent adviser on Ministers' interests. The Cabinet Office contended that it is 'accordingly essential that officials, and in particular officials in the Cabinet Office, are able to consider allegations about the conduct of Ministers, and to freely deliberate and accurately advise on such allegations'.

55. The Cabinet Office contended that in the event of the withheld information being disclosed, there would be the risk of a serious chilling effect, which would in turn, inhibit the free and frank provision of advice. The Cabinet Office stated as follows:

> • It is important that officials are able to assess the complaint and the facts relating to as to whether they engaged the BARs and/or the Code. Whenever a complaint is received it will be reviewed by the Cabinet Office. Some complaints may need further assessment in order to determine the position in relation to any alleged breach. It is only on the basis of such an assessment that officials can provide accurate advice.
>
> • Officials may be prejudiced in their future efforts to assess the complaint and the facts relating to as to

[7] https://www.gov.uk/government/publications/patel-priti-secretary-of-state-the-department-for-international-development-acoba-advice

whether they engaged the BARs and/or the Code as individuals are discouraged in future from candidly expressing their views or sharing relevant information.

• Disclosure of this information may also deter officials from recording information in respect of complaints of this nature in the future.

• The force of the chilling effect is especially acute in circumstances where the relevant information necessarily relates to the conduct of very senior figures in Government. Any diminution of the quality of the exchange of views and/or the provision of advice, through concerns that candid views would be publicly disclosed, would lead to a less informed picture with significant repercussions

• The implications of a chilling effect would be very serious. It would result in a less comprehensive and accurate assessment of the facts, with the consequence that officials would be less equipped to provide frank and effective advice in relation to any complaints alleging breaches of the Code and/or the BARs.

56. The Cabinet Office also contended that officials needed a 'safe space' to consider and respond to complaints alleging breaches of the Code and/or the BARs. The Cabinet Office stated that as the Code serves as broad guidance in setting out the standards of conduct expected of Ministers, *'it necessarily follows that complaints received will be broad in nature'.* The Cabinet Office advised that there is no prescribed process for dealing with complaints and that whilst all complaints which are received are reviewed, it will be clear that some complaints do not relate to the Code. The level of assessment that each complaint receives will depend on the nature of the complaint and *'determinations are made on a case by case basis as to the procedure to be followed'.*

57. The Cabinet Office advised that not every allegation would warrant full investigation; not every assessment or investigation will result in a finding of breach; and not every breach is of the same severity or nature. Further, the Cabinet Office stated that *'the Code makes clear that it is for Ministers to justify their actions and conduct to Parliament and the public, there may be circumstances where the Minister does that and so there is no investigation whatsoever'.* The Cabinet Office advised that where a breach is found, the consequences which may flow from a

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'.*

59. As noted in paragraph 45 above, as the Commissioner considers that the qualified person's opinion has failed to establish a prejudice *'otherwise'* than those covered by section 36(2)(b)(i) and (ii), he has not considered the Cabinet Office public interest arguments in respect of section 36(2)(c)."

10. The ICO then set out his position and his decision as follows:

"Commissioner's position
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'.*

61. 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. However, 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.

62. 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.

65. The Commissioner notes that in a previous decision *FS507959018* (October 2019)[8], he similarly recognised that there was a significant and strong public interest in knowing why a former Foreign Secretary (as the current Prime Minister was at the time of that request) with a particularly high public profile, failed to comply with his duty under the Ministerial Code and seek ACOBA's advice prior to taking up a position as a columnist for The Telegraph.

66. In that case the Commissioner noted that the public interest was particularly prominent as that was not the only

[8] https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2616091/fs50795901.pdf

case in recent years where a former senior government minister had been found not to have complied with the BARs. In April 2017, ACOBA noted that it was *'a matter of regret'* that former Chancellor of the Exchequer, George Osborne's appointment as Editor of the Evening Standard was announced on 17 March 2017, only four days after Mr Osborne had submitted his application to ACOBA and before the Committee had an opportunity to make the necessary enquiries, consider his application and provide its advice. In a letter to Mr Osborne (published on the ACOBA website) of 28 April 2017, the Committee stated that it was not appropriate for him to have signed his contract of employment with the Evening Standard on 20 March 2017, without having received the Committee's advice.

67. Given that the Cabinet Office have been clear with the Commissioner about the technical accuracy that there has never been a finding that the Home Secretary has committed a breach of the Ministerial Code, it is unfortunate and regrettable that the Cabinet Office was not similarly clear with the complainant. Both in their substantive response to the complainant of 23 March 2020 and subsequent internal review of 16 September 2020, the Cabinet Office informed the complainant that they held no information about *'Ms Patel's original breach of the Code'.* By omitting the important word *'alleged'*, the Cabinet Office arguably impliedly accepted that there had been a previous breach of the Code by Ms Patel (which was the complainant's belief). The Cabinet Office could and should have made clear to the complainant that they held no such information because Ms Patel had never been found to be in breach of the Ministerial Code (i.e. no such information could be held).

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[9].

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,

[9] https://assets.publishing.service.gov.uk/media/6273a6ec8fa8f57a41d53ee9/UA_2020_000324_000325_GIA.pdf

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.

75. In supplemental submissions to the Commissioner, the Cabinet Office clarified the apparent contradiction between their having stated that *'the information in question is now almost two years old, and so might not be thought to relate to a live issue',* and *'the information sought relates to an issue which was live at the time that the request was made and remains so'.*

76. The Cabinet Office stated that their reference to the issue remaining live was in the sense that the Minister in question is a serving minister and that has a *'live'* and direct impact on those providing the advice in this case as well as the future chilling effect. In respect of their second statement, the Cabinet Office advised that *'we were simply making the point, in relation to the public interest test, that the matters specific to the held information/complaint were arguably not under live consideration'.*

77. In respect of the issue which was central to the complainant's request, namely, Ms Patel's alleged breach of the Ministerial Code in failing to notify ACOBA before taking up her role at Viasat, the Cabinet Office informed the Commissioner that the outcome/response in respect of the complaint which was made to the Prime Minister by Mr Trickett was not within the scope of the current request. The Cabinet Office also stated that they did not consider *'this in any sense a relevant issue to the matters in hand'.* The Cabinet Office further contended that *'of further relevance to transparency as to complaints is the publication of the correspondence of ACOBA, which satisfies the public interest'.* The Commissioner considers that the Cabinet Office are fundamentally mistaken on both of these latter points.

78. Firstly, what action (if any) taken by the Prime Minister in response to the complaint about the Home Secretary has a key bearing on the public interest weight and value of the withheld information. If, for example, there was information in the public domain which recorded that the Prime Minister had considered the complaint made by Mr Trickett but was of the view that Ms Patel had not breached the Ministerial Code, then that information would at least show that a

complaint which was clearly grounded on credible evidence, had been considered (even if rejected) by the Prime Minister. That is to say, there would be some degree of transparency and accountability which met the important public interest in knowing that such issues are treated with due weight and seriousness by Government (or the Prime Minister specifically in this case). As it is, the Commissioner is not aware that there is any such information in the public domain.

79. Secondly, and crucially, the Cabinet Office reference to the correspondence published by ACOBA and their contention that *'much of the public interest in disclosure has been satisfied'* by this correspondence is plainly incorrect in this case, for a very simple reason. The letter published by ACOBA in respect of Ms Patel's role at Viasat, is dated July 2019[10]. In their letter of advice, ACOBA applied three conditions to the appointment and asked Ms Patel to *'inform us as soon as you take up this role'*. However, unbeknownst to ACOBA at the time of their letter of advice, Ms Patel had already taken up the role at Viasat before she sought the Committee's advice. That is to say, Ms Patel had made a retrospective application to ACOBA.

80. ACOBA's Annual Report (2019 & 2020) states (at para 21) that *'a retrospective application is one where an appointment or employment has been taken up or announced before the Committee has provided its full and final advice. This is a breach of the Government's Rules'*[11]. The Reports goes on to state (para 23) that *'there may be unusual or extenuating circumstances where the Committee may choose to consider the retrospective application. This will not be the norm. in these cases, the Committee will still make clear it is not acceptable to submit an application retrospectively'.*

81. In *FS50795901*, concerning Mr Boris Johnson's appointment as a columnist at The Telegraph, following his resignation as Foreign Secretary in July 2018, ACOBA, in a letter to Mr Johnson dated 8 August 2018 and published on their website, 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*

[10] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/821249/Priti_Patel_Viasat_letter.pdf
[11] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962428/ACOBA_Annual_Report_for_publication_2018-2020_final.pdf

incumbent upon you on leaving office under the Government's Business Appointment Rules'. In that case, the Commissioner found, in upholding section 36, that the public interest in transparency and accountability had been appropriately and proportionately met by ACOBA's publishing of its letter to Mr Johnson. However, the Commissioner noted that had ACOBA not placed such information in the public domain, then the withheld information would have assumed a greater weight and significance.

82. By contrast, that case can be distinguished from the present case in which there has been no such transparency or accountability surrounding Ms Patel's own apparent failure to abide by the Rules. 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.

83. ACOBA state (para 24) in their Annual Report that it *'deploys transparency to hold individuals to account, publishing the correspondence concerned. The Committee takes this approach in order to draw attention to the failure to submit an application and to encourage wider compliance with the Government's Rules'.* However, as noted, in respect of Ms Patel, there is no published correspondence from ACOBA holding her to account for her retrospective application.

84. Furthermore, the Commissioner considers that the public interest deficit in transparency and accountability in this case is increased. Firstly, there is no transparency (unlike in the aforementioned cases of Mr Osborne and Mr Johnson) in respect of Ms Patel's apparent failure to abide by the Rules in respect of seeking advice from ACOBA. Secondly, there is also, as noted above, no information in the public domain in respect of any outcome of the complaint made by Mr Trickett about Ms Patel having allegedly breached the Ministerial Code, which is central to the complainant's information request.

85. The Commissioner has had sight of the withheld information, which concerns the allegation that in taking up

her role at Viasat before seeking advice from ACOBA[12], Ms Patel was in breach of the Ministerial Code. The Commissioner entirely recognises and accepts that the information is sensitive and that in order to provide free and frank advice as to the appropriate response to allegations relating to the Code, officials require a safe space free from the external pressures exerted by the risk of public disclosure.

86. The Cabinet Office have contended that 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'.* The Commissioner would agree that unsubstantiated or baseless allegations about the conduct of Ministers or former Ministers, can cause significant reputational damage and it would be irresponsible and unfair to the individual Minister(s) concerned to disclose any information which would foster or encourage any such allegations.

87. However, as the Cabinet Office rightly note, Ministers are public figures, with huge influence and power on public policy and decisions that affect citizens' everyday lives. 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.

88. At the time of the complainant's request, Ms Patel had returned to Government in her current position as Home Secretary, a position of significant responsibility, influence and decision making power that is publicly accountable.

89. In her resignation letter to Prime Minister May in November 2017, Ms Patel acknowledged that her actions (when in post of Secretary of State for International Development) *'fell below the standards of transparency and openness that I have promoted and advocated'.* The Commissioner considers this self assessment to be important and relevant in the present case, since the evidence suggests that Ms Patel was not entirely open and transparent with ACOBA about her role at Viasat (i.e. in

[12] https://publications.parliament.uk/pa/cm/cmregmem/190812/patel_priti.htm

approaching the Committee for their advice, she did not tell them that she had already taken on the Viasat role).

90. These incidents, and the bullying matter referenced above, 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.

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.

92. The Cabinet Office have contended that the chilling effect of disclosure is likely to be especially strong in this case, because the withheld information relates to the enquiries, deliberations and advice of officials in relation to allegations of misconduct against Ms Patel. As the Commissioner's well established guidance on section 36 makes clear, civil servants and other public officials are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. It is also possible that the threat of future disclosure could actually lead to better quality advice. Nonetheless, chilling effect arguments cannot be dismissed out of hand. Such arguments are likely to be most convincing where the issue in question is still live.

93. In this case whilst the Commissioner certainly does not discount the risk of a chilling effect and accepts that such arguments have relevance given the frank and candid nature of the withheld information, he is not minded to give such arguments substantial weight, for the following reasons.

94. Firstly, most of the officials who are named in the withheld information and whose exchanges comprise the same, occupied very senior roles at the time and had significant public profiles. The Commissioner considers that the individuals in question would therefore be expected to be robust when providing advice and not easily deterred by

the possibility of such information being disclosed. Indeed, given their roles, the Commissioner considers that they should appreciate the need for maximum transparency and accountability in matters such as this.

95. Secondly, whilst the Cabinet Office have not been clear with the Commissioner as to whether the issue of Ms Patel's alleged breach of the Rules was finalised or not, despite this factor clearly having a key bearing on the strength of the safe space arguments propounded, they have confirmed that they consider the issue to be live in the sense that Ms Patel remains a serving Minister and this has a direct impact on those providing the advice in this case as well as the future chilling effect.

96. The Commissioner is not persuaded that disclosure of the specific information in this case would have a significant chilling effect in future such cases. As the Cabinet Office is aware, the Commissioner considers each case on its own individual facts and circumstances, and the respective public interest arguments will necessarily differ from case to case. This case is exceptional and in most cases senior officials could have reasonable confidence that their advice and exchanges would not be publicly disclosed, and not whilst a matter was 'live'.

97. In assessing the public interest balance in this case, the Commissioner has had due regard to the reasonable opinion of the qualified person, Ms Smith. The Commissioner entirely accepts that it is necessary for officials to be able to consider and discuss arguments as to whether the requirements of the Rules and the Code have been complied with in a free and frank manner. Such discussions facilitate the arriving at a position whereby informed advice can be provided to Ministers.

98. As previously noted, section 36 is primarily concerned with protecting the processes of advice and deliberation and ensuring that these are not inhibited. The Commissioner considers that there is a strong and important public interest in providing and protecting the safe space which allows officials to have such discussions and exchanges. Where information relates to discussions and exchanges about a particular issue that are still ongoing, the Commissioner also considers that public interest arguments as to the chilling effect will have weight and relevance.

99. 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. The Commissioner recognises that the content of the withheld information is frank and candid in nature, such that there are strong public interest grounds for protecting its confidentiality. Such is the strength of that public interest that the Commissioner considers that there would need to be a specific and compelling public interest factor for the public interest in maintaining the exemption to be outweighed.

100. The Cabinet Office have contended that there is no such compelling public interest factor in this case. The Commissioner strongly disagrees with this contention, for the following reasons.

101. In respect of the serious matter which underlies the complainant's request, namely, the allegation that in failing to approach ACOBA for advice before taking up her role at Viasat, Ms Patel breached the Rules and therefore the Code, there has been, to date, no due transparency or accountability. There has been no published letter to Ms Patel from ACOBA, reprimanding her for her retrospective application, as there usually is in such cases. ACOBA's letter to Ms Patel of July 2019 cannot, for the reasons explained, provide any such transparency or accountability. Furthermore, to the best of the Commissioner's knowledge, there has been no public announcement or statement from the Cabinet Office as to the outcome/conclusion of the consideration of Mr Trickett's complaint (as reported in the press) to the Prime Minister about Ms Patel having allegedly breached the Code.

102. In the absence of the usual ACOBA letter, or published statement from the Cabinet Office, there is no transparency or accountability in respect of a serious matter which clearly requires both. The Commissioner considers that this notable and unusual lack of transparency and accountability risks undermining public confidence in being assured that government handles such allegations in a robust and consistent manner and risks strengthening a possible public perception, created by the controversial outcome of the bullying inquiry, that the Home Secretary may be being protected from the consequences of her actions or behaviour. The Commissioner has expanded upon this in a Confidential Annex to this notice.

103. Having had sight of the withheld information, the Commissioner considers that its disclosure would provide the valuable transparency and accountability, that is currently missing (and shows no sign of being provided in future) in respect of the serious allegation made against Ms

Patel in respect of her dealings with ACOBA regarding her previous Viasat role. It is important to be clear that reputational harm to ministers is not a relevant public interest argument/consideration in relation to section 36.

104. As previously noted, the Commissioner is not persuaded that the Cabinet Office arguments as to the future chilling effect have strong or realistic application to some of the individual officials named in the withheld information, given their senior and public facing roles. However, in respect of more junior and non-public facing officials named in the withheld information, the Commissioner considers that the risk of a future chilling effect, both upon them personally and with regard to departmental junior officials more widely, is a real and credible one, such that the public interest balance supports maintaining the exemption to their identities. The Commissioner has detailed in the Confidential Annex those names where he considers the public interest in disclosure of the names and positions outweighs the public interest in maintaining the exemption. The Commissioner notes that the Cabinet Office have not also applied section 40(2) to the individuals in question.

105. In conclusion, 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.

106. The Commissioner is therefore satisfied that the exemptions at sections 36(2)(b)(i) and (ii) have been correctly applied by the Cabinet Office but that the public interest in the withheld information, with the exception of all names other than the three individuals listed in the Confidential Annex, favours disclosure.

107. As the Cabinet Office have not applied Section 40(2) to the three individuals listed in the Confidential Annex, and the Commissioner is satisfied that all other names are exempt under Section 36, the Commissioner has no need to consider the application of Section 40(2)."

11. By way of coda the ICO concluded

> **"Section 21 – Information accessible by other means**
> 108. Section 21 FOIA states that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information. Section 21 is an absolute exemption and therefore not subject to a public interest test.
>
> 109. The Cabinet Office have relied on section 21 in respect of one part of the withheld information, specifically the letter from ACOBA to Ms Patel of July 2019. As noted in footnote 5 on page 6 of this notice, this letter is available online, having been published by ACOBA. The Commissioner is therefore satisfied that this specific information is reasonably accessible to the complainant and therefore exempt from disclosure under section 21 of the Act.
>
> **Other matters**
> 110. The Commissioner has already addressed the Cabinet Office's dilatory response to the complainant's request in FS50906944, having found that the Cabinet Office breached section 17(3) of the Act. In submissions to the Commissioner, the Cabinet Office accepted that their handling of the request had not been in line with their normal practices, and apologised to the complainant and the Commissioner for the manner in which it had been handled. The Cabinet Office explained that the request coincided with a period of acute pressure for officials following a transition in Prime Minister, and was delayed further as a result of the 12 December 2019 General Election and subsequent Covid19 pandemic. The Cabinet Office assured the Commissioner that they were taking steps to improve their FOI processes.
>
> 111. Although not subject to statutory time limits under the FOIA, the Commissioner's guidance as regards internal reviews is clear and well established in that he expects public authorities to provide most internal reviews within 20 working days. In exceptional cases, such as where the public interest issues are particularly complex or the public authority needs to consult with external or third parties, a maximum of 40 working days is permissible.
>
> 112. In this case the complainant requested an internal review on 16 April 2020 but was not provided with the review by the Cabinet Office until 16 September 2020. The Commissioner is mindful both of the public interest complexity of this case and the fact that the complainant's

> request for an internal review coincided with the ongoing pandemic, which will have placed considerable resource and staffing pressures upon the Cabinet Office, as it did upon all public authorities. Nevertheless, even taking these factors into account, a period of five months to provide an internal review was clearly excessive and unsatisfactory. However, the Commissioner would commend the Cabinet Office for having taken the time and effort to provide a second internal review of their decision."

12. The decision of the ICO was therefore that

> "2. The Commissioner's decision is that the Cabinet Office correctly applied section 36 to the withheld information but that the public interest balance favours disclosure of the information. The Commissioner also finds that the Cabinet Office correctly applied section 21 to some of the information held.
>
> 3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
>
> • Disclose the withheld information to the complainant, with all names redacted except the three individuals specified in the Confidential Annex.
>
> 4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court."

Relevant Codes of Conduct

13. There are two relevant versions of the Ministerial Code of Conduct, the first approved by Mrs May in January 2018 (which was in force until August 2019) and the second approved by Mr Johnson and in force after that date, which were set out in the decision of the Tribunal (I have inserted in square brackets other relevant provisions not set out by the Tribunal):

> "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:

> *[1.1* ***Ministers of the Crown are expected to maintain high standards of behaviour and to beave in a way that upholds the highest standards of propriety*** (emphasis in the original)*]*
>
> *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.

[1.5 The Code provides guidance to Ministers on how they should act and arrange their affairs in order to uphold these standards. It lists the principles which may apply in particular situations. It applies to all members of the Government and covers Parliamentary Private Secretaries in paragraphs 3.7–3.12.

1.6 Ministers are personally responsible for deciding how to act and conduct themselves in the light of the Code and for justifying their actions and conduct to Parliament and the public. However, Ministers only remain in office for so long as they retain the confidence of the Prime Minister. She is the ultimate judge of the standards of behaviour expected of a Minister and the appropriate consequences of a breach of those standards."

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."”*

14. The key passage of the 2018 Code for the purposes of this appeal is found at section 7, which was headed “Ministers’ private interests”. Under the heading “Acceptance of appointments after leaving ministerial office”, paragraph 7.25 stated:

> “On leaving office, Ministers will be prohibited from lobbying Government for two years. They must also 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. Former Ministers must ensure that no new appointments are announced, or taken up, before the Committee has been able to provide its advice. To ensure that Ministers are fully aware of their future obligations in respect of outside appointments after leaving office, the Business Appointment Rules are attached at Annex B. Former Ministers must abide by the advice of the Committee which will be published by the Committee when a role is announced or taken up.”

15. The purpose of the Code was considered by the Divisional Court in ***R (FDA) v Prime Minister and Minister for the Civil Service*** [2021] EWHC 3279 (Admin) (“***FDA***”), a case which concerned allegations made by Home Office civil servants that Ms Patel had engaged in bullying and thereby acted in breach of the Code. In rejecting the Prime Minister’s arguments that paragraph 1.21 of the Code (which provided that “Harassing, bullying or other inappropriate or discriminating

behaviour wherever it takes place is not consistent with the Ministerial Code and will not be tolerated") was not justiciable, the Divisional Court explained at [41] (with emphasis added):

> "We accept that certain decisions — such as the decision to dismiss or retain a minister in office — would not be justiciable. *We do not, however, accept the submission of the defendant that the sole purpose of the Ministerial Code is to determine the standards that ministers must meet in order to retain the confidence of the Prime Minister.* The Ministerial Code prescribes the standards that ministers are expected to comply with. As it says in paragraphs 1.5 and 1.6 in the present version, it gives guidance to ministers on how they should act and arrange their affairs. Ministers are personally responsible for deciding how to act and how to conduct themselves in the light of the Ministerial Code and for justifying their actions including to the
> public. *As such, the Ministerial Code does more than simply describe circumstances in which the Prime Minister may cease to have confidence in a minister.* Indeed, while the fact that a minister only holds office if the Prime Minister continues to have confidence in him or her has always been the context in which the Prime Minister issued the Ministerial Code, it was only in 1997 that that fact was explicitly included in the way now provided for in the final sentence of paragraph 1.6 of the current version of the Ministerial Code."

16. The Court in ***FDA*** further explained at [60] that, although the Prime Minister is the "arbiter of the code", this "is not intended to mean that it is for the Prime Minister to give any interpretation he chooses to the words used in the Ministerial Code".

Business Appointments Rules for Former Ministers

17. The Business Appointments Rules for Former Ministers ("BARs") annexed to the 2018 Code explained at the outset that:

> "It is in the public interest that former Ministers with experience in Government should be able to move into business or into other areas of public life, and to be able to start a new career or resume a former one. It is equally important that when a former Minister takes up a particular

appointment or employment, there should be no cause for any suspicion of impropriety. “

18. The work of ACOBA was summarised at paragraphs 3 and 5-6:

> “3. The Committee will need to consider details of the proposed appointment or employment, which includes any proposal to undertake consultancy work. If necessary, the Committee will seek, in confidence, additional information from senior officials of a former Minister’s Department(s) about any contact with the prospective employer or its competitors and the nature of any contractual, regulatory or other relationships with them … With the former Minister’s permission, the Committee may wish to contact the proposed new employer for clarification of the proposed appointment or employment and notification of the conditions that will apply to it …
>
> 5. The Advisory Committee will consider each request for advice about an appointment or employment on its merits, against specific tests relating to the following: I. to what extent, if at all, has the former Minister been in a position which could lay him or her open to the suggestion that the appointment was in some way a reward for past favours? II. has the former Minister been in a position where he or she has had access to trade secrets of competitors, knowledge of unannounced Government policy or other sensitive information which could give his or her new employer an unfair or improper advantage? III. is there another specific reason why acceptance of the appointment or employment could give rise to public concern on propriety grounds directly related to his or her former Ministerial role?
>
> 6. The Advisory Committee will need to balance any points arising under these tests against the desirability of former Ministers being able to move into business or other areas of public life, and the need for them to be able to start a new career or resume a former one.”

19. Having repeated paragraph 7.25 of the 2018 Ministerial Code, paragraph 1 of the BARs explained that:

> “The business appointment rules for former Ministers seek to counter suspicion that: a) the decisions and statements of a serving Minister might be influenced by the hope or expectation of future employment with a particular firm or organisation; or b) an employer could make improper use of

> official information to which a former Minister has had access; or c) there may be cause for concern about the appointment in some other particular respect."

20. Paragraph 4 of the BARs explained that "Retrospective applications will not normally be accepted", a point addressed further in ACOBA's Annual Report for 2018-2019 and 2019-2020, which was published in February 2021. As the current Chair, Lord Pickles, explained in the Foreword (with emphasis added): "*Retrospective applications will be unambiguously treated as breaches of the Rules*." The Annual Report goes on to explain in more detail (with emphasis added):

> "21. A retrospective application is one where an appointment or employment has been taken up or announced before the Committee has provided its full and final advice. *This is a breach of the Government's Rules*"
>
> (see, to the same effect, paragraphs 49-50 of ACOBA's 2017-2018 Annual Report).
>
> 22. The Committee needs to be free to offer the most appropriate advice in any situation without the obvious constraints which occur (perceived or otherwise) if an appointment or employment has already been announced, or the applicant has already signed a contract or taken up the role.
>
> 23. There may be unusual or extenuating circumstances where the Committee may choose to consider the retrospective application. This will not be the norm. In these cases, the Committee will still make it clear it is not acceptable to submit an application retrospectively.
>
> 24. The Committee deploys transparency to hold individuals to account, publishing the correspondence concerned. The Committee takes this approach in order to draw attention to the failure to submit an application and to encourage wider compliance with the Government's Rules. The Committee's transparent approach leads to welcomed scrutiny by members of the public and the media who know to expect to see advice published on ACOBA's website for taken up appointments.
>
> 25. Where the Committee has received a retrospective application, it will make it clear in its advice that retrospective cases will not be accepted and that a failure to

> seek advice is a breach of the Rules. It will also consider on a case by case basis how the public interest is best served. For example, the Committee may consider the risks presented on the face of the application to be so significant that it will provide full and final advice to ensure such risks do not go without consideration and mitigation."

The Decision of the Tribunal

21. The Cabinet Office appealed against the ICO's decision notice to the Tribunal, which heard the appeal on 26 October 2023. On 5 December 2023 the Tribunal dismissed the appeal (although the decision was not promulgated until 14 December 2023).

22. The Tribunal set out the basis of the Cabinet Office's 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 ...

(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 paragraph 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."

23. The Tribunal then set out its decision in the following terms:

> **"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."

24. It is common ground that the second ground of appeal (that the ICO erred in carrying out the public interest test) was dismissed. The parties disagree as to whether the first ground (that he erred in finding that s.36(2)(c) was not engaged) was upheld or not.

25. The ICO also accepts that the basis on which the Tribunal dismissed the appeal diverged significantly from the reasons advanced by him at the hearing (as to which I refer below).

The Appeal to the Upper Tribunal

26. The Cabinet Office sought permission to appeal from the Tribunal, which was refused on 30 January 2024. It then applied to the Upper Tribunal for permission to appeal on 26 February 2024.

27. On 7 March 2024 I granted permission to appeal and directed the suspension of the Tribunal's decision pending the resolution of the appeal to the Upper Tribunal. It did not prove possible to hear the appeal on the originally scheduled date of 17 July 2024 and I did not hear the appeal until 4 December 2024 when both parties were represented (by videolink) by counsel, the Cabinet Office by Mr Jason Coppel KC and Mr Leo Davidson and the ICO by Mr Will Perry, to whom I am indebted for their able written and oral submissions.

28. By the time of the hearing, both parties were agreed that the decision of the Tribunal could not be upheld and that I should remake the decision. The difference between them was as to how I should remake the decision, by ordering (or withholding) disclosure of the closed material. I am satisfied that it is appropriate that I should remake the decision rather than remit it for rehearing and thus engender further delay in the resolution of the matter. I do not therefore need to consider further whether or not the matter should be remitted for rehearing, a course which appealed neither to the parties nor to me.

The Grounds of Appeal

29. The Cabinet Office had three grounds of appeal:

(1) the Tribunal erred by failing to give adequate reasons for its conclusion that the public interest favoured disclosure

(2) the Tribunal erred in its application of the public interest test by having regard to irrelevant considerations

(3) the Tribunal erred in that it failed to evaluate the public interest in disclosure for itself in the light of all the material and evidence before it.

The Cabinet Office's Submissions

Ground 1: Inadequate reasons

30. When the Tribunal decided an issue, it must set out its reasoning so that the reader might "understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues": ***South Bucks District Council v Porter (No 2)*** [2004] 1 WLR 1953 at [36]. The "reader" in this context may be one of the parties, the appellate tribunal or indeed the public.

31. The reasons in this case were inadequate, in five ways:

(1) the decision failed to engage with key points relied on by the Cabinet Office

(2) the Tribunal failed to give appropriate weight to the relevant evidence of Mr Madden and/or gave insufficient reasons for rejecting Mr Madden's evidence

(3) it failed to give appropriate weight to the qualified persons' opinions

(4) it gave insufficient reasons for its key finding that the existence of "exceptional circumstances" would "dramatically reduce" the harms flowing from disclosure and/or that finding was perverse

(5) it failed to address the implications of its finding that s.36(2)(c) was engaged, bringing into scope broader evidence.

(a) Failure to engage with key points

32. The Cabinet Office had pursued seven arguments which related to the public interest balancing test. The arguments themselves were listed in the Tribunal's decision at [25], but the consideration section of the decision did not adequately address several of the points, namely 1, 2, 4 and 7:

(1) point 1 related to the "appropriate weight" to be given to the views of the qualified person

(2) point 2 related to the broader evidence as to the impact on the effective conduct of public affairs (including the need for its consideration as a result of the ICO's error in respect of s. 36(2)(c))

(3) point 4 related to the notion that the circumstances were exceptional

(4) point 7 related to the notion that there was a lack of transparency and accountability. The Cabinet Office had made detailed submissions of both:

(i) principle – as to the proper role of FOIA where due process had been followed and the prospect of a "court of public opinion" compounding the chilling effect, citing ***Information Commissioner ("IC") v Malnick and ACOBA*** [2018] AACR 29 ("***Malnick***") at [42]; and

(ii) fact – that the significance of ACOBA's misunderstanding at the time of its July 2019 letter was overstated, given the public registration of the appointment in June 2019 and the process which ACOBA followed at the time.

33. The Tribunal, however, did not grapple with any of that. Rather, it simply parroted the ICO's finding and therefore did not explain either why it considered that there was a lack of transparency and accountability nor why the prospect of trial by public opinion would not increase the risk of a chilling effect.

34. This was not nit-picking: the Cabinet Office recognised that tribunals are not required to deal with every submission or point made by the parties. Rather, the lacunae in the reasons went to the heart of the issues and left the reader in the dark as to whether, and if so how and why, key factors were taken into account.

(b) Weight to be afforded to witness with institutional expertise

35. The Tribunal had the advantage of direct evidence from Mr Madden, Director of Propriety and Ethics in the Cabinet Office, on the likely chilling effect of disclosure. Some of his evidence was recounted in the decision at [27-31]. The ICO agreed that the Tribunal's analysis of the weight to be placed on Mr Madden's evidence was inadequately reasoned.

36. When faced with evidence of this nature, the Upper Tribunal had endorsed the following principles (***Department for Transport v IC and Alexander*** [2021] UKUT 327 (AAC); [2022] 1 WLR 3403 ("***Alexander***") at [134]):

(1) a "bald statement" that such evidence was taken into account will be insufficient and will not demonstrate that the Tribunal gave it proper weight: [74].

(2) if it rejected the evidence, it must explain why – it must not simply substitute its own speculation, particularly where the evidence was unchallenged and from someone who was well placed to make the relevant assessment: [75].

(3) as distinct from the qualified person point above, this was not a question of deference, but rather a requirement that the Tribunal reach decisions as to the likely effect of disclosure, not on the basis of its own speculation, but on the basis of the evidence before it: [76].

(4) when making a prognostic assessment, the Tribunal would give great weight to the views of those with the relevant institutional expertise: [76].

37. In light of that authority, it was unclear why the Commissioner disagreed with the proposition that Mr Madden's evidence should have been afforded substantial weight and asserted that it was unsupported by authority. The authorities relied on by the ICO were to the effect that the Tribunal might take a critical view of the evidence, which was entirely consistent with ***Alexander***. In ***Department of Health v IC and Lewis*** [2015] UKUT 0159 (AAC) ("***Lewis***") at [69(iv)], the Upper Tribunal noted that decision-makers should have regard to "the relevant expertise and responsibilities of those advancing the rival contentions and their impact".

38. Indeed, in ***Alexander*** the Upper Tribunal noted the principle that assertions of a chilling effect should be treated with caution, but counterbalanced them with the observation at [138]:

> "… A degree of circumspection or caution does not however mean (and is not suggested in any of the authorities to mean) that this threshold can never be discharged (particularly given the low degree of likelihood required), nor that it cannot properly be discharged on the basis of evidence in writing setting out
> the basis of the view taken that such a chilling effect will occur, as occurred in this case."

39. In light of those clear and authoritative statements, it might simply be that the ICO misunderstood the Cabinet Office's position and was rebutting a submission which was not being advanced.

40. In any event, the parties were certainly in agreement that, as the Upper Tribunal in ***Lewis*** held, the Tribunal's process should have involved "the giving of reasons for the conclusion reached which will generally be the best way of demonstrating the approach taken to the issues of degree and thus whether 'proper' or 'appropriate' weight or 'judicious recognition' has been given to the relevant factors" ([69(vi)]) and that that was lacking in the present case.

41. As in ***Alexander***, the Tribunal made a "bald statement" that it placed "weight on the evidence of Mr Madden which fairly set out the challenges which civil servants face" at [46]. However, its reasoning showed no evidence of taking that material into account substantively let alone affording it the proper weight.

42. Rather than explain why it rejected the evidence, it simply quoted the dictum in ***Lewis*** about the "weakness" in candour arguments at [46]. That fell well short of the reasoned engagement which it was required to undertake and to demonstrate that it had undertaken – both in terms of the credibility of the witness and the limits of the "circumspection" approach. The Tribunal substituted its own speculative view for that of an experienced senior civil servant, without any explanation for doing so.

(c) Weight to be afforded to the qualified person's opinion

43. Before the Tribunal, the Cabinet Office relied on the well-established principle that it should give appropriate weight to the views of the qualified person, entrusted by Parliament to make the decision under s.36. In ***Malnick***, the Tribunal's consideration of the public interest balancing test had been "flawed by the FTT either ascribing no weight at all to the QP's opinion or, if it did, failing to give it appropriate weight" (at [65]). The Tribunal recited that principle, at [35], but failed to act accordingly.

44. The ICO disagreed that a qualified person's opinion "carries substantial inherent weight", calling that a "misreading" of the Court of Appeal's dictum in ***Department of Work and Pensions v IC & Zola*** [2016] EWCA Civ 758; [2017] 1 WLR 1 ("***Zola***") that it "is clearly important that appropriate consideration should be given to the opinion of the qualified person". It was not clear how that could be squared with ***Malnick***, in which the Upper Tribunal at [29] cited Lloyd Jones LJ's dictum in ***Zola*** and remarked that "although the opinion of the QP is not conclusive as to prejudice … it is to be afforded a measure of respect"; it went on to uphold the appeal on the basis that the Tribunal had erred by failing to give the qualified person's opinion any, or any appropriate, weight (at [65]). Again, it might

be that that was a semantic question and there was in fact no material difference between the parties on the point.

45. It appeared that, aside from that (possible) divergence, the ICO agreed with that criticism of the decision.

46. It was incumbent on the Tribunal to explain how and why it disagreed with the qualified person's opinion as to the public interest balancing test. It failed to discharge that burden. It appeared to have considered that Mr Dowden's opinion was undermined by the fact that he could not have been aware of certain circumstances at the time (at [45]), but did not say so expressly nor explain why that should be so. The decision failed to engage with the factors which Mr Dowden identified, and the balance he reached, in the context of his role as qualified person.

47. Moreover, it was wrong for the Tribunal to dismiss the later opinions of other qualified persons (namely Chloe Smith and Baroness Neville-Rolfe) in such a peremptory fashion at [45]. Having (seemingly) relied on the chronology to rob Mr Dowden's opinion of the weight which it was due, the Tribunal should have engaged with the substance of subsequent considerations by qualified persons which did have the advantage of the relevant information.

48. As set out below, the Tribunal's consideration of the weight to be afforded to the qualified person's opinion was in any event vitiated by its erroneous regard to irrelevant considerations.

(d) "Exceptional circumstances"

49. The Cabinet Office had challenged the ICO's finding that the present case was exceptional. The linchpin of the Tribunal's decision, however, was the supposed "exceptional circumstances" of the case (at [45], [47]).

50. Any set of facts might be distinguishable from others on a particular basis, or might have features which were unique or rare. What all such scenarios had in

common – as the Cabinet Office explained in its evidence and submissions – was that a safe space was needed for candid discussion and consideration. The officials whose candour would be chilled by disclosure had no way of knowing whether any given situation was to be regarded as "exceptional" either for the reasons relied on in this case or otherwise. That was particularly so where the circumstances which were said to make this case exceptional occurred months after the relevant discussions took place and could hardly have been foreseen at the time. It followed that in any case, however pedestrian, officials would reasonably fear that future events might happen which could, on the Tribunal's logic, retroactively render the circumstances exceptional and therefore the discussions susceptible to disclosure; as a result, they would be deterred from contributing freely and frankly. That very uncertainty was what gave rise to a chilling effect, with the attendant prejudice to the conduct of public affairs.

51. However, the Tribunal in this case did not explain key stages of its reasoning:

(1) first, it did not explain why it reached the view, despite the Cabinet Office's submissions and evidence, that the facts were "exceptional". There was no explanation of what that description meant, or in what other circumstances it would or might be satisfied. What appeared exceptional to one person might, to someone else with different experience and perspective, seem run of the mill

(2) secondly, it did not explain why those exceptional facts (which were, on their face, irrelevant) affected the public interest balancing test in relation to the FOIA request under consideration

(3) thirdly, and in light of the uncertainty around its own subjective view that the facts were "exceptional", it did not explain why that exceptionality would avoid the chilling effect warned about in the Cabinet Office's evidence and submissions.

52. The ICO agreed that the Tribunal's reasoning in that respect was inadequate.

(e) No regard to broader evidence despite s.36(2)(c) finding

53. The Cabinet Office had criticised the ICO for expressly refusing to take into account "broader evidence", on the basis that s.36(2)(c) was not engaged. However, and contrary to the ICO's submission, the Tribunal held at [34] that s.36(2)(c) was engaged:

(1) in the decision notice, the ICO did not accept that s.36(2)(c) applied, since "the prejudice claimed must be different to that claimed under section 36(2)(b)" and no "other" prejudice had been identified (at [45]). The ICO therefore declined to consider the Cabinet Office public interest arguments in respect of s.36(2)(c) (at [59])

(2) in its grounds of Appeal to the Tribunal, the Cabinet Office said that that was an error because, in fact, "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"

(3) the Tribunal recounted that first ground and indeed quoted it verbatim (at [25])

(4) at the outset of its "Consideration", the Tribunal reiterated the first ground of appeal and quoted from Mr Madden's evidence on the importance of confidentiality for the purposes of proper investigation of breaches (at [32])

(5) the Tribunal went on to find that "there could well be a need for *a careful collection of information* and the chilling effect of disclosure in this case … would foreseeably have some negative impact on that ability to gather relevant information" (emphasis added) (at [33]).

(6) the Tribunal was therefore satisfied that disclosure would indeed, as the qualified person had opined, "be likely to inhibit the provision of advice, the exchange of views *and the ability to gather evidence and weight*" (emphasis added) (at [34]).

(7) that plainly amounted to a finding that there was indeed a likelihood of "other" prejudice to public administration beyond the factors covered in s.36(2)(b), contradicting the ICO's finding in the decision notice. (Of course, the issue for the Tribunal was whether the qualified person's opinion in that respect was reasonable.)

54. The question of broader evidence therefore became particularly salient in light of the success of the first ground of appeal before the Tribunal. As the Upper Tribunal explained in ***Malnick*** at [65-66], it ought to have followed that the ICO's conduct of the public interest balancing test was similarly flawed.

55. The decision, however, showed no sign of having reckoned with the implications of finding that the ICO had erred in his assessment of the applicability of s.36(2)(c). Given the flaws which it identified in that reasoning, it was incumbent on the Tribunal – at the very least – to explore the implications of its finding as to the applicability of the additional exemption, set out findings on the "broader evidence" ignored by the ICO and explain why rectifying the consequent flaw in the ICO's public interest balancing test did not lead to a different outcome.

Ground 2: Irrelevant considerations

56. The Tribunal erred by taking into account irrelevant considerations when carrying out the public interest balancing test, namely:

(1) the resignation of Sir Philip Rutnam on 29 February 2020;

(2) previous breach of the BARs by Mr Johnson;

(3) public perception; and

(4) various other matters identified by the ICO.

(a) Resignation of Sir Philip Rutnam

57. Sir Philip's resignation (and accompanying allegations) considerably post-dated the 3 August 2019 request and had no connection to its subject matter, namely Ms Patel's dealings with ACOBA in May-July 2019. While the request was eventually dealt with substantively on 23 March 2020, that was well beyond the statutory time frame (and indeed the ICO had issued a decision notice to that effect on 4 March 2020, reference FS50906944). At the time when the request should have been dealt with, Sir Philip had not resigned. Even by the time of the actual response, all that had happened was that allegations had been made alongside the resignation and an internal inquiry launched (on 2 March 2020). No findings of a breach of the Ministerial Code had been made, nor given the lack of any investigation or due process, could such findings fairly or reasonably have been made.

58. In any event, far from being salient, that resignation (whether unprecedented or not) was irrelevant to the public interest balancing test in relation to the request. There was simply no logical connection between (what were at the time mere allegations of) bullying and dealings with ACOBA, and no basis to conclude that the former had any bearing on the public interest in disclosure of information relating to the latter. Even less relevant was Sir Philip's own conduct.

59. The Tribunal's reliance on and interpretation of the judicial review of the Prime Minister's decision on the application of the Ministerial Code to Sir Philip's allegations, ***FDA***, were also misplaced. It cited a brief discussion of justiciability (at [38-39]). The Divisional Court was there drawing a distinction between (i) what it could consider, namely the construction of the Ministerial Code itself, and (ii) and what it could not, namely whether a minister should be dismissed or retained. There is no basis in that judgment for the distinction which the Tribunal sought to draw, between "normative values and political choice".

60. The implications of the Tribunal's approach were profound. It proceeded on the basis that, regardless of the decision reached by a competent adjudicator on a particular issue, a decision-maker (whether that be public authority, ICO or Tribunal) should not only reach its own view on the merits of that issue, but

should also have regard to the view which "the public" might reach. The same logic would apply, in an extreme case, to a criminal conviction. A jury might acquit X of a crime, or a conviction might be quashed on appeal, but according to the Tribunal's reasoning a decision-maker could approach a FOIA request on the basis that X was, in its view or in the public perception, guilty.

61. The ICO disagreed with the Tribunal's approach to the Rutnam resignation.

(b) Breach of the BARs by Mr Johnson

62. In a similar vein, the Tribunal erred in having regard to the breach of the Business Appointment Rules which Mr Johnson was found to have committed by ACOBA following his tenure as Foreign Secretary. The Tribunal interpreted the ICO's decision notice as having been predicated on "significant and strong public interest in a former Foreign Secretary acting in breach of the rules of conduct". It was not clear that that was so – the point which the ICO appeared to be making at [81-82] of the decision notice was that in Mr Johnson's case "transparency and accountability had been appropriately and proportionately met by ACOBA's publishing of its letter to Mr Johnson", whereas in Ms Patel's case the published correspondence was not capable of
doing the same.

63. In any event, the breach by Mr Johnson, while thematically similar to the subject matter of the request in this case, had no bearing on the public interest in disclosing information within the scope of the request in this case.

64. The ICO agreed that the Tribunal was wrong to place weight on the allegations against Mr Johnson.

(c) Public perception

65. The Tribunal also led itself astray by considering what the public might think of the political processes or underlying facts relating to the request. That approach came dangerously close to the classic conflation of "public interest" with "what interests the public" – the fact that there was or might be a widespread

public perception of wrongdoing or cover-up (say) did not justify a decision-maker proceeding on the basis that there was a strong public interest in shedding light on such matters. (Far from being a "tired platitude", as the Tribunal put it (at [45]), that was a crucial distinction as established at the highest authority: ***British Steel Corp v Granada Television Ltd*** [1981] AC 1096 at 1168 per Lord Wilberforce: "there is a wide difference between what is interesting to the public and what it is in the public interest to make known".) Such an approach would generate a significant chilling effect indeed, if disclosure decisions were to be materially influenced by public opinion and political popularity.

66. The correct position was that such considerations were subjective and ultimately unknowable, and therefore not suitable to be taken into account for the purposes of applying exemptions under FOIA. It followed that that was an irrelevant consideration for the Tribunal to have had regard to.

(d) Other matters identified by the ICO

67. In his Response, the ICO pointed out that the Tribunal seemed to have placed weight on other factors, including "the unlawful prorogation of Parliament by the Prime Minister, a general election and the withdrawal from the EU" and the timing of the Cabinet Office's Response, being "communicated on 'a good day to bury bad news'" (at [40-41]). It was not clear to what extent those considerations formed part of the Tribunal's ratio for reaching its decision, but certainly they were all irrelevant to the issues which it was determining.

Ground 3: Abdication

68. The Tribunal was required to consider the request afresh and reach its own view as to the balance of public interests (if authority were needed, see ***Malnick*** at [90]).

69. In his Response to the application for permission to appeal, the ICO listed eight supposed differences between his own decision notice and the decision of

the Tribunal. He argued that that demonstrated that the Tribunal did indeed approach the issues afresh.

70. Given that what follows in the Cabinet Office's submissions refers directly to the eight points in the Response of the ICO, it makes sense to set them out here before referring to the Cabinet Office's submissions in response to them:

(1) the Tribunal did not appear to place weight on the content of the withheld information in question. For example, it did not produce a Closed annex to its judgment which considered the particular public interest in disclosure of the information with reference to the points identified in the ICO's skeleton argument.

(2) the Tribunal did not appear to have placed weight on the fact that provisions of the Code and BARs concerning retrospective applications to ACOBA were clear and unambiguous. The ICO's view was that the clarity of the rules in question heightened the public interest in disclosure.

(3) the Tribunal did not appear to have placed any weight on the fact that a formal decision as to whether a minister had complied with the Code was ultimately a matter for the Prime Minister alone. The ICO was at pains throughout the decision notice to acknowledge that point (at [63-64] and [69]) and made clear that he was not proceeding on the assumption that Ms Patel had in fact acted in breach of the Code in taking up the Viasat appointment (at [91]). Instead, the decision notice proceeded on the basis that serious and credible questions had been raised about Ms Patel's compliance with the BARs and the Code in relation to the Viasat appointment. Transparency and accountability in relation to those questions weighed heavily in favour of disclosure, in particular given the clarity of the BARs rules in issue as well as the fact that serious and credible questions regarding Ms Patel's compliance with the Code had been raised on other occasions. In relation to alleged breaches of the Code, the ICO considered that his approach was consistent with ***FDA***, where at [41] the Divisional Court rejected the suggestion that "the sole purpose of the Ministerial Code is to determine the standards that ministers must meet in order to retain the confidence of the Prime Minister". Although the Tribunal's approach to the matter was not altogether clear, the ICO

considered that it was wrong at [39] for the Tribunal to conclude the Cabinet Office was "disingenuous" (and wrong) to "place weight" on the Prime Minister's role in enforcing the Code. For the same reasons, the Tribunal was also wrong at [45] to refer to bullying allegations against Ms Patel as "the third breach of the Ministerial Code".

(4) the Tribunal took a different view to the ICO of the resignation in February 2020 of Sir Philip Rutnam, the then Home Office Permanent Secretary. The ICO had relied on the resignation in the decision notice as part of the overall context of bullying allegations against Ms Patel. In his view, those allegations raised serious and credible questions about her compliance with the Code on a further occasion. In contrast:

(a) the Tribunal appeared to have drawn a direct link between the bullying allegations and the Cabinet Office's chilling effect arguments in concluding that Ms Patel's alleged conduct might have impacted on the way civil servants advised on the Viasat appointment at [43-44]. Similarly, at [47] the Tribunal appeared to have concluded that the Cabinet Office's chilling effect arguments were specifically undermined by the circumstances of Sir Philip's resignation. The ICO had never sought to argue that the withheld information shed light on bullying allegations made against Ms Patel. Nor had he sought to discount the Cabinet Office's chilling effect arguments on the basis that they arose, in whole or in part, from a culture of ministers bullying civil servants.

(b) the ICO considered the bullying allegations against Ms Patel alongside the fact that in 2017 a Number 10 spokesperson stated to the press that Ms Patel had breached the Code during her role as Secretary of State for International Development. The Tribunal cursorily accounted for the 2017 incident at [42], when it referred to "a Minister dismissed by Mrs May apparently for breaching the Ministerial Code". It did not otherwise consider that point as part of its reasoning. Conversely, it relied heavily on the Rutnam resignation and bullying allegations, for example, at [45].

(5) the Tribunal appeared to have placed weight on allegations that Mr Johnson had acted in breach of the Code and the BARs when he was appointed as a columnist at The Telegraph following his resignation as Foreign Secretary in July 2018, for example, at [42]. The ICO did not argue before the Tribunal that that alleged breach heightened the public interest in disclosure of all of the withheld information – e.g. because Mr Johnson may have had self-interested political motivations for concluding that Ms Patel had not acted in breach of the rules. Instead the ICO's position was that:

(a) a comparison could be drawn with the way in which ACOBA censured Mr Johnson for his retrospective application regarding The Telegraph appointment with the fact that it did not comment on the timing of Ms Patel's Viasat appointment, see the decision notice at [81].

(b) the point was, in addition, relevant to one limited piece of the withheld information.

(6) although the Tribunal recorded at [40] that "[a] letter from Mr Trickett (an Opposition spokesman) to the Prime Minister on the matter went unanswered" and concluded "[t]here had been no effective parliamentary scrutiny and accountability", it failed to consider important dimensions of the ICO's analysis of the accountability and transparency deficit. In particular, its ruling did not consider the ICO's arguments that (a) there was no published correspondence from ACOBA criticising, or otherwise commenting on, Ms Patel's retrospective application, (b) there was no public indication of the Prime Minister's response to allegations against Ms Patel and (c) Ms Patel did not make any Parliamentary or other public statement regarding her compliance with the BARs or the Code.

(7) the Tribunal did not appear to place weight on the positions occupied by the individuals who expressed views in the documents caught by the underlying request, the majority of whom were senior civil servants. That was a highly relevant factor. As explained in the decision notice at [94]: "the individuals in

question would therefore be expected to be robust when providing advice and not easily deterred by the possibility of such information being disclosed".

(8) the Tribunal adopted other strands of reasoning which went beyond the ICO's arguments, namely (a) the reference at [40] to "the unlawful prorogation of Parliament by the Prime Minister, a general election and the withdrawal from the EU" and (b) the suggestion at [41] that the qualified person's opinion of 12 February 2020 (Oliver Dowden MP) was given on "a good day to bury bad news". The relevance of those matters to the issues in dispute was unclear.

71. Reverting then to the Cabinet Office's submissions in relation to those eight points, the Cabinet Office submitted that the first, second, sixth and seventh points were all examples of the Tribunal appearing not to place weight on factors on which the ICO had relied: specifically (1) the content of the withheld information, (2) the clarity of the applicable rules, (6) aspects of the accountability and transparency deficit and (7) the seniority of the civil servants whose views were contained in the withheld information. The mere fact that those factors were not mentioned in the decision did not mean that the Tribunal disagreed with the ICO as to their relevance. It could simply be that it considered those factors to be superfluous, or that it had regard to them in the same way as the ICO, but failed to say so. Given the (agreed) inadequacy of the reasons, there was no way of knowing whether the Tribunal in fact diverged from the ICO on those matters or not.

72. The third, fourth and fifth points ((3) the ICO did not say that Ms Patel had in fact breached the Ministerial Code, (4) different treatment of the Rutnam resignation (5) the Tribunal placed weight on Mr Johnson's breach) highlighted divergences which were better explained by the Tribunal's misunderstanding of the ICO's position than by any exercise of independent judgment.

73. The eighth point ((8) strands of reasoning going beyond the ICO's arguments) did not indicate any independent judgement either. Those additional factors were in the same vein as the ICO's position – or, at least, the Tribunal's understanding

of his position. Gilding the lily with additional factors did not constitute a substantive difference.

74. In fact, there was no sign from the decision of the Tribunal bringing to bear its own judicial analysis to decide the relevant issues afresh. Rather, it adopted (and to some extent embellished) what it understood to be the ICO's position.

Conclusion

75. For these reasons, and at least to the extent agreed between the parties, the appeal should be allowed.

76. The issue of the public interest balancing test was one which the Upper Tribunal was in as good a position to determine as a freshly constituted tribunal would be, and which it could determine more expeditiously. The Cabinet Office therefore invited the Upper Tribunal to re-make the decision itself and substitute a decision notice accordingly, to the effect that the withheld information should not be disclosed.

The ICO's Submissions

Overarching Submission

77. The ICO accepted that the appeal should be allowed, albeit not to the full extent pleaded in the Cabinet Office's grounds of appeal. In summary:

(1) Ground 1 (inadequate reasoning): although the ICO did not agree with all of the Cabinet Office's arguments advanced under Ground 1, he too took the view that the Tribunal's reasoning was inadequate in a number of respects. In addition, and in contrast to the Cabinet Office's position, he submitted that the Tribunal failed to reach any clear conclusion regarding the application of s.36(2)(c) and that that was a further error of law.

(2) Ground 2 (irrelevant considerations): the ICO agreed that the Tribunal erred in various respects when considering other alleged breaches of the Code and BARs by Ms Patel and Mr Johnson. The Tribunal took a very different approach from

the ICO to those matters and in the process reached conclusions and/or placed weight on matters which it should not have. With that said, the Cabinet Office was wrong to suggest that questions about Ms Patel's historic compliance with the Code were entirely irrelevant. The ICO also rejected any suggestion that there was limited public interest in the disclosure of views expressed by anyone other than the Prime Minister on the application of the Code and/or the BARs.

(3) Ground 3 (failure properly to evaluate the public interest balance): the argument advanced under Ground 3 was unclear. Insofar as it simply reframed Ground 1, then the ICO repeated his response to that ground. If, instead, the Cabinet Office contended that the Tribunal failed to exercise its own independent judgment in the context of a full merits appeal, he repeated the significant differences between the approach in his decision notice and the Tribunal's ruling.

78. The ICO agreed with the Cabinet Office that the Upper Tribunal should remake the decision itself, not least in circumstances where the request was made over 5 years ago.

79. As to the substance of the issues, the ICO remained of the view that the public interest favoured disclosure. In summary:

(1) public interest in disclosure: information about a sitting Home Secretary's compliance with the Code and the BARs would invariably attract a strong public interest in disclosure. On the facts of the case, that public interest was further heightened by four factors: (1) the withheld information concerns serious and credible questions about Ms Patel's compliance with the Code and the BARs, as could be seen from the clarity of the rules in question, the withheld information and documentary and oral evidence, (2) the lack of meaningful transparency and accountability through any other means (e.g. through a letter of rebuke from ACOBA, or as a result of the Prime Minister investigating or reaching any final decision), (3) Ms Patel's breach of the Code in 2017 which, combined with the Viasat appointment, raised questions about her approach to the behavioural standards expected of ministers and (4) the fact that the withheld information

would specifically contribute to public debate about the way in which the Code and the BARs were enforced.

(2) public interest in non-disclosure: the ICO had consistently accepted that disclosure would result in a loss of candour/give rise to a chilling effect. However, he did not agree that the risks were as significant as the Cabinet Office alleged for two main reasons: (1) the decision notice only ordered disclosure of the names of very senior, public-facing civil servants; and (2) for the same reasons that the public interest in disclosure was heightened, the circumstances were unusual and would therefore not give rise to any expectation that information relating to a minister's compliance with the BARs and the Code would be disclosed in future.

80. In circumstances where the Tribunal did not properly determine whether or not s.36(2)(c) applied, the ICO repeated his arguments from below that that limb of the s.36 exemption was not engaged. With that said, the determination of that issue had no material bearing on the public interest balance.

Legal Framework

81. S.36 FOIA was unique amongst FOIA exemptions: whether it was engaged depended on the "reasonable opinion" of a "qualified person", rather than a direct assessment of the factual situation. The question of whether an opinion was reasonable was a substantive one, see ***Malnick***.

The public interest test: general considerations

82. Whenever the public interest test was applied, the need for transparency and accountability would weigh in favour of disclosure. The importance of those factors was emphasised by the Supreme Court in ***BBC v Sugar*** [2012] UKSC 4 (Lord Walker) at [76]. In the same vein, the Upper Tribunal in ***Evans v IC*** [2012] UKUT 313 (AAC) recognised at [133] that "[w]hen the disputed information concerns important aspects of the working of government, the interests in accountability and transparency will be not merely of general importance, but of particular strength."

83. The time for assessing the public interest balance was the date of the public authority's initial refusal: ***R (Evans) v Attorney General*** [2015] UKSC 21 at [72], ***Montague v IC and Department for International Trade*** [2022] UKUT 104 (AAC) at [63].

The public interest test: s.36 specific considerations

(a) Weight afforded to the qualified person's opinion

84. Where s.36 was engaged – and it was therefore accepted that the qualified person's opinion was reasonable – then, as the Court of Appeal explained in ***Zola*** at [55] (emphasis added):

> "It is clearly important that *appropriate consideration* should be given to the opinion of the qualified person at some point in the process of balancing competing public interests under section 36. No doubt the weight which is given to this consideration will reflect the Tribunal's *own assessment* of the matters to which the opinion relates."

85. The need for the ICO and/or the Tribunal to undertake its own assessment of the weight to be afforded to the qualified person's opinion was consistent with various authorities which warned against the adoption of too deferential an approach to the risks of disclosure advanced by Government: see ***Office of Government Commerce v IC (Rev 1)*** [2008] EWHC 737 (Admin) at [102], ***Home Office & Anor v IC*** [2009] EWHC 1611 (Admin) at [29], ***Lewis*** at [66-67].

(b) "Chilling effect" arguments

86. "Chilling effect" arguments were often raised in relation to s.35. It was well-established that such arguments "are to be treated with some caution": ***Davies v IC and Cabinet Office*** [2019] UKUT 185 (AAC) at [25]. That was for two main reasons.

87. First, civil servants were expected to act robustly: see ***Davies*** at [26], where the Upper Tribunal endorsed [75(vii)] of ***DfES v IC*** (EA/2006/0006), where the Information Tribunal observed that:

> "In judging the likely consequences of disclosure on officials' future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants since the Northcote-Trevelyan reforms. These are highly-educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions. The most senior officials are frequently identified before select committees, putting forward their department's position, whether or not it is their own."

88. The expectation that civil servants would act robustly applied with greater force to senior civil servants. As the Upper Tribunal explained in ***DEFRA v IC and Badger Trust*** [2014] UKUT 526 (AAC) at [75] (see ***Davies*** at [26]): "We are not persuaded that persons of the calibre required to add value to decision making of the type involved in this case by having robust discussions would be inhibited by the prospect of disclosure when the public interest balance came down in favour of it …"

89. These observations were moreover consistent with the Civil Service Code, which explained that:

> "As a civil servant, you are appointed on merit on the basis of fair and open competition and are expected to carry out your role with dedication and a commitment to the Civil Service and its core values: integrity, honesty, objectivity and impartiality. In this code:
>
> - '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”.

90. Second, candour and chilling effect arguments were inherently weak, as Charles J recognised in ***Lewis*** at [27-29] (see ***Davies*** at [27]):

> “27. 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 it 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. …
>
> 28. … any properly informed person will know that information held by a public authority is at risk of disclosure in the public interest.
>
> 29. In my view, evidence or reasoning in support of the safe space or chilling effect argument in respect of a FOIA request that does not address in a properly reasoned, balanced and objective way: (i) this weakness, (ii) the public interest in there being disclosure of information at an appropriate time that shows that the robust exchanges relied on as being important to good decision making have taken place, and (iii) why persons whose views and participation in the relevant discussions would be discouraged from expressing them in promoting good decision making and administration and thereby ensuring that this is demonstrated both internally and when appropriate externally, is flawed.”

91. Although these comments concerned s.35, the Upper Tribunal in ***Davies*** at [29] stated that they were “also relevant to the approach to an assessment by the qualified person of a likely chilling effect under section 36(2) and so to the question whether that opinion is a reasonable one.”

92. The Cabinet Office argued that the caution expressed in ***Davies*** should be tempered in light of observations made by the Upper Tribunal in two cases: ***Department of Work and Pensions v IC*** [2015] UKUT 0535 (AAC) at [13] and ***Alexander*** at [134-138]. However, the relevance of those passages was overstated. In the former case, the Upper Tribunal was dismissing a specific argument that the Department of Work and Pensions might establish a chilling effect by way of a comprehensive "paper trail". In the latter, the Upper Tribunal was considering chilling effect arguments in the context of the applicability of the s.36(2) exemption, rather than the weight to be afforded to that exemption in the public interest balance.

Response to the Grounds of Appeal

Ground 1: failure to give adequate reasons for conclusion on the public interest balance

93. The Cabinet Office's Ground 1 was that the Tribunal failed to give adequate reasons for its conclusion that the public interest favoured disclosure of the withheld information. The ICO agreed in part with three of the Cabinet Office's submissions.

94. First, the ICO agreed with the Cabinet Office that the Tribunal's analysis of the weight to be placed on Mr Madden's evidence was inadequately reasoned.

95. However, the ICO disagreed with the Cabinet Office's assertion that "Mr Madden's evidence should have been afforded substantial weight" regardless of the persuasiveness of that evidence. That approach was unsupported by authority. To the contrary, it was well-established that the weight to be afforded to evidence given by civil servants was a matter for the Tribunal, see the caselaw cited above.

96. Second, the ICO agreed with the Cabinet Office that the Tribunal's reasoning in respect of the two opinions given by qualified persons for the purposes of s.36 (at [35], [45] and [46]) was inadequate.

97. However, the ICO disagreed with the Cabinet Office's assertion that a qualified person's opinion invariably carried substantial inherent weight. As the Court of Appeal explained in ***Zola*** at [55]: "[i]t is clearly important that *appropriate consideration* should be given to the opinion of the qualified person" and that "the weight which is given to this consideration will reflect the Tribunal's *own assessment* of the matters to which the opinion relates" (emphasis added). The Cabinet Office's reference to "appropriate weight" is a distortion of that passage from ***Zola***. It was wrong to ascribe a uniform weight to a s.36 opinion, or afford an opinion substantial "inherent" weight, given the reasonableness threshold for engaging s.36 was a relatively low one, see ***Guardian Newspapers & Brooke v IC and BBC*** (EA/2006/0011 and 0013) at [91-92], recognising that a finding that the qualified person's opinion was reasonable "does not necessarily imply any particular view as to the severity or extent of such inhibition or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant".

98. Third, the ICO agreed that the reasoning at [47] concerning the Cabinet Office's evidence and arguments on the prejudice flowing from disclosure was inadequate.

99. However, for the avoidance of doubt, the ICO noted that the Cabinet Office continued to misunderstand the Commissioner's position on the question of "exceptional circumstances".

100. As to the Cabinet Office's suggestion that the Tribunal failed to give adequate reasons as to how its success on s.36(2)(c) impacted its assessment of the overall public interest balance:

(1) the ICO did not agree that the Tribunal concluded s.36(2)(c) was engaged. It was unclear from [32-34] whether the Tribunal rejected the ICO's view that the Cabinet Office had failed to identify any material prejudice beyond that caught by s.36(2)(a) or (b) FOIA. In that regard, [33] appeared to have rejected the portion

of Mr Madden's statement quoted at [32] relating to s.36(2)(c), whilst the only reference to "gather[ing]" information (cf. [33-34]) in Mr Madden's statement was at [19], under the heading "Free and frank provision of advice". The ICO considered that that lack of clarity amounted to a further standalone error in the Tribunal's judgment.

(2) if the ICO were wrong in that submission, then he agreed with the Cabinet Office that the Tribunal failed to give adequate reasons on the impact of s.36(2)(c) with regard to the public interest balance.

Ground 2: regard to irrelevant considerations as part of the public interest balance

101. The Cabinet Office's Ground 2 was that the Tribunal placed weight on two irrelevant considerations, namely "matters related to the handling of entirely separate allegations against Ms Patel and another Minister [Mr Johnson] as purportedly strengthening the public interest in transparency and accountability". The ICO accepted that Ground 2 identified errors of law, but not to the full extent pleaded in the CO's Grounds of Appeal.

102. The ICO had consistently accepted that only the Prime Minister could formally determine whether the Code had been broken. He was at pains to acknowledge that point throughout the decision notice and made clear that he was not proceeding on the assumption that Ms Patel had in fact acted in breach of the Code in taking up the Viasat appointment, see [61], [63-64], [69] and [91]. Although the Tribunal's approach to those matters was not altogether clear, it appeared to have erred: (a) at [39], in concluding that the Cabinet Office's attempts to "place weight" on the Prime Minister's role in enforcing the Code was "disingenuous" and "without substance" and (b) at [45], where it referred to bullying allegations against Ms Patel as "the third breach of the Ministerial Code".

103. The ICO also accepted that the Tribunal erred in its approach to previous suggestions that Ms Patel had acted in breach of the Code in bullying civil servants:

(1) the ICO took the bullying allegation into account in combination with Ms Patel's 2017 breach and the Viasat appointment, and concluded that those matters raised a broader question about her commitment to the standards set out in the Code (the decision notice at [90]).

(2) the Tribunal took an entirely different view of the bullying allegations. It concluded at [42-44] and [47] that the candour of civil servants' views regarding Ms Patel's Viasat appointment was materially reduced by the "risk of bullying". Those findings were unevidenced and therefore irrational and/or amounted to irrelevant considerations. The ICO had never sought to argue that the withheld information shed light on bullying allegations made against Ms Patel. Nor had he sought to discount the Cabinet Office's chilling effect arguments on the basis that they arose, in whole or in part, from a culture of ministers bullying civil servants.

104. The ICO no longer contended that the bullying allegations weighed in favour of disclosure, because they post-dated the time for assessing the public interest balance.

105. Finally, the ICO agreed with the Cabinet Office that the Tribunal erred in its approach to allegations that Mr Johnson had acted in breach of the Code and the BARs when he was appointed as a columnist at The Telegraph following his resignation as Foreign Secretary in July 2018 (e.g. at [42-43]):

(1) the ICO's position was that that matter was relevant: (i) when considering (the lack of) transparency and accountability, as a comparison could be drawn between ACOBA holding Mr Johnson to account for his retrospective application with its lack of comment on Ms Patel's Viasat appointment (decision notice at [81]) and (ii) in relation to one limited piece of the withheld information.

(2) however, the Tribunal was wrong (i) to record that Mr Johnson had in fact acted in breach of the Code, and (ii) to conclude that an evaluation of all the

circumstances provided a sufficient evidential basis to raise doubts about Mr Johnson's personal "commitment" to the Code.

106. That was as far as Ground 2 went. The ICO did not understand the Cabinet Office to argue on this appeal that, because the Prime Minister had sole responsibility for enforcing the Code, it was impermissible to consider serious and credible questions about Ms Patel's compliance with the Code and the BARs as part of the public interest balance under FOIA:

(1) the Cabinet Office did not under Ground 2, and did not before the Tribunal, take issue with the ICO's suggestion that Ms Patel's Viasat appointment raised questions about her compliance with the Code. In other words, the Cabinet Office did not argue that there could be no public interest in disclosure because compliance with the Code was a matter for the Prime Minister alone

(2) nor did the Cabinet Office appeal against the Tribunal's decision at [42] to place weight on Ms Patel's 2017 breach of the Code when she was Secretary of State for International Development (as confirmed to the press by a Prime Minister's spokesperson). That point was relevant to the public interest, as it raised broader questions about Ms Patel's approach to the behavioural standards expected of ministers: see the decision notice at [90].

107. Instead, the Cabinet Office appeared to argue that the weight of the public interest in disclosure was significantly reduced by the "inherently subjective and/or political" context. That submission was misguided:

(1) first and foremost, the Cabinet Office's submission was predicated on the assumption that "the proper processes have been followed". That assumption was wrong. In particular, ACOBA was not made aware of the retrospective application and did not issue any letter of rebuke. Nor did the Prime Minister investigate or reach any conclusion regarding the Viasat appointment. The lack of transparency or accountability was plainly a factor which must be taken into account as part of the public interest balance.

(2) second, such an approach was inconsistent with the Divisional Court's analysis in ***FDA***, where at [41] it rejected the Cabinet Office's submission "that the sole purpose of the Ministerial Code is to determine the standards that ministers must meet in order to retain the confidence of the Prime Minister", and recognised that "Ministers are personally responsible for deciding how to act and how to conduct themselves in the light of the Ministerial Code and for justifying their actions including to the public. As such, the Ministerial Code does more than simply describe circumstances in which the Prime Minister may cease to have confidence in a minister."

(3) third, and relatedly, it was clear that other individuals and bodies with particular involvement and/or competence in questions of ministerial ethics and propriety were expected to express views about those matters. There was a considerable public interest in disclosure of those views. In particular, there was a strong public interest in understanding the view taken by ACOBA to compliance with the BARs (as opposed to the Code). To take another example: where the Independent Advisor on Minister's Interests had provided an opinion on ministerial compliance with the Code (as in the context of the bullying allegations against Ms Patel), that view was also a matter of considerable public interest. (The role of the Independent Advisor was recognised in the Code at 1.4, 7.2, 7.4, 7.7, 7.11, 7.13 and 7.25.)

Ground 3: failure to evaluate the public interest in disclosure in light of all relevant material and evidence

108. The Cabinet Office's Ground 3 was that "consequentially upon its failure to give adequate reasons" the Tribunal failed "to consider and evaluate for itself the matters relevant to the public interest assessment". Insofar as Ground 3 simply reframed the arguments advanced under Ground 1, then the ICO repeated his response to that ground. If, however, the Cabinet Office's real complaint was that the Tribunal failed to exercise its own independent judgment in the context of a full merits appeal, then he repeated the significant points of divergence between his arguments and the Tribunal's approach, as set out above. This was not a

case where the Tribunal simply accepted the analysis set out in the decision notice.

The public interest balance

109. Given that there was no issue between the parties that the decision of the Tribunal should be set aside and remade, the remainder of the ICO's submissions on the substantive issues to be determined as part of the remade decision were (1) whether the withheld information engaged s.36(2)(c) and (2) whether the public interest favoured disclosure or non-disclosure. In circumstances where the answer to the first issue had no material bearing on the second, the ICO addressed those points in reverse order.

(a) The ICO's limited reliance on the Tribunal judgment under appeal

110. The ICO invited the Tribunal to consider the various ways in which the Tribunal's basis for dismissing the appeal diverged significantly from the reasons advanced by him at the hearing, as set out above. In that context, the following submissions primarily approached the issues afresh rather than with reference to the Tribunal's analysis.

(b) The public interest in disclosure

111. Information of the kind requested withheld here – about a serving minister's compliance with the Code and the BARs – would invariably attract a strong public interest in disclosure for reasons of transparency and accountability (see the decision notice at [69]). As the decision notice explained at [87], ministers were public figures, with huge influence and power on public policy and decisions which affected citizens' everyday lives. The public rightly expected ministers to behave in a manner which respected the rules and codes of conduct which ministers agreed to follow and adhere to. As stated at paragraph 1.1 of the Code: ***"Ministers of the Crown are expected to maintain high standards of behaviour and to behave in a way that upholds the highest standards of propriety".*** The need for transparency and accountability was heightened where the minister in question was a sitting minister, a member of Cabinet, and occupied one of the "Great Offices of State". That was precisely the type of case

described by the Upper Tribunal in ***Evans*** at [133], where "the disputed information concerns important aspects of the working of government" and the need for transparency and accountability is "not merely of general importance, but of particular strength."

112. The strong public interest in disclosure was heightened yet further by four main factors:

(1) first, the withheld information concerned serious and credible questions about Ms Patel's compliance with the Code and the BARs in taking up the Viasat appointment without first notifying ACOBA, as could be seen from:

(a) the clear and unambiguous wording of paragraph 7.25 of the Code and paragraph 4 of the BARs

(b) the clear and unambiguous commentary in ACOBA's Annual Report that retrospective applications were not permitted

(c) Mr Madden's oral evidence before the Tribunal, which accepted that Ms Patel's "later application to ACOBA ... could be seen to be retrospective"

(2) second, there was a clear transparency and accountability deficit in relation to Ms Patel's compliance with the Code and the BARs in taking up the Viasat appointment (as recognised at [40]). This was not a case where there was any evidence that "the proper processes have been followed".

(a) ACOBA did not comment at all on Ms Patel's retrospective application.[13] ACOBA only published one letter (in July 2019), which was written without

[13] Mr Madden gave evidence that ACOBA was not concerned with breaches of the BARs at the time of the Viasat appointment. That evidence must be discounted. ACOBA was exercising advisory functions in 2017 and 2018 when Mr Osborne and Mr Johnson made retrospective applications, as well as in 2019 when Ms Patel took up the Viasat appointment. For example, ACOBA's letter of July 2019 to Ms Patel explained that "[i]t is the Committee's role to advise on the conditions that should apply to appointments or employment under the Government's Business Appointment Rules for Former Ministers". See also the requirement at paragraph 7.25 of

knowledge that Ms Patel had sought its advice retrospectively. The absence of any advice from ACOBA could be compared, for example, with its previous decisions to censure (i) George Osborne MP, following his appointment as the editor of the Evening Standard in March 2017; and (ii) Mr Johnson for making a retrospective application in respect of his appointment with The Telegraph, following his resignation as Foreign Secretary in July 2018. 24

(b) the Prime Minister did not make any public statement about whether Ms Patel complied with the Code, let alone initiate any investigation. As Mr Madden explained in oral evidence "the Prime Minister initiated no investigation, and therefore there was no conclusion to reach because there was no investigation to offer advice either way." The absence of any investigation and decision could be compared, for example, with statements made (i) in response to Ms Patel's 2017 resignation and (ii) the Prime Minister's public statement in response to the bullying allegations (***FDA*** at [18]).

(c) the Cabinet Office suggested that transparency and accountability was provided by Ms Patel registering the Viasat appointment with the Register of Members' Financial Interests before she submitted her application to ACOBA. That submission was untenable. First, it was clear that ACOBA was unaware of the appointment when it sent the July 2019 letter. Second, the relevant version of the Register of Interests ran to almost 500 pages and it was therefore unreasonable for expect ACOBA to review it.

In his written evidence, Mr Madden asserted that "[w]here there has been no finding of any breach of the rules in the context of due process, public disclosure is not an appropriate backdoor mechanism for accountability." However, there was no identifiable process of investigation into, or conclusion concerning, Ms Patel's compliance with the rules. FOIA would therefore play a vital role in

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the 2019 Code to notify ACOBA of appointments. However, if the Upper Tribunal accepted Mr Madden's evidence that ACOBA had no responsibility for advising on breaches of the BARs, that added further weight to the ICO's submission that there was a clear transparency and accountability deficit in relation to the Viasat appointment.

providing the transparency and accountability which was lacking through other means.

(3) third, doubts about Ms Patel's compliance with the Code and the BARs fell to be considered in light of her breach in 2017 whilst she was Secretary of State for International Development. The Guardian article quoted in the decision notice at [5] recorded that, on 6 November 2017, "A No 10 spokesman confirm[ed] that Patel was rebuked for breaching the ministerial code." The combination of Ms Patel's previous breach of the Code and the serious and credible questions of breach raised by the Viasat appointment in turn raised a broader question about her approach to the behavioural standards expected of ministers.

(4) fourth, the withheld information was likely to contribute to public debate about the way in which the Code and the BARs were enforced, including:

(a) the effectiveness of ACOBA in upholding the BARs

(b) the tension between the clear standards set out in the Code and the political context in which it was applied (including the Prime Minister's discretion in determining whether there had been breaches).

113. The ICO no longer relied on the bullying allegations against Ms Patel as part of his assessment of the public interest in disclosure. Since the decision notice and the Tribunal hearing, he had adopted the position that, where a public authority failed to provide its initial refusal within the 20 working day timeframe deadline at s.10 FOIA, matters must still be assessed as they stood on the date of the statutory deadline. On the facts of the present case, that meant assessing matters on 4 September 2019, rather than 23 March 2020. The ICO was not aware of any clear evidence indicating that the alleged bullying took place prior to 4 September 2019. (For the avoidance of doubt, the ICO was not inviting the Upper Tribunal to reach any decision on whether the public interest balance should be assessed at the time of the statutory deadline for compliance rather than the Cabinet Office's initial refusal.)

(c) The public interest in non-disclosure

114. The ICO had consistently accepted that disclosure would result in a loss of candour and/or give rise to a chilling effect (e.g. the decision notice at [99]). However, he did not agree that the risks were as significant as the Cabinet Office alleged, or that they outbalanced the weighty public interest in disclosure (see the decision notice at [99-100]).

115. Firstly, the decision notice did not order disclosure of the names of all of the officials mentioned in the withheld information. Instead, it concluded that the names of just three individuals in very senior, public-facing roles should be disclosed at [104] cf. ***Davies*** at [26] and ***Badger Trust*** at [75]. (The ICO submitted that Mr Madden's evidence on the impact of anonymisation of the names of more junior officials was unconvincing and should be afforded minimal weight.)

116. Second, the CO's candour arguments were overstated because the facts of this case were unusual. In particular, as set out above, the public interest in disclosure was heavily informed by (a) the clarity of the rules in issue; (b) the transparency and accountability deficit, in particular the lack of any investigation and/or censure by ACOBA or the Prime Minister regarding Ms Patel's compliance with the rules and (c) the relevance of Ms Patel's previous breach of the Code in 2017.

117. In that regard, the Cabinet Office had misunderstood the ICO's position in the decision notice at [96] 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". The Cabinet Office argued that that argument was flawed because there was no guidance as to what would amount to "exceptional circumstances". The ICO had never suggested that civil servants were able to appreciate at the time of advice and discussions whether the circumstances were exceptional and/or the public interest would favour disclosure if those communications were requested under FOIA. His position was instead

that, if disclosure were ordered in this case, civil servants would know that the circumstances giving rise to disclosure were exceptional and/or unusual, and would therefore not be discouraged from expressing themselves frankly and freely in future.

(d) Further arguments relied on by the Cabinet Office

118. The Cabinet Office relied on various other arguments, all of which were without merit.

119. First, the ICO did not err in failing to give "appropriate weight" to the qualified persons' opinions. The weight to be afforded to the qualified person's opinion is a matter for the ICO and/or Tribunal. It cannot be said that his analysis of the weight to be afforded to the opinions in this case (in the decision notice at [99]) was flawed in circumstances where those opinions were highly generic.

120. Second, he did not give insufficient weight in the decision notice (at [65-66]) to his earlier decision notice, FS50795901, concerning Mr Johnson's appointment as a columnist at The Telegraph:

(1) it was trite that decision notices were fact-specific and non-binding on the Tribunal: cf. ***O'Hanlon v IC*** [2019] UKUT 34 (AAC) 4 at [17] (on the relevance of previous Tribunal decisions).

(b) decision notice FS50795901 reached a different view on the public interest in circumstances where (i) the prejudice arising from a chilling effect was of greater concern because ACOBA did not have the power to compel applicants to cooperate with it and was therefore dependent on the voluntary provision of information (at [49-50] of FS50795901) and (ii) the public interest in transparency and accountability was met by ACOBA publishing its letter rebuking Mr Johnson for his appointment (see [51]). Neither of those factors was relevant in the present case.

121. Third, the ICO did not fail to take into account additional public interest factors as a result of his decision that s.36(2)(c) did not apply, as explained below.

Whether s.36(2)(c) was engaged

122. This issue only arose if the Upper Tribunal agreed with the ICO that the Tribunal did not reach a sufficiently clear decision on that issue.

123. Because s.36(2)(c) concerned situations where disclosure "would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of affairs" (emphasis added), it could not apply to a situation properly covered by ss.(2)(a) or (b): see ***Evans v IC and the Ministry of Defence*** at [53] and ***McIntyre v IC and the Ministry of Defence*** (EA/2007/0068) at [25].

124. In that regard, the correct interpretation of s.36(2)(c) was a hard-edged question of law with a single answer. The substance of the qualified person's opinion needed only meet a rationality threshold. But it did not follow that the qualified person could adopt his or her own interpretation of the statutory wording so long as that interpretation was not absurd or irrational cf. ***R (Kingston Upon Hull City Council) v Secretary of State for Business, Innovation and Skills & Ors*** [2016] EWHC 1064 (Admin) at [55-59].

125. In the same vein, Mr Madden's written evidence purportedly addressing s.36(2)(c) was in fact concerned with the importance of the free and frank provision of advice and views:

(1) paragraph 28 stated that the Prime Minister must be given "robust advice about potential breaches", and that the Cabinet Office "is able to notify and provide accurate information to ACOBA".

(2) paragraph 29 focused on “individuals being willing to come forward and participate, and on their full cooperation and frankness”, and on the “quality and frankness of any information they provide”

(3) paragraph 30 considered the risks of “[a]ny diminution in the candour or quality of advice and views”

(4) where paragraph 31 considered (with emphasis added) the “*broader importance* to the public of the Cabinet Office maintaining a well functioning system for handling complaints underpinned by assurances of confidentiality which are upheld other than in exceptional cases”, that was concerned with the consequential benefits of protecting candour.

126. In any event, if s.36(2)(c) were engaged, the error was one of form rather than substance for the purposes of the public interest balance. It was clear from that that any additional prejudice alleged by the Cabinet Office was inextricably linked to its candour arguments.

Conclusion

127. For those reasons the ICO invited the Upper Tribunal to:

(1) allow the appeal, but only on the more limited basis set out above

(2) remake the Tribunal’s decision; and

(3) uphold the decision notice by ordering disclosure of all of the withheld information, save for all names other than the three individuals listed in the Confidential Annex.

Discussion

Preliminary

Grounds 1 and 2

128. Given that both parties are in agreement that the decision of the Tribunal contained errors of law and that the appeal should be allowed and the decision of the Tribunal remade, I am satisfied that I do not need to embark on a detailed exegesis of the decision of the Tribunal. It is sufficient to say that, insofar as the parties are in agreement about the extent of the errors made by the Tribunal in relation to grounds 1 and 2 of the appeal, I accept those submissions and accept that it follows that the decision of the Tribunal should be set aside. I do not therefore need to consider whether the Cabinet Office is right that the grounds of appeal should succeed to a wider extent or on additional bases beyond the ambit of the concessions made by the ICO. Mr Coppel KC for the Cabinet Office candidly accepted in his opening submissions that the matters on which the parties continued to disagree as to the grounds of appeal were not matters of substance, or as Mr Perry put it in his oral submissions, there was some remaining dispute "at the edges" about where the errors of the Tribunal lay. It is therefore sufficient to set aside the decision of the Tribunal that grounds 1 and 2 succeed to the extent agreed by the parties and to decide that the decision of the Tribunal should be set aside for error of law.

129. For these reasons, and at least to the extent agreed between the parties, the appeal is allowed.

S.36(2)(c)

130. Given its potential impact on the public interest balance test, it is, however, right that I should consider in more detail the Tribunal's treatment of the application of s.36(2)(c) in the light of the ICO's original decision.

131. In the original decision notice, the ICO considered that, whilst s.36(2)(b)(i) and (ii) were engaged, s.36(2)(c) was not:

> "45. Having considered the content of the withheld information on the basis of this exemption, and taking into

> account the qualified person's above opinion, the Commissioner is satisfied that both sections 36(2)(b)(i) and (ii) are engaged to the withheld information. However, in order for section 36(2)(c) to apply, the prejudice claimed must be different to that claimed under section 36(2)(b) (i.e. must 'otherwise prejudice')[14]. As the qualified person's opinion has not identified what 'other' prejudice (i.e. other than that covered by section 36(2)(b)), would be caused by disclosure of the withheld information, the Commissioner does not consider that section 36(2)(c) is engaged in this matter.
>
> ...
>
> 59. As noted in paragraph 45 above, as the Commissioner considers that the qualified person's opinion has failed to establish a prejudice *'otherwise'* than those covered by section 36(2)(b)(i) and (ii), he has not considered the Cabinet Office public interest arguments in respect of section 36(2)(c)."

132. By contrast, the Tribunal found that

> "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."

133. Given that s.36(2)(b)(i) covers the provision of advice and s.36(2)(b)(ii) the exchange of views, the reference to the gathering of evidence and weight can only sensibly refer to an additional matter, namely prejudice to the effective conduct of public affairs under s.36(2)(c). (Like Mr Perry, I am not sure that I understand the addition of the words "and weight", but the reference to the gathering of evidence can only sensibly refer to s.26(2)(c).)

134. That conclusion does not, however, appear easily to follow from the preceding paragraphs [32] and [33] where the Tribunal stated (with emphasis added):

[14] ***Evans v Information Commissioner and the Ministry of Defence*** (EA/2006/0064).

> "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*."

135. Having initially stated that "*on this occasion there is no issue of a need for witnesses to come forward*" and thus (apparently) no engagement of s.36(2)(c), the Tribunal then went on to refer to (a) the question being whether the proper processes of government, namely 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 and (b) there being a need for a careful collection of information and the chilling effect of disclosure which would foreseeably have some negative impact on the ability *to gather relevant information,* suggesting by contrast that it was engaged. The matter is frankly opaque, but the short answer is that paragraph [34] can only be read as engaging s.36(2)(c).

136. I therefore conclude that the Tribunal did find that s.36(2)(c) was engaged, but that (as the ICO now accepts) its decision in that respect was inadequately reasoned. I shall go on to consider below (a) whether s.36(2)(c) was in fact engaged (contrary to the decision of the ICO) (b) if s.36(2)(c) were engaged, whether that makes any difference to the public interest balancing test.

137. As to whether s.36(2)(c) was in fact engaged, the Minister of State, Chloe Smith, provided a short opinion running to three paragraphs, the first stating her conclusion that ss.36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) were engaged and the second stating her conclusion that disclosure of the information in scope of the request would be likely to inhibit the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation, and would otherwise prejudice, or would be likely to otherwise to prejudice, the effective conduct of public affairs.

138. However, the last paragraph of her opinion, which was cited by the ICO in his decision notice at [44], stated only that

> *'It is necessary that officials are able to consider and discuss arguments as to whether the requirements set out in the Business Appointment Rules and the Ministerial Code have been complied with in a particular case in a free and frank manner. Such free and frank discussions allow them to come to a position so that they may provide advice to Ministers. This is important when discussions relate to a serving Minister. Disclosure, or fear of disclosure, of such conversations may deter officials from taking part in these deliberations frankly, which is likely to be harmful to the quality of such discussions. I am satisfied that there is a real risk that this is likely to happen'.*

139. On that basis the ICO concluded at [45] that

> "45. Having considered the content of the withheld information on the basis of this exemption, and taking into account the qualified person's above opinion, the Commissioner is satisfied that both sections 36(2)(b)(i) and (ii) are engaged to the withheld information. However, in order for section 36(2)(c) to apply, the prejudice claimed must be different to that claimed under section 36(2)(b) (i.e. must 'otherwise prejudice')[15]. As the qualified person's opinion has not identified what 'other' prejudice (i.e. other than that covered by section 36(2)(b)), would be caused by disclosure of the withheld information, the Commissioner does not consider that section 36(2)(c) is engaged in this matter."

140. I am satisfied that he was entitled to reach that conclusion on the evidence before him. The third paragraph does not identify what "other" prejudice (i.e. other than that covered by s.36(2)(b)), would be caused by disclosure of the withheld information) and accordingly the ICO was rightly entitled to conclude that s.36(2)(c) was not, on the true construction of the opinion, engaged in the matter.

141. The whole thrust of that third paragraph is to do with the provision of advice and the free and frank exchange of views (with emphasis added):

> "It is necessary that officials are able to consider and *discuss arguments* as to whether the requirements set out in the Business Appointment Rules and the Ministerial Code have been complied with in a particular case in a free and frank manner. Such free and frank *discussions* allow them to come to a position so that they may *provide advice* to Ministers. This is important when *discussions relate to a serving Minister*. Disclosure, or fear of disclosure, *of such conversations* may deter officials *from taking part in these deliberations frankly*, which is likely to be harmful to *the quality of such discussions*. I am satisfied that there is a real risk that this is likely to happen."

142. In short, if the exemption were to be upheld in relation to s.36(2)(c), the qualified opinion would have had to be more detailed and more explicit than it

[15] ***Evans v Information Commissioner and the Ministry of Defence*** (EA/2006/0064).

was. It is not in dispute that the opinion of the qualified person was a reasonable one, but the exemption in relation to the particular subsection only bites if the opinion of the qualified person actually engages that subsection in the first place. This one was too brief and did not, although it did engage both limbs of subsection (b).

143. The Cabinet Office's riposte is that the additional or other prejudice was instead covered by the evidence of Mr Madden. Mr Madden, of course, was not the qualified person for the purposes of s.36, but the Cabinet Office's point was that Mr Madden's evidence was relevant to the question of the public interest balance in deciding whether or not the withheld material should be disclosed. Paragraphs 19 to 24 of his witness statement covered the provision of advice under s.36(2)(b)(i), paragraphs 25 to 26 the free and frank exchange of views under s.36(2)(b)(ii) and paragraphs 27 to 32 other prejudice to the effective conduct of public affairs under s.36(2)(c). I accept the Cabinet Office's submission that Mr Madden's evidence is relevant to the question of the public interest balance in deciding whether or not the withheld material should be disclosed, but in my judgment that does not advance the Cabinet Office's case.

144. It is not in dispute that s.36(2)(c) concerns situations where disclosure "would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of affairs" and that it cannot not apply to a situation properly covered by ss.(2)(a) or (b)(i) or (ii): see ***Evans*** at [53] and ***McIntyre*** at [25].

145. I agree, however, with the submissions of Mr Perry that, when analysed, the main thrust of those latter paragraphs of Mr Madden's evidence, which purported to address s.36(2)(c) are, when read as a whole, in fact concerned with the importance of the free and frank provision of *advice* and *views.*

146. Thus, paragraph 28 states that the Prime Minister must be given "robust *advice* about potential breaches" and in that context that the Cabinet Office "is able to *notify* and *provide accurate information* to ACOBA" (i.e. to advise it or to provide views to it).

147. Paragraph 29 focuses on “individuals being willing to come forward and participate, and on their full cooperation and frankness”, and on the “quality and frankness of any information they provide”.

148. Paragraph 30 considers the risks of “[a]ny diminution in the candour or quality of *advice* and *views*”.

149. Paragraph 31 considers the “broader importance to the public of the Cabinet Office maintaining a well-functioning system for handling complaints underpinned by assurances of confidentiality which are upheld other than in exceptional cases”, but that is concerned with the consequential benefits of protecting candour.

150. In substance, what is apparent from Mr Madden’s evidence is that the prejudice which is said to arise in relation to s.36(2)(c) is in essence the same as, and flows directly from, the chilling effect and candour-type prejudice already identified in relation to s.36(2)(b)(i) and (ii). There is no distinct and separate head of prejudice in relation to s.36(2)(c); the chilling effect and candour points already fall squarely within s.36(2)(b)(i) and (ii).

151. Moreover, I also agree with Mr Perry that, in any event and even if s.36(2)(c) were engaged, contrary to the view of the ICO and my own conclusion, the matter is really one of form rather than substance for the purposes of the public interest balance. It is clear that any additional prejudice alleged by the Cabinet Office is inextricably linked to its candour and chilling effect arguments.

152. In other words, if the Cabinet Office succeeds on s.36(2)(b)(i) and (ii), it does not need s.36(2)(c), but if it fails on s.36(2)(b)(i) and (ii), s.36(2)(c) is not a trump card which will nevertheless win the trick.

153. The Cabinet Office sought to rely on ***Malnick*** at [65-66] for the proposition that it ought to follow that the ICO’s conduct of the public interest balance was flawed because the question of broader evidence in relation to s.36(2)(c) had not

been considered, but those paragraphs add nothing to its case. In my judgment, those matters did not fall to be considered because s.36(2)(c) was not engaged and, even if it had been, the outcome of the case would have been the same, but in any event those paragraphs in ***Malnick*** turn on the particular facts of that case as to the weight to be accorded to the qualified person's reasonable opinion and lay down no rule that the ICO's conduct of the public interest balancing exercise was necessarily flawed were it the case that s.36(2)(c) was in fact engaged.

154. Equally, I did not find much assistance in what was said in ***Alexander*** at [134-138]. I have no reason to doubt the correctness of what was said in ***Alexander***, although I take the point that what was said was said in the context of submissions about chilling effect in relation to the applicability of the s.36(2) exemption, rather than the weight to be afforded to that exemption in the public interest balance. As with ***Malnick***, the relevant paragraphs in ***Alexander*** turn on the particular facts of that case as to the weight to be accorded to the qualified person's reasonable opinion and lay down no rule that the ICO's conduct of the public interest balancing exercise was necessarily flawed were it the case that s.36(2)(c) was in fact engaged.

155. In reality, I suspect that there was no real or significant difference between the parties as to the *principles* behind the relative weight to be accorded to the evidence of Mr Madden; the real point of cleavage between them was the application of those principles to the facts of this case.

Ground 3

156. I should also say, however, that I do not accept ground 3 of the grounds of appeal (though in oral argument both sides accepted that it was now not necessary to deal with it). Insofar as that ground repeats ground 1, it is sufficient to have accepted the concessions made in that respect by the ICO. Insofar as the ground asserts that the Tribunal effectively abdicated its judicial function and failed to exercise its own independent judgment about the merits of the appeal, I do not accept it.

157. Given the eight areas of significant divergence between the decision notice of the ICO and the decision of the Tribunal, which I have set out at some length in paragraph 70 above, the submission that there was no sign from the decision of the Tribunal bringing to bear its own judicial analysis to decide the relevant issues afresh, but that it simply adopted (and to some extent embellished) what it understood to be the ICO's position, summed up under the single word heading "abdication", is simply untenable.

158. On the contrary, it is apparent rather that the Tribunal embarked on its own analysis of the issues, of its own motion and without some of them having even been argued by the ICO. It is the position of the parties that it did so defectively, as I have accepted, but it did not simply rubber-stamp what the ICO had decided. Far from it.

159. Indeed the submission itself was constrained to accept that the first, second, sixth and seventh points were all examples of the Tribunal appearing not to place weight on factors on which the ICO had relied, which is hardly consistent with wholesale abdication of function. The submission went on to suggest that the third, fourth and fifth points highlighted divergences, but then sought to explain them away as being better explained by the Tribunal's misunderstanding of the ICO's position than by any exercise of independent judgment. The more compelling explanation is that the Tribunal had not misunderstood the ICO's position, but that it had perfectly well understood it, but had gone radically (and erroneously) beyond it.

160. The Cabinet Office argued that "gilding the lily with additional factors did not constitute a substantive difference." On the contrary, the decision can only be read as a substantive and substantial departure from the decision of the ICO, albeit that the Tribunal reached the same outcome as the ICO, but on radically different (but flawed) grounds.

161. I therefore reject the third ground of appeal in any event.

Remaking the Decision

162. The parties are also in agreement that I should remake the decision rather than remit it for further rehearing. I agree. The issue of the public interest balancing test is one which the Upper Tribunal is, after full argument, in as good a position to determine as a freshly constituted tribunal would be and I can determine the matter now more expeditiously.

163. In the first place, the underlying FOIA request is now more than 5 years old (indeed nearly 6 years old). Secondly, I have all of the information before me necessary to remake the decision. Thirdly, the issues on the appeal largely overlap the substantive issues originally considered by the ICO in his decision notice and the issues subsequently considered by the Tribunal and on which I have heard full argument, supplemented by detailed skeleton arguments and oral submissions.

164. I therefore conclude that, having set aside the decision of the Tribunal, I should remake the decision myself.

165. The real question is *how* I should remake the decision, whether (as the Cabinet Office says) to the effect that the withheld information should not be disclosed or (as the ICO says) to uphold the original decision notice by ordering disclosure of all of the withheld information, save for all the names other than the three individuals listed in the Confidential Annex to the original decision notice.

166. For the reasons which are set out below, I have concluded that the correct course is to remake the decision in the manner contended for by the ICO.

The Public Interest Balance

167. In my judgment, the public interest arguments both for and against disclosure of the information in this case are strong and quite finely balanced.

168. I agree with the ICO that

> "98. ... section 36 is primarily concerned with protecting the processes of advice and deliberation and ensuring that these are not inhibited. The Commissioner considers that there is a strong and important public interest in providing and protecting the safe space which allows officials to have such discussions and exchanges. Where information relates to discussions and exchanges about a particular issue that are still ongoing, the Commissioner also considers that public interest arguments as to the chilling effect will have weight and relevance.
>
> 99. 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. The Commissioner recognises that the content of the withheld information is frank and candid in nature, such that there are strong public interest grounds for protecting its confidentiality. Such is the strength of that public interest that the Commissioner considers that there would need to be a specific and compelling public interest factor for the public interest in maintaining the exemption to be outweighed."

169. The ICO concluded at [105] of the decision notice that

> "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."

170. The ICO does not now place reliance on the bullying allegations relating to Sir Philip Rutnam's resignation (see paragraphs 104 and 113 above) and so that matter no longer falls to be considered in the balance of the public interest for and against disclosure.

171. I shall therefore proceed to consider the factors in favour of public disclosure as against those factors which weigh against public disclosure in the absence of that factor.

Factors in favour of disclosure

172. I consider in turn the four main factors in favour of disclosure identified by the ICO:

(1) the withheld information concerned serious and viable questions about Mrs Patel's compliance with the Code and the BARs

(2) there was a clear transparency and accountability deficit in relation to her compliance with the Code and the BARs in taking up the Viasat appointment

(3) doubts about her compliance with the Code and the BARs fell to be considered in the light of her alleged breach in 2017 whilst she was Secretary of State for International Development

(4) the withheld information was likely to contribute to public debate about the way in which the Code and the BARs are enforced.

173. However, in my judgment it is important when considering these factors to bear in mind the need for transparency and accountability where important aspects of the work of government are concerned. As Lord Walker said in ***BBC v Sugar*** at [76]

> "It is common ground that FOIA was enacted in order to promote an important public interest in access to information about public bodies. There are (as Schedule 1 to FOIA reveals) thousands of public authorities, large and small, which are paid for out of public funds, and whose actions or omissions may have a profound effect on citizens and residents of the United Kingdom. There is a strong public interest in the press and the general public having the right, subject to appropriate safeguards, to require public authorities to provide information about their activities. It

> adds to parliamentary scrutiny a further and more direct route to a measure of public accountability."

and as the Upper Tribunal has held in ***Evans*** at [133]

> "[w]hen the disputed information concerns important aspects of the working of government, the interests in accountability and transparency will be not merely of general importance, but of particular strength."

Serious and viable questions about compliance

174. Paragraph 7.25 of the Code is clear that

> "Former Ministers must ensure that no new appointments are announced, or taken up, before the Committee has been able to provide its advice."

175. Paragraph 4 of the BARs was also equally clear that

> "Retrospective applications will not normally be accepted".

176. The same point was addressed further in ACOBA's Annual Report for 2018-2019 and 2019-2020, As was explained in the Foreword (with emphasis added):

> "*Retrospective applications will be unambiguously treated as breaches of the Rules*."

177. The Annual Report went on to explain (again with emphasis added):

> "21. A retrospective application is one where an appointment or employment has been taken up or announced before the Committee has provided its full and final advice. *This is a breach of the Government's Rules*"
>
> (see, to the same effect, paragraphs 49-50 of ACOBA's 2017-2018 Annual Report).
>
> 22. *The Committee needs to be free to offer the most appropriate advice in any situation without the obvious*

> *constraints which occur (perceived or otherwise) if an appointment or employment has already been announced, or the applicant has already signed a contract or taken up the role*.
>
> 23. There may be unusual or extenuating circumstances where the Committee may choose to consider the retrospective application. This will not be the norm. *In these cases, the Committee will still make it clear it is not acceptable to submit an application retrospectively.*
>
> ...
>
> 25. *Where the Committee has received a retrospective application, it will make it clear in its advice that retrospective cases will not be accepted and that a failure to seek advice is a breach of the Rules.* It will also consider on a case by case basis how the public interest is best served. For example, the Committee may consider the risks presented on the face of the application to be so significant that it will provide full and final advice to ensure such risks do not go without consideration and mitigation."

178. Importantly, the Report also states that

> *"24. The Committee deploys transparency to hold individuals to account, publishing the correspondence concerned. The Committee takes this approach in order to draw attention to the failure to submit an application and to encourage wider compliance with the Government's Rules. The Committee's transparent approach leads to welcomed scrutiny by members of the public and the media who know to expect to see advice published on ACOBA's website for taken up appointments."*

179. Mr Trickett, the shadow minister for the Cabinet Office, had complained to the Prime Minister calling or an investigation on the basis that Mrs Patel had apparently breached the Code (see the decision notice at [9], [64], [77-78], [84] and [101].

180. Mr Madden's oral evidence before the Tribunal, which was accepted, was that Mrs Patel's later application to ACOBA "could be seen as retrospective".

181. It seems to me that none of this can be gainsaid. The allegation made against Mrs Patel undoubtedly raised serious and credible issues about breach of the Code and the BARs. Instead, Mr Coppel KC made two points. The first was that all of the information necessary to ascertain whether or not Mrs Patel had complied with the Code and the BARs was in the public domain already and that disclosure would provide no additional clarity: the view so the civil servants would add little to what was already in the public domain. That falls more naturally to be dealt with under the hearing of transparency and accountability and I shall deal with it there.

182. The second was in relation to the ICO's submission that the case was an exceptional one. It was said by the ICO that the case raised serious and credible allegations, but civil servants would then be in the invidious position of having to weigh up seriousness and credibility when only the Prime Minister could decide whether or not the Code had actually been broken.

183. I shall deal further with the question of exceptionality below, but I do not consider that Mr Coppel KC's submission in any way reduces the fact that serious and credible allegations had been made. Those allegations needed to be investigated and considered. That only the Prime Minister could ultimately decide whether or not the Code had actually been broken did not preclude the need for such investigation and consideration, a consideration which leads to and is inextricably linked with the questions, to which I now turn, of transparency and accountability.

Transparency and accountability deficit

184. I am satisfied that there was a clear transparency and accountability deficit in this case in relation to in relation to Mrs Patel's compliance with the Code and the BARs in taking up the Viasat appointment.

185. In the first place, ACOBA did not comment at all on Mrs Patel's retrospective application. ACOBA only published one letter (in July 2019), which was clearly written without knowledge that she had sought its advice retrospectively.

186. As the letter stated (with emphasis added)

> "You approached the Committee *about taking up* an appointment as a Strategy Adviser to Viasat Inc.
>
> ...
>
> When a former Minister *takes up* a particular appointment or employment, there should be no cause for any suspicion or impropriety.
>
> ...
>
> You seek to take up an appointment as a Strategic Adviser at Viasat Inc (Viasat). You told the Committee your role *will involve* providing strategic business advice in Asia and *will not involve* any UK work, UK Government work, or advocacy on Viasat's behalf.
>
> ...
>
> I should be grateful if you would inform us *as soon as you take up this role*, or if it is announced that *you will do so* ... *We shall otherwise not be able to deal with any enquiries, since we do not release information about appointments that have not been taken up or announced. This could lead to a false assumption being made about whether you had complied with the Rules and the Ministerial Code*."

187. It is true that Mr Madden gave evidence that ACOBA was not concerned with breaches of the BARs at the time of the Viasat appointment. It was, however, exercising advisory functions in 2017 and 2018 when Mr Osborne and Mr Johnson made retrospective applications, as well as in 2019 when Mrs Patel took up the Viasat appointment, and it made clear its position in relation to those earlier matters. Thus the letter of July 2019 to Mrs Patel also explained that

> "[i]t is the Committee's role to advise on the conditions that should apply to appointments or employment under the Government's Business Appointment Rules for Former Ministers".

188. Were it the case that I accepted Mr Madden's evidence that ACOBA had no responsibility for advising on breaches of the BARs at the time, that would in fact add further weight to the ICO's submission that there was a clear transparency and accountability deficit in relation to the Viasat appointment.

189. The absence of any such advice from ACOBA therefore contrasts strikingly with its previous decisions to censure first Mr Osborne, following his appointment as the editor of the Evening Standard in March 2017 and secondly Mr Johnson for making a retrospective application in respect of his appointment with The Telegraph, following his resignation as Foreign Secretary in July 2018.

190. In the former case ACOBA remarked in its letter of 28 April 2017

> "You submitted your application on 13 March. The Committee considers it to be a matter of regret that your appointment as Editor was announced by the Evening Standard on 17 March, just days later and before the Committee had an opportunity to make the necessary enquiries, consider your application, and provide its advice. You informed the Committee that you had no involvement in the timing of the announcement, which you assured the Committee was made by your prospective employer due to your appointment becoming known to other media organisations. The Committee also notes that the press statement issued by the PR firm working for ESI Media (parent company of the Evening Standard) stated: "As required of former ministers, Mr Osborne is seeking the advice of the Advisory Committee on Business Appointments on his appointment." However the Committee is very concerned that despite the press statement noting you were still seeking the Committee's advice, you subsequently signed a contract of employment with the Evening Standard on 20 March - without having received the Committee's advice. It was not appropriate for you to do so. You did not disclose any intention to do so to the Committee when you originally submitted your application, nor have you provided an explanation for this during the course of the Committee's consideration. This is not in compliance with the Business Appointment Rules, which state that former Ministers 'must abide by the advice of the Committee' – advice which you were yet to receive."

191. In the latter ACOBA remarked in its letter of 8 August 2018

> "You resigned as a Minister on 9 July.
>
> It became public knowledge you would be taking up a role when The Telegraph started to advertise your 'new weekly column' on the weekend of 14 and 15 July 2018.
>
> You have confirmed that you signed a contract with The Telegraph on 12 July 2018, yet the Committee did not receive your application until 26 July 2018.
>
> The Committee considers 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 leaving office under the Government's Business Appointment Rules.
>
> The Rules apply by virtue of the Ministerial Code, paragraph 7.25 of which states that [see above]
>
> Failure to seek advice before The Telegraph made public you would be taking on this work and before signing a contract was a failure to comply with your duty to seek advice.
>
> The Government has confirmed that all ministers are asked to sign the Ministerial Code on entering ministerial office. Further, in January 2018, the Ministerial Code was updated and Ministers were required to confirm in writing that they had read the Code and understood their obligations under it.
>
> ...
>
> The Government's Business Appointment Rules for former Ministers specify that retrospective application will not normally be accepted. To fulfil the remit given to it by Government, the Committee needs to be able to consider an application fully and freely before offering its advice. It is impossible to do this in a way that will command public confidence if an appointment has already been announced and/or taken up ...
>
> In all the circumstances, the Committee refuses to provide retrospective advice for this appointment."

(It was this factor which served to distinguish the case from the instant one, as the ICO explained in his decision notice FS50795901 of 15 October 2019.)

> "51. The Commissioner considers, in all the circumstances of the case, that the public interest in maintaining the exemptions outweighs the public interest in disclosure of the withheld information. The Commissioner is satisfied that the public interest in transparency and accountability in this matter has been appropriately and proportionately met by ACOBA's publishing of its letter to Mr Johnson of 8 August 2018. The information contained in that letter reflects the withheld information and the latter would not disclose any further explanation, justification or defence made by Mr Johnson for his failure to follow the Rules. Had ACOBA not placed such information in the public domain, then the withheld information in this matter would have assumed a greater weight and significance.")

192. The transparency and accountability deficit is compounded by the fact that the Prime Minister did not make any public statement about whether or not Mrs Patel had complied with the Code. Indeed it is apparent from Mr Madden's evidence that the Prime Minister did not initiate any investigation. As Mr Madden explained in his oral evidence "the Prime Minister initiated no investigation, and therefore there was no conclusion to reach because there was no investigation to offer advice either way." That was in marked contrast to the statement made in response to Mrs Patel's resignation in 2017 and the exchange of letters between her and Mrs May in the aftermath of that resignation.

193. I agree with Mr Perry that the Cabinet Office's submission that transparency and accountability was provided by Mrs Patel registering the Viasat appointment with the Register of Members' Financial Interests before she submitted her application to ACOBA is untenable. It is obvious from the extracts from the letter cited above that ACOBA was unaware of the appointment when it sent the July 2019 letter. In addition, the relevant version of the Register of Interests ran to almost 500 pages and it was not reasonable to expect ACOBA to review it. It is true that the Register is assembled in alphabetical order, so it would not require a detailed toothcombing search to find the relevant entries, but I agree with Mr Perry that ACOBA should not as a matter of principle (rather than of practicality) be expected to proceed on the basis that there has not been full and frank

disclosure by the applicant and that it must double check what the applicant has said to it by referring to the Register or other documentation.

194. Mr Coppel KC argued that it was crystal clear and in the public record when Mrs Patel took up the appointment with Viasat, but the crucial point is that ACOBA should not as a matter of principle be expected to proceed on the basis that there has not been full and frank disclosure by the applicant and that it must double check what the applicant has said to it by referring to the Register or other documentation. ACOBA should not be required to piece together parts of a jigsaw puzzle. Nor should the public.

195. Moreover, it is plain from ACOBA's Annual Report (see paragraph 20 above) that

> "24. The Committee deploys transparency to hold individuals to account, publishing the correspondence concerned. The Committee takes this approach in order to draw attention to the failure to submit an application and to encourage wider compliance with the Government's Rules. The Committee's transparent approach leads to welcomed scrutiny by members of the public and the media who know to expect to see advice published on ACOBA's website for taken up appointments."

In this case, however, there was no published correspondence from ACOBA holding Mrs Patel to account for her retrospective application. ACOBA's letter to her in July 2019 does not criticise her for making a retrospective application because at the time at which it provided its advice, it was clearly unaware that she had done so.

196. Mr Coppel KC also relied on the written evidence of Mr Madden, who asserted that "[w]here there has been no finding of any breach of the rules in the context of due process, public disclosure is not an appropriate backdoor mechanism for accountability." However, in this case there was no identifiable process of investigation into, or conclusion concerning, Mrs Patel's compliance with the rules. FOIA therefore plays an important role in providing the

transparency and accountability which was lacking through other means. It is not some sort of covert or "backdoor mechanism for accountability". On the contrary, as Lord Walker said in ***BBC v Sugar*** at [76], there is a strong public interest in the press and the general public having the right, subject to appropriate safeguards, to require public authorities (and, I would add, Ministers) to provide information about their activities. FOIA adds to parliamentary scrutiny a further and more direct route to a measure of public accountability; it does not subvert it.

197. I agree with Mr Perry that the position might well have been different if there had been a Prime Ministerial investigation of the circumstances surrounding Mrs Patel's appointment, an ACOBA letter following up the matter when it became clear that the application had indeed been made retrospectively, a statement in the House of Commons by Mrs Patel in the light of such investigation and correspondence, a response to the Opposition, no previous allegation of breach of the Code, a much more complicated factual matrix admitting of a number of interpretations of the evidence and conflicting views amongst the civil servants charged with investigating the matter, but there was not.

198. Indeed, Mr Madden himself, in cross-examination accepted that there would be exceptional cases in which disclosure would be ordered:

> "Q. And what I wanted to understand is whether you think that there are exceptional cases where information will be disclosed under FOIA or whether officials should have an absolute comfort that they're going to have confidentiality in all cases?
>
> A. I don't, I don't accept that there should be an absolute right of confidentiality. FOIA exists for a purpose, it's a noble purpose, and of course there is a balance always to strike between the public interest of disclosure, notwithstanding all the provisions of the Act, but then that does have to be balance against the public interest of not undermining certain aspects which would be brought about as a result of disclosure.
>
> Q. So, civil servants know that in certain cases their communications may be disclosed?

A. Yes. I wouldn't want you to go away with the impression that civil servants expect an absolute right of confidentiality in their work.

Q. Yes. So, we can sort of debate what the standard is, but what you appear to be saying in your statement, and what you appear to be saying now, is that there will be exceptional or unique cases where disclosure should take place. Why, in your view, is this not an exceptional case where disclosure should take place?

A. For the reasons I've set out in my witness statement; I feel that the, that it would have an impact on the effective conduct of public affairs. Officials are required, officials need a safe space to be able to provide free and frank advice to ministers. Now, all of this operates within the context of FOIA, obviously, but that's why the exemptions are there, to protect certain functions, and then we need to strike the right balance between the public interest.

Q. Right, so based on that answer, what you're saying is that the exceptional cases are ones where disclosure wouldn't result in any significant chilling effects; loss of candour, loss of a safe space. Is that an accurate representation of your position?

A. Yes, I think so.

Q. And, again, a hypothetical question; if the Tribunal here were to recognise in its judgment that the facts of this case were somehow unique or unusual or exceptional and ordered disclosure on that basis, how would that judgment, and the contents of that judgment, impact on your assessment of the risk of a chilling effect?

A. On what basis would you say this case is exceptional, sorry?

Q. Well, I think that's a matter for submissions later and we'll come on to that, but just assume, for sake of argument, the Tribunal says this case is unusual or exceptional and we've ordered disclosure, how would that impact civil servants; would they be at a lesser risk of a chilling effect or is the risk the same?

A. The risk, the risk would exist, but we, we would seek, well, we would implement the judgment, but the risk would remain.

Q. But would the risk be unchanged?

A. I don't see how the judgment would change the risk."

199. In those circumstances I am satisfied that the ICO was entitled to state that

> "87. However, as the Cabinet Office rightly note, Ministers are public figures, with huge influence and power on public policy and decisions that affect citizens' everyday lives. The public rightly expect Ministers to behave in a manner which respects the rules and codes of conduct 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."

200. That seems to me to be entirely correct as a matter of principle and to encompass matters in a nutshell.

201. In my judgment, the ICO was therefore also entitled to conclude that

> "101. In respect of the serious matter which underlies the complainant's request, namely, the allegation that in failing to approach ACOBA for advice before taking up her role at Viasat, Ms Patel breached the Rules and therefore the Code, there has been, to date, no due transparency or accountability. There has been no published letter to Ms Patel from ACOBA, reprimanding her for her retrospective application, as there usually is in such cases. ACOBA's letter to Ms Patel of July 2019 cannot, for the reasons explained, provide any such transparency or accountability. Furthermore, to the best of the Commissioner's knowledge, there has been no public announcement or statement from the Cabinet Office as to the outcome/conclusion of the consideration of Mr Trickett's complaint (as reported in the press) to the Prime Minister about Ms Patel having allegedly breached the Code.
>
> 102. In the absence of the usual ACOBA letter, or published statement from the Cabinet Office, there is no transparency or accountability in respect of a serious matter which clearly requires both. The Commissioner considers that this notable and unusual lack of transparency and accountability risks undermining public confidence in being assured that government handles such allegations in a robust and consistent manner and risks strengthening a possible public perception ... that the Home Secretary may be being

> protected from the consequences of her actions or behaviour ...
>
> 103. Having had sight of the withheld information, the Commissioner considers that its disclosure would provide the valuable transparency and accountability, that is currently missing (and shows no sign of being provided in future) in respect of the serious allegation made against Ms Patel in respect of her dealings with ACOBA regarding her previous Viasat role. It is important to be clear that reputational harm to ministers is not a relevant public interest argument/consideration in relation to section 36."

202. A case in which there are serious and credible allegations of a potential breach of the rules, coupled with the absence of a Prime Ministerial investigation of the circumstances surrounding the appointment under scrutiny, the absence of an ACOBA letter following up the matter when it became clear that the application had been made retrospectively, the absence of a Parliamentary statement by the minister in question, the absence of a response to the Opposition and a previous incident where it was accepted that action had fallen short of ministerial standards, is not a "run of the mill" case.

Doubts about compliance in the light of the alleged breach in 2017

203. I entirely accept (as did the ICO) that it is not for me to determine whether or not Mrs Patel breached the Code in 2017. That determination is solely for the Prime Minister alone.

204. However, the wording of her own resignation letter made it perfectly clear that she herself considered that her conduct fell below the standards expected of her and that that recognition was accepted and reflected in the Prime Minister's response. The combination of her apparent acceptance that her behaviour fell below accepted standards, as recognised by Mrs May in her response to the resignation letter, coupled with the serious and credible questions of potential breach raised by the circumstances surrounding the Viasat appointment, do raise a serious question about Mrs Patel's approach to the behavioural standards expected of ministers.

205. As the ICO rightly concluded in his decision notice (with emphasis added)

> "62. 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."

206. It seems to me that none of that can be gainsaid by the Cabinet Office and Mr Coppel KC wisely did not try.

207. To reach that conclusion in relation to Mrs Patel's ministerial history does not encroach in any way on the jurisdiction and remit of the Prime Minister as sole arbiter as to determining breaches of the Code, but what it does do is to recognise the public interest which lies behind the original request as a factor in ordering disclosure. If the Cabinet Office's proposition is that there is only a limited public interest in disclosure of the views of anyone but the Prime Minister about the application of the Code and the BARs, I unhesitatingly reject it.

Contribution to public debate about enforcement

208. I can take this factor relatively shortly.

209. I accept Mr Perry's submission that the withheld information is likely to contribute to public debate about the way in which the Code and the BARs are enforced.

210. That debate encompasses both the question of the effectiveness (or otherwise) of ACOBA in upholding the BARs and the apparent tension between on the one hand the clear standards set out in the Code and the BARs and on the other the political context in which the Code is applied, including in particular the fact that the Prime Minister has a discretion in determining whether or not there have been breaches of the Code. I reiterate, however, that it is solely for the Prime Minister (and not for the ICO or the Tribunal) to determine whether or not there have been breaches of the Code.

Exceptionality

211. It was Mr Perry's submission that the case was an exceptional one, or one out of the norm, and that that factor militated in favour of disclosure.

212. That was the point made by the ICO in the decision notice at [96] where it was held that the case was exceptional and in most cases senior officials could have reasonable confidence that their advice and exchanges would not be publicly disclosed.

213. By contrast, it was one of Mr Coppel KC's headline submissions that that submission was fundamentally misconceived because it could not be known, at the time of the discussions within the Cabinet Office about the Viasat appointment, whether or not the facts of the case would *subsequently* be found to be exceptional. At the time when the civil servants within the Cabinet Office were considering the matter which later became the subject of a FOIA request, they were not in possession of an oracle or a crystal ball which would enable them to divine what would later be the outcome of the request. The ICO was determining that question with the benefit of hindsight and it was inappropriate for him to do so

to rectify what he saw as gaps in the political process by the ex post facto application of FOIA.

214. The ICO countered that by making clear that he had never suggested that civil servants would be able to appreciate at the time of advice and discussions whether the circumstances were exceptional or that the public interest would favour disclosure. Rather the point was that, if disclosure were ordered in this case, they would know that the circumstances giving rise to disclosure were exceptional or out of the norm, and would therefore not be discouraged from expressing themselves frankly and freely in future. I accept and endorse that submission.

215. More fundamentally, however, the problem with Mr Coppel KC's argument is that, if it is correct, it would preclude disclosure in every case since ex hypothesi it would never be known at the time of the advice and discussions whether the ICO would subsequently determine that the circumstances were exceptional or that the balance of the public interest favoured disclosure.

216. As Mr Perry rightly submitted, if the Cabinet Office's argument were correct, it would mean that unform weight would have to be ascribed to transparency and accountability in all cases. It would make no difference if ACOBA had commented on the retrospective nature of the application nor that the Prime Minister had investigated the matter; it would be impermissible for the ICO to take such matters into account and that cannot be right.

217. In fact Mr Coppel KC's argument lose much of its force in any event when regard is had to the matters to which I refer in paragraphs 219 to 222 below.

Factors against disclosure

218. I therefore turn to the factors which militate against disclosure. Those factors do not exist in isolation and must be measured and applied in the light of previous decisions.

219. Firstly, as the 3 judge panel of the Upper Tribunal (by which a single judge of the Upper Tribunal sitting alone is bound) rightly observed in ***Davies*** at [25] (citing another 3 judge panel)

> "25. There is a substantial body of case law which establishes that assertions of a "chilling effect" on provision of advice, exchange of views or effective conduct of public affairs are to be treated with some caution. In *Department for Education and Skills v Information Commissioner and Evening Standard* EA/2006/0006, the F-tT commented at [75(vii)] as follows:
>
> > "In judging the likely consequences of disclosure on officials' future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants since the Northcote-Trevelyan reforms. These are highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions. The most senior officials are frequently identified before select committees, putting forward their department's position, whether or not it is their own."
>
> 26. Although not binding on us, this is an observation of obvious common sense with which we agree. A three-judge panel of the Upper Tribunal expressed a similar view in *DEFRA v Information Commissioner and Badger Trust* [2014] UKUT 526 (AAC) at [75], when concluding that it was not satisfied that disclosure would inhibit important discussions at a senior level:
>
> > "75. We are not persuaded that persons of the calibre required to add value to decision making of the type involved in this case by having robust discussions would be inhibited by the prospect of disclosure when the public interest balance came down in favour of it …
> >
> > 76. … They and other organisations engage with, or must be assumed to have engaged with, public authorities in the full knowledge that Parliament has passed the FOIA and the Secretary of State has made the EIR. Participants in such boards cannot expect to be able to bend the rules.""

220. Those observations are entirely consistent with the Civil Service Code, the relevant extracts from which I have set out in paragraph 89 above.

221. Secondly, the strength of arguments about candour and chilling effect must be considered in the light of the comments of Charles J (sitting in the Upper Tribunal) in ***Lewis*** at [27-29] (as recognised in ***Davies*** at [27]) (with emphasis added):

> "27. 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 it 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 …*
>
> 28. … *any properly informed person will know that information held by a public authority is at risk of disclosure in the public interest.*
>
> 29. In my view, evidence or reasoning in support of the safe space or chilling effect argument in respect of a FOIA request that does not address in a properly reasoned, balanced and objective way: (i) this weakness, (ii) the public interest in there being disclosure of information at an appropriate time that shows that the robust exchanges relied on as being important to good decision making have taken place, and (iii) why persons whose views and participation in the relevant discussions would be discouraged from expressing them in promoting good decision making and administration and thereby ensuring that this is demonstrated both internally and when appropriate externally, is flawed."

222. Although those comments concerned s.35, the Upper Tribunal in ***Davies*** at [29] stated that they were

> "also relevant to the approach to an assessment by the qualified person of a likely chilling effect under section 36(2)

> and so to the question whether that opinion is a reasonable one."

223. They are also relevant, in my judgment, to the weighing of the public interest balance once the s.36 exemption is engaged.

224. Mr Coppel KC sought to argue that the caution expressed in ***Davies*** should be tempered in light of observations made by the Upper Tribunal in two cases: ***Department of Work and Pensions v IC*** [2015] UKUT 0535 (AAC) at [13] and ***Alexander*** at [134-138]. ***Alexander*** I will deal with immediately below. As for ***Department of Work and Pensions***, the Upper Tribunal was there dealing with a specific argument that the Department might establish a chilling effect by way of a comprehensive paper trail before and after disclosure demonstrating such a chilling effect and it dismissed the argument stating that it was unlikely that the officials in question would admit what they were doing or provide a paper trail by which it could be demonstrated, but the decision goes no further than that.

225. As to the weight to be accorded to the evidence of Mr Madden as Director of Propriety and Ethics at the Cabinet Office, it seems to me that the correct test is to accord *appropriate* consideration to that evidence. As the Court of Appeal said in ***Zola*** at [55] (with emphasis added):

> "It is clearly important that *appropriate consideration* should be given to the opinion of the qualified person at some point in the process of balancing competing public interests under section 36. No doubt the weight which is given to this consideration will reflect the Tribunal's *own assessment* of the matters to which the opinion relates."

226. Although that was said in the context of the opinion of the qualified person in the process of the balancing of the competing public interests, it seems to me again that it applies equally well to the evidence given by another person, such as Mr Madden, in the context of the balancing of the competing public interests.

227. Mr Coppel KC relied on the statement of Upper Tribunal Judge Jones in ***Alexander*** at [76] to the effect that

> "It is well recognised that, where a court has to make prognostic assessments it will nevertheless give *great* weight to the views of those with the relevant institutional expertise: *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2015] AC 945 ..."

and he laid some stress on the word "great" in that context.

228. When the decision in ***Alexander*** is read as a whole, however, I do not consider that the passage and the use of the word "great" has quite the significance that Mr Coppel KC attributed to it. Paragraph [76] was said in the context of setting out counsel's submissions on the fourth ground of appeal. It is true that at [134] Judge Jones accepted that the fourth ground of appeal was made out for the reasons submitted by counsel, with which he agreed, but what he went on to say (with emphasis added) was that

> "135. I am satisfied that the FTT failed to take account of and/or give *appropriate* weight to the relevant evidence of Ms Jordan as to the impact of disclosure of the requested reports and failed to give sufficient reasons for rejecting her evidence.
>
> ...
>
> 142. Insofar as, contrary to the above, the evidence of Ms Jordan was taken into account by FTT, I am not satisfied it was taken into account or given *proper* weight in determining whether prejudice would be caused by the release of the requested reports."

229. I do not therefore consider that Judge Jones was laying down a rule of law that *great (*as opposed to *appropriate)* weight will be accorded to the views of those with the relevant institutional expertise. That is not to say that, in the appropriate case, a court or tribunal should not accord great weight to the views of those with the relevant institutional expertise, as the Supreme Court held in ***Carlile***.

230. ***Carlile*** was a national security case and it was in that context that Lord Sumption said that

> "32. Rather different considerations apply where the question is not what is the constitutional role of the court but what evidential weight is to be placed on the executive's judgment, a question on which the human rights dimension is relevant but less significant. It does not follow from the court's constitutional competence to adjudicate on an alleged infringement of human rights that it must be regarded as factually competent to disagree with the decision-maker in every case or that it should decline to recognise its own institutional limitations. In the first place, although the Human Rights Act requires the courts to treat as relevant many questions which would previously have been immune from scrutiny, including on occasions the international implications of an executive decision, they remain questions of fact. The executive's assessment of the implications of the facts is not conclusive, but may be entitled to great weight, depending on the nature of the decision and the expertise and sources of information of the decision-maker or those who advise her. Secondly, rationality is a minimum condition of proportionality, but is not the whole test. Nonetheless, there are cases where the rationality of a decision is the only criterion which is capable of judicial assessment. This is particularly likely to be true of predictive and other judgmental assessments, especially those of a political nature. Such cases often involve a judgment or prediction of a kind whose rationality can be assessed but whose correctness cannot in the nature of things be tested empirically. Thirdly, where the justification for a decision depends upon a judgment about the future impact of alternative courses of action, there is not necessarily a single "right" answer. There may be a range of judgments which could be made with equal propriety, in which case the law is satisfied if the judgment under review lies within that range. A case like the present one is perhaps the archetypal example. Fourthly, although a recognition of the relative institutional competence of the executive and the courts in this field is a pragmatic judgment and not a constitutional limitation, it is consistent with the democratic values which are at the heart of the Convention, because it reflects an expectation that in a democracy a person charged with making assessments of this kind should be politically responsible for them. Ministers are politically responsible for the consequences of their decision. Judges are not. These considerations are particularly important in the context of decisions about national security on which, as

> Lord Hoffmann pointed out in Rehman, “the cost of failure can be high”. It is pre-eminently an area in which the responsibility for a judgment that proves to be wrong should go hand in hand with political removability.”

231. In similar vein, Lord Neuberger stated that

> “58. The specific issue raised on this appeal arises from concerns about how the Iranian government is likely to react to a particular decision of the United Kingdom government, and whether the reaction could endanger the safety of individuals for whom our government has some responsibility, or could harm this country’s economic or international political interests. These are plainly matters which are entrusted under our constitutional settlement to the executive, and in particular to the Foreign Secretary, who, with the experience and sources of information available to his department internally and externally, is, almost literally, infinitely more qualified to form an authoritative opinion on such issues than a domestic judge, however distinguished and experienced he or she may be.”

232. However, he went on to say that

> “68. Accordingly, even where, as here, the relevant decision maker has carried out the balancing exercise, and has not made any errors of primary fact or principle and has not reached an irrational conclusion, so that the only issue is the proportionality of the decision, the court cannot simply frank the decision, but it must give the decision appropriate weight, and that weight may be decisive. The weight to be given to the decision must depend on the type of decision involved, and the reasons for it. There is a spectrum of types of decision, ranging from those based on factors on which judges have the evidence, the experience, the knowledge, and the institutional legitimacy to be able to form their own view with confidence, to those based on factors in respect of which judges cannot claim any such competence, and where only exceptional circumstances would justify judicial interference, in the absence of errors of fact, misunderstandings, failure to take into account relevant material, taking into account irrelevant material or irrationality.”

233. I entirely accept that it is inherent in the precautionary approach which is generally required in dealing with potential threats to national security and public safety that decisions must be based on inherently uncertain assessments of the future and that such assessments must be made by the executive, which is infinitely more qualified to form an authoritative opinion on such issues than a domestic judge, but that is not this case.

234. The weight to be given to the decision must depend on the type of decision involved and the reasons for it. In my judgment, this is just such a case based on factors on which a judge has the evidence, the experience, the knowledge and the institutional legitimacy to be able to form his own view with confidence. It is not a case based on factors in respect of which a judge cannot claim any such competence and where only exceptional circumstances would justify judicial interference (in the absence of errors of fact, misunderstandings, failure to take into account relevant material, taking into account irrelevant material or irrationality).

235. Accordingly, the correct test to accord to the weight of the evidence of Mr Madden as Director of Propriety and Ethics at the Cabinet Office is to give it appropriate consideration and weight, but no more.

236. I accept that the present case is one where the chilling effect of disclosure is likely to be particularly strong. The information sought relates to enquiries, deliberations and the advice of civil servants relating to allegations of misconduct against a very senior figure in government. The consequences of a finding of any breach of the Ministerial Code, both political and personal, can be very severe. In those circumstances, the effect of disclosure in deterring officials from freely expressing their views on such sensitive matters is an obvious and significant one.

237. I also accept that, in order to provide free and frank advice and exchange views for the purpose of considering the appropriate response to allegations

relating to the Ministerial Code, civil servants require a safe space free from the pressure engendered by the risk of public disclosure.

238. In addition, I also accept that a safe space is important given that allegations that ministers (or former Ministers) have acted in breach of standards of behaviour expected of them can cause significant reputational damage to them as public figures and to the Government. I do not dissent from the proposition that unsubstantiated allegations about the conduct of ministers (or former ministers) can cause significant reputational damage. It would indeed be irresponsible and unfair to the individual minister concerned to disclose any information which would foster or encourage any such allegations. As against that, ministers are public figures who have great influence and power as to public policy and decisions which affect the lives of millions of citizens. The public are entitled to expect ministers to behave in accordance with the rules and codes of conduct which they agree to follow and adhere to. If there is serious and credible evidence to suggest that a minister may not have followed or adhered to the Ministerial Code or the BARs, he or she should expect a degree of legitimate and necessary transparency and accountability in relation to that conduct.

239. Whilst I give appropriate weight to those considerations, in my judgment there is a clear and strong public interest in knowing that ministers abide by and respect the Ministerial Code. Where there are strong and credible grounds for believing that minister may not have done so, there is an important public interest in transparency and accountability as to the consequences for any minister who has not abided by those obligations. That outweighs the countervailing considerations set out by Mr Madden and the Cabinet Office.

Conclusion

240. It is for these reasons that I have reached the conclusion that what tips the balance in favour of disclosure is the lack of public transparency and accountability in respect of the serious allegation made against Mrs Patel, when

seen in the relevant and important context of the previous example in 2017, when the Home Secretary's behaviour did not (on her own admission and as accepted by the then Prime Minister) accord with the high standards and conduct required and expected of Ministers, albeit that I accept that there was no formal finding of a breach of the Ministerial Code in that case.

241. Mr Coppel KC rightly said that the question of Sir Philip Rutnam's resignation loomed large in the decision of the Tribunal. That is so, but neither side seeks to uphold that decision. The ICO did not rely on it to the extent that the Tribunal did, although it clearly influenced his decision at [72], [74], [90] and [102].

242. Reconsidering the matter for myself and remaking the decision of the Tribunal below, although the allegations of bullying in relation to the resignation of Sir Philip Rutnam no longer fall to be taken into account, and thus that the balance in favour of public disclosure is not as decisive as the ICO found in his original decision notice, the absence of that factor does not, in my judgment, suffice to tip the balance in favour of withholding disclosure. In the absence of that factor, the matter is more finely balanced, but I have concluded that the balance of the public interest nevertheless still justifies disclosure.

Disclosure of the Names

243. I also agree with the conclusion of the ICO that

> "106. The Commissioner is therefore satisfied that the exemptions at sections 36(2)(b)(i) and (ii) have been correctly applied by the Cabinet Office but that the public interest in the withheld information, with the exception of all names other than the three individuals listed in the Confidential Annex, favours disclosure."

244. As to the disclosure of the identities of the more junior and non-public facing officials, the ICO found that

> "104. As previously noted, the Commissioner is not persuaded that the Cabinet Office arguments as to the future chilling effect have strong or realistic application to some of the individual officials named in the withheld

> information, given their senior and public facing roles. However, in respect of more junior and non-public facing officials named in the withheld information, the Commissioner considers that the risk of a future chilling effect, both upon them personally and with regard to departmental junior officials more widely, is a real and credible one, such that the public interest balance supports maintaining the exemption to their identities."

245. In his submissions, as set out in paragraph 115 above, Mr Perry submitted that Mr Madden's evidence on the impact of anonymisation of the names of more junior officials was unconvincing and should be afforded minimal weight, although that was a submission which was not developed or particularly emphasised.

246. I do not agree. It seems to me that, in the case of the more junior officials, the risk of a future chilling effect, both upon them personally and with regard to departmental junior officials more widely, is a real and credible one, such that the public interest balance supports maintaining the exemption to their particular identities and I did not understand the ICO ultimately to contend strongly otherwise.

Disposal

247. The decision of the First-tier Tribunal dated 5 December 2023 (after an oral hearing on 26 October 2023) under file reference EA2022/0253 involves errors on a point of law. The appeal against that decision is allowed and the decision of the Tribunal is set aside.

248. The decision is remade.

249. The decision is that the Cabinet Office correctly applied s.36(2)(b)(i) and (ii) of the Freedom of Information Act 2000 to the withheld information, but that the public interest balance favours disclosure of the information.

Confidential Annex

250. This decision should be read in conjunction with the Confidential Annex of even date which is issued with it.

Action to be Taken

251. The Cabinet Office is required to disclose the withheld information to the complainant, with all names redacted, except the three individuals specified in the Confidential Annex to the decision notice of the Information Commissioner dated 4 August 2022, within 35 calendar days of the date of the issue of this this decision to the parties.

Mark West
Judge of the Upper Tribunal

Signed on the original on 28 March 2025