

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2024

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information about advice given in 2022 by the Cabinet Office's Propriety and Ethics Team (PET) to the Prime Minister and the Cabinet Secretary relating to ministerial conflicts of interest. Specifically, the complainant requested 1) the number of occasions that the PET gave such advice to the Prime Minister and the Cabinet Secretary; 2) the number of occasions where that advice was actioned and not actioned by the relevant minister, and 3) the name of any case management database used by the PET to manage such cases.
2. The Cabinet Office originally advised that they could neither confirm nor deny (NCND) whether they held the information requested in parts 1 and 2 of the request by virtue of section 36(3) of FOIA (prejudice to effective conduct of public affairs), and they refused part 3 of the request as vexatious under section 14(1). Following an internal review the Cabinet Office withdrew reliance on section 14(1) in respect of part 3 of the request and instead applied section 36(3) to the same.
3. During the Commissioner's investigation the Cabinet Office revised their position again in respect of parts 1 and 2 of the request. They confirmed that they did hold the information requested in part 1 but that this was exempt under sections 36(2)(b)(i), (ii) and (c). In respect of the information requested in part 2 of the request, the Cabinet Office confirmed that they did not hold this information.

4. The Commissioner's decision is that the information requested in part 1 of the request is not exempt under sections 36(2)(b)(i) and (ii) but is exempt from disclosure under section 36(2)(c) and the public interest balance favours maintaining the exemption.
5. The Commissioner finds, on the balance of probabilities, that the information requested in part 2 of the request is held by the Cabinet Office.
6. In respect of part 3 of the request, the Commissioner has found that the Cabinet Office were correct to NCND whether this information is held by virtue of section 36(3) of the FOIA and that the public interest balance favours maintaining this exemption.
7. The Commissioner has also found that the Cabinet Office breached section 10(1) of FOIA in that they did not provide a response to the request within the required 20 working days.
8. The Commissioner requires the Cabinet Office to take the following step to ensure compliance with the legislation:
 - Disclose the information held in part 2 of the request or provide the complainant with a fresh response explaining why this information is exempt from disclosure.
9. The Cabinet Office must take this step within 35 calendar days of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

10. On 30 November 2022, the complainant wrote to the Cabinet Office and requested information in the following terms:
 - '1) Please state the number of occasions in the 2022 calendar year that the propriety and ethics team gave advice to the
 - (a) prime minister
 - (b) cabinet secretaryin relation to a ministerial conflict of interest.
 - 2) Please state the number of occasions in the 2022 calendar year that the propriety and ethics team gave advice to the
 - (a) prime minister

(b) cabinet secretary

about a ministerial conflict of interest where the advice was

a) actioned by the relevant minister

b) not actioned by the relevant minister

3) If any case management database is used by the propriety and ethics team for managing cases of a potential ministerial conflict of interest, please state the name of that database (for example, the ministerial interests case management system)'.

11. The Cabinet Office belatedly responded to the request on 20 February 2023.
12. In respect of parts 1 and 2 of the request, the Cabinet Office advised that following a search of their paper and electronic records, they could neither confirm nor deny (NCND) whether they held the requested information by virtue of section 36(3) of FOIA (prejudice to the effective conduct of public affairs).
13. The Cabinet Office explained that they could NCND whether information was held because, in the opinion of the qualified person, 'to do so would have the effects set out in sections 36(2)(b)(i), (ii) and 36(2)(c) of the Act'. They stated that section 36(3) was being applied because, in the opinion of the qualified person, 'to confirm or deny that information exists within scope of your request would inhibit the free and frank provision of advice and free and frank exchange of views for the purposes of deliberation, and would also otherwise prejudice the effective conduct of public affairs'.
14. In respect of the public interest test, the Cabinet Office recognised that there is a public interest in transparency on ministerial interests. However, they advised that it is important to the management of potential conflict of interests that officials, Ministers, and the Prime Minister are able to freely consider options in relation to appointments within a safe space. To support this, it is important that effective advice can be commissioned or provided freely and frankly. The Cabinet Office contended that confirming or denying the existence of information in scope of the request 'about this area of work would have a detrimental, chilling effect on the decisions to commission or provide advice, and subsequently the quality of any advice that may be provided. Consequently, the effectiveness of deliberations and decision making would be harmed generally'.
15. Furthermore, the Cabinet Office advised that they considered that confirming or denying the existence of information in scope of the request would have a prejudicial effect on the ministerial interests

process in the future 'and the ability of the Prime Minister to perform their constitutional role as the Sovereign's principal adviser with responsibility for the organisation of the Executive. It is a longstanding convention that the government does not comment on advice the Prime Minister may or may not have received, including from the Cabinet Secretary'.

16. Taking into account all the circumstances of the case, the Cabinet Office determined that the balance of the public interest favoured NCND whether they held information in scope of the request under section 36(3). The Cabinet Office acknowledged that their reasoning was brief, but advised that they were unable to provide detailed explanations without undermining the NCND position.
17. In respect of part 3 of the request, the Cabinet Office advised the complainant that 'after careful consideration' they had concluded that the request was vexatious and they were therefore refusing it under section 14(1) of FOIA. In reaching this decision, the Cabinet Office advised that they had consulted the Commissioner's guidance on vexatious requests, and they provided a link to that guidance to the complainant.
18. The Cabinet Office stated that whilst they accepted that there is a legitimate public interest in the ministerial interests process and that those processes and decisions are functioning properly, they judged that 'there is limited value, purpose and public interest in disclosure of the specific information requested (case management database). This is because, in our view, confirming or denying the name of any such database would not contribute to the public interest in ministerial interests more widely'.
19. The Cabinet Office informed the complainant that he was welcome to provide more details that they could consider at internal review, if he wished to do so.
20. The complainant requested an internal review on 21 February 2023. He contended that:

'There is widespread concern about how the appointment of a number of recent ministers has been handled, including the fact that it appears that concerns about Dominic Raab's conduct had been flagged to the propriety and ethics team ahead of his reappointment, as well as the fact that Chris Pincher had been vetted by PET before his appointment, given subsequent allegations of impropriety'.
21. The complainant further contended that:

'Very little information about how PET operates is in the public domain, raising concerns about how effectively it operates and whether advice

about the risks of political appointments are being appropriately made to the Prime Minister, or whether this advice is being followed'.

The complainant therefore contended that 'there is a clear public interest in some basic statistical information about the case handling process being put in the public domain, and what is done with the advice which PET provides'.

22. The complainant added that the little public information about the process 'raises concerns about how it operates', and he stated that 'if PET advice on handling conflicts is not being actioned by ministers in all cases, this raises serious concerns about the effectiveness of the PET's role as a safeguard for our political system, something about which there is a clear public interest in transparency'.
23. The complainant contended that:

'As the most senior public official and politician in the country, it is reasonable to expect the PM or Cabinet Secretary to justify not following PET advice, and this cannot be seen as an unreasonable imposition on their decision making, especially as this would not prevent the PM from exercising their patronage rights. It is reasonable to expect the PM to justify not following advice given by civil servants on ministerial conflicts of interest, where this could harm confidence in the political system or lead to the appointment of persons about which there are conflicts, to positions of power'.
24. With regard to the section 14 refusal of part 3 of his request, the complainant contended that the provision had not been applied correctly. He stated:

'There is a clear public interest in understanding whether PET is tracking its caseload, through a basic tool such as a compliance database, and reasonable to state what its name is. If there is no such database, it would raise concerns about how previous ministerial interest issues raised to it are being recorded and tracked, increasing the risk that relevant information is missed. Transparency is therefore something in which there is a clear public interest'.
25. The complainant submitted that to deem a request as vexatious on the grounds of spuriousness, rather than on grounds of burden alone, 'is a high bar to meet', and that if information is held and there is not an excessive cost in providing it, there is not normally a public interest test as requests are normally treated as purpose blind.
26. The complainant acknowledged that section 14 is normally also applicant blind, but suggested that 'in these cases an assessment of who the requestor is, is appropriate. In this case, refusing a media request on grounds of spuriousness, where there is a demonstrable public interest

in transparency as set out above, raises concern about how this request has been initially handled. This gives the impression of obstructiveness to a reasonable inquiry under FOIA'.

27. The complainant concluded by asking the Cabinet Office to please disclose the requested information. He noted that, 'given the unreasonable delay experienced with this request already, there should be no issue in providing an internal review response within 20 working days'.
28. The Commissioner subsequently wrote to the Cabinet Office on 28 April 2023 and noted that they had not provided the complainant with the requested internal review. Due to the length of time which had passed since the review was requested, the Commissioner confirmed that he would accept the complainant's complaint for substantive investigation without the need for an internal review.
29. The Cabinet Office subsequently provided the complainant with the outstanding internal review on 3 May 2023.
30. The review upheld the decision to NCND whether any of the information requested in parts 1 and 2 of the request was held, but revised the decision to apply section 14 to part 3 of the request and instead provided a NCND response under section 36(3) of FOIA to part 3 of the request as well.
31. The Cabinet Office also provided some contextual information which they advised was relevant to the consideration of the public interest in this case. They noted that the complainant's request was for information relating to advice given by PET on ministerial conflicts of interest, i.e. the interaction between a Minister's personal or private interests (such as their financial interests) with their ministerial role.
32. The Cabinet Office advised that 'the management of ministers' interests is separate to matters of personal conduct', and that as set out in the Ministerial Code, 'it is the personal responsibility of each Minister to decide whether and what action is needed to avoid a conflict or the perception of a conflict, taking account of advice received from their Permanent Secretary and the Independent Adviser on Ministers' interests'. The Cabinet Office stated that matters relating to ministerial conduct are separate from the processes put in place regarding the considerations of and advice given on ministerial interests.
33. The Cabinet Office explained that the work that is undertaken to access and advise on ministerial conflicts of interest supports the Prime Minister's selection of ministers for appointment, as well as the ongoing management of ministerial interests. The work is highly sensitive that involves the gathering, assessing and communicating of personal information, and relies on officials being able to handle, record and

communicate and exchange views on sensitive information effectively while maintaining a confidential space.

34. The Cabinet Office contended that confirming the existence of information in scope of the request and/or releasing information about this area of work 'is likely to have a chilling effect on those working in this area'. The Cabinet Office stated that knowledge that information would be, 'routinely going into the public domain' would likely result in less information (or deliberation about that information) being recorded and less effective record keeping. This would mean that knowledge retention and the free and frank provision of advice and exchange of views would be inhibited, adversely affecting decision-making.
35. The Cabinet Office stated, 'we do not suggest that such changes in record keeping would be inappropriate, but simply that it would dilute information to a point that would make it less useful and informative for policy and operational decisions'. They contended that 'routine disclosure of the information sought in this case would erode the ability of future officials to give advice to the Cabinet Secretary and Prime Minister in confidence', and confirmed that, 'it is a long standing convention, maintained across multiple administrations, that the government does not comment on advice that officials may or may not give to the Prime Minister'.
36. Taking into account all the circumstances of the case, the review confirmed that the balance of the public interest remained in favour of NCND whether the Cabinet Office held information within the scope of parts 1 and 2 of the request under section 36(3) of FOIA.
37. In the revised response to part 3 of the request, the review advised that the Cabinet Office could NCND whether the requested information was held because, in the opinion of the qualified person, to do so would have the effects set out in section 36(2)(c), namely, it would prejudice the effective conduct of public affairs.
38. In respect of the public interest, the review recognised that, 'there is a public interest in transparency on ministerial interests'. However, the Cabinet Office advised that they considered that confirming or denying the internal information requested, 'would have a negative effect on the conduct of public affairs while serving limited public interest'.
39. The Cabinet Office contended that:

'It is essential for the effective functioning of the ministerial interests process that ministers have confidence that the process is confidential (i.e. that the process is protected by a safe space). Any lack of confidence in this process could have prejudicial effects on the process. We consider that confirming or denying whether information is held specific to the processes which ensure information security is maintained

would erode this confidential space and could have a deleterious effect on the overall process’.

40. Furthermore, the Cabinet Office contended that confidentiality of this process is necessary so that officials can organise their resources in a manner that best suits the needs of the process at the time, in a ‘safe space’ without being subject to external pressures. The Cabinet Office stated that it was, ‘vital for the sake of cyber and information security that insight regarding the location or mode for where sensitive information (including personal information) is managed or stored should be well-protected. This kind of information could be beneficial to malicious actors, who may use this insight to better target their efforts to malign ends’.
41. As with parts 1 and 2, taking into account all the circumstances of the case, the Cabinet Office determined that the balance of the public interest favoured NCND whether they held the information requested in part 3 of the request.

Scope of the case

42. The complainant contacted the Commissioner on 27 April 2023 to complain about the way his request for information had been handled.
43. As noted above, the Cabinet Office subsequently provided the complainant with their delayed internal review on 3 May 2023.
44. Before commencing his investigation the Commissioner advised the complainant that the Cabinet Office had correctly noted in their internal review that matters relating to ministerial conduct are separate from the processes put in place regarding the considerations of and advice given on ministerial interests. This distinction is important as the clear wording of the complainant’s request concerns advice in relation to ‘ministerial conflict of interest’ matters. Two of the cases cited by the complainant in his request for an internal review, those of Mr Raab and Mr Pincher, concern matters of ministerial conduct rather than ministerial conflict of interest. Therefore, the scope of the complainant’s request is limited to ministerial conflict of interest matters only. The complainant accepted that the scope of his request was as advised by the Commissioner, and confirmed that he wished the Commissioner to proceed with his investigation of the Cabinet Office response, rather than submit a reworded request to the Cabinet Office.
45. During the course of the Commissioner’s investigation, the Cabinet Office revised their position in respect of parts 1 and 2 of the complainant’s request. The Cabinet Office advised that they had sought a further reasonable opinion from the qualified person, who had revised

their original reasonable opinion, such that the Cabinet Office now confirmed that information in scope of part 1 of the request was held, and was exempt from disclosure under section 36(2)(b)(i), (ii) and (c) of FOIA, because, in the opinion of the qualified person, its disclosure would, or would be likely to, inhibit the free and frank provision of advice, and/or the free and frank exchange of views for the purposes of deliberation, and/or otherwise prejudice the effective conduct of public affairs. The Cabinet Office confirmed that they did not hold information within scope of part 2 of the request.

46. The Commissioner considers that the scope of his investigation is to determine whether the Cabinet Office correctly applied the exemptions to the complainant's request and to determine whether or not the Cabinet Office hold the information requested.

Reasons for decision

Part 1 of the request

47. Section 36(2) states that:

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

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

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

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

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

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

49. 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.

50. The Commissioner notes that the qualified person in this case, Baroness Neville-Rolfe, Minister of State at the Cabinet Office, originally provided her opinion (as relayed to the complainant by the Cabinet Office) that to confirm or deny whether information exists within the scope of the request would inhibit the free and frank provision of advice and free and frank exchange of views for the purposes of deliberation, and would also otherwise prejudice the effective conduct of public affairs.
51. However, during the Commissioner's investigation, Baroness Neville-Rolfe revised her original opinion and provided a further reasonable opinion on 9 October 2023. The outcome of that process was as set out in paragraph 45 above.
52. In submissions to the Commissioner, the Cabinet Office explained why the information requested in part 1 of the request was exempt under the provisions of section 36.

Section 36(2)(b)(i) and (ii)

53. The Cabinet Office stated that the work that is undertaken to support, assess and advise on ministers' interests and potential areas of conflict (thus supporting the Prime Minister's decisions on ministerial appointments, as well as the ongoing management of ministerial interests) is highly sensitive, involving the receiving, assessing and communicating of personal information, and is integral to the effective management of ministers' interests and the effective conduct of Government. The Cabinet Office stated that the work 'relies on officials being able to handle, record, communicate and exchange views on sensitive information without the threat of media speculation about the quantity, extent or content of that information, or the processes by which it is gathered and communicated to the Cabinet Secretary, Prime Minister or others'.
54. The Cabinet Office contended that disclosing information about this area of work is likely to have a chilling effect on those working in this area. 'Knowledge that information would be routinely going into the public domain would likely result in less information (or deliberation about that information) being recorded and less effective record keeping. This would mean that knowledge retention and the free and frank provision of advice and exchange of views would be inhibited, adversely affecting decision-making'. The Cabinet Office stated that it was critical that ministers' private interests are disclosed, assessed and managed effectively, so that the public can be confident that holders of public office are acting free of influence, in line with the Ministerial Code and the Seven Principles of Public Life. The Cabinet Office stated that the

handling of this information and provision of advice, as well as the exchange of views for the purposes of deliberation, is what enables these interests to be managed and mitigated.

55. The Cabinet Office submitted a number of points which they contended supported their position that a chilling effect **would** result from the disclosure of the information.

- The whole system for managing ministerial interests and any potential conflicts relies on Ministers recognising that information is handled with the utmost confidence.
- At the moment, advice is given via the appropriate channels when it is thought appropriate and necessary to do so, or where specific advice is requested. If there is an expectation that the number of times advice is given will be made public, this will have a chilling effect because it is reasonable to expect that the Cabinet Office will receive requests for the nature of that advice, as well as further requests or other public calls to justify the number of times that advice has been given against a particular time frame.
- Were there any expectation that this advice could potentially be made public it would lose that necessary quality of frankness that allows very senior decision makers to consider issues promptly and appropriately.
- Additionally, it is important to note that a potential conflict of interest (between a private interest held by a minister or their family member and their ministerial portfolio or duties) is not the same as wrongdoing but this is often not portrayed in this way in public narratives. If the figures (of the number of times that the PET gave advice) were made public, this would also likely inhibit the requesting and/or provision of advice given the expectation that the publication of a higher number of referrals would lead to an inaccurate public narrative of ministerial wrongdoing.

Section 36(2)(c)

56. In submissions to the Commissioner, the Cabinet Office explained that this sub-section is concerned with the effects of making the information public and the long-standing precedent of not disclosing information regarding individual cases or advice to the Prime Minister. The Cabinet Office advised that they considered that making public, information about advice from the PET to the Cabinet Secretary, Prime Minister or others, 'would encourage undue media speculation and comment about the ministerial interests and ministerial appointments processes'. The Cabinet Office contended that routine disclosure of the information sought in this case would erode the ability of future PET officials (or other officials) to give advice to the Cabinet Secretary and Prime

Minister in confidence, including on matters outside the ministerial interests process. The Cabinet Office stated that, 'it is a longstanding convention, maintained across multiple administrations – and accepted by Parliament – that the government does not comment on advice that officials may or may not give to the Prime Minister'.

57. Building on that position, the Cabinet Office stated that it would be a significant break in precedent, maintained across multiple administrations, for information to be routinely released into the public domain about the number of times that officials gave advice to senior officials/ministers, 'even if the advice itself were not released'.
58. The Cabinet Office contended that their position of confirming that the relevant information (numerical figure) is held and withholding that information is entirely consistent with the above precedent, 'which is a vitally important one for governments of all political persuasion'. The Cabinet Office noted that the precedent/convention was recently demonstrated by the Director General Propriety and Constitution Group in oral evidence session with the Public Administration and Constitutional Affairs Committee (PACAC) on 12 July 2023.
59. On that occasion, the Director General, Mr Darren Tierney, asked by Committee member Mr John McDonnell, as to whether there had been examples of where he (Mr Tierney) had intervened to advise the Prime Minister about the propriety and ethics of ministers' behaviour, declined to provide detailed information beyond confirming that 'there have been some examples'¹. The Cabinet Office noted that in all recent oral evidence sessions with the PACAC, dated 26 April 2021, 28 June 2022, and 12 July 2023, the Cabinet Secretary and Mr Tierney had reiterated the need for confidentiality in individual cases and did not disclose details of cases or advice given to the Prime Minister. The Cabinet Office maintained that if the information held was disclosed in response to the complainant's request, 'even statistics relating to the frequency of the requests', it would be a significant erosion of this longstanding precedent that preserves the confidentiality of advice.
60. The Cabinet Office also advised that:

'Furthermore, we judge that releasing information in scope could lead to inaccurate inferences about the ministerial interests process because of the nature of the information requested. For example, if the information was disclosed and the number of pieces of advice regarding conflicts of interest was misconstrued as very large or very small, this could lead to erroneous assumptions from the public that there are a very large

¹ <https://committees.parliament.uk/oralevidence/13497/html/>

number of propriety issues that need to be considered, or that the process of providing advice is not thorough enough, respectively. The assumptions that sit beneath the request mean there is an increased likelihood of such interpretations being made – and thus harms to the overall process being incurred’.

61. Finally, the Cabinet Office contended to the Commissioner that the ‘high bar’ for considering a qualified person’s opinion to be unreasonable should be given due weight.
62. The Cabinet Office contended that ‘the submission, follow-up advice, and agreement from the qualified person clearly sets out why section 36(2) applies to the information in scope of this part of the request. We contend that this judgement – coming from a minister who themselves has experience of participating in the ministerial interests process – is clearly an ‘objectively reasonable’ one and we cannot see convincing arguments to the contrary’. The Cabinet Office stated that they did not believe that the high bar has been reached for the qualified person’s judgement to be considered unreasonable, given that they could not see that the applicability of section 36 could be objectively characterised as ‘absurd’ or ‘irrational’.
63. The Commissioner notes and acknowledges the experience of the qualified person, but also notes that their original opinion was that the Cabinet Office could NCND whether the information requested was held.
64. It is not clear to the Commissioner how providing a confirmation or denial that the Cabinet Office hold the information requested (number of occasions in 2022 where the PET provided advice to the Prime Minister and Cabinet Secretary) could have a chilling effect upon or otherwise prejudice those working in the PET or indeed officials elsewhere in the department. It is already publicly known (especially through cases reported in the media in recent years) that the PET provide advice to the Prime Minister and Cabinet Secretary in respect of ministerial conflict of interests matters. Had the Cabinet Office maintained their NCND position in respect of part 1 of the request, it is quite possible that the Commissioner would have found the qualified person’s opinion to be ‘irrational’ and therefore unreasonable.
65. However, public authorities are permitted to revise their approach to exemptions at any point in the complaints consideration process and it is the reasonableness of the qualified person’s *revised* opinion which the Commissioner must make a finding on in this case.
66. The Commissioner accepts that it is reasonable to expect that if the Cabinet Office were to disclose the number of times that the PET had provided the relevant advice, then the Cabinet Office would be likely to receive requests for the nature (i.e. the details) of that advice.

However, the Commissioner is not persuaded that this scenario would necessarily have the chilling effect contended by the Cabinet Office. There is a great deal of difference in sensitivity and confidentiality between an anonymised numerical figure and the nature or details of the advice which are encompassed by that figure.

67. Whatever the case for withholding the numerical figure, the Cabinet Office would clearly have very strong and well established grounds, under section 36, for withholding the details or nature of specific advice given by the PET. This might not be apparent or appreciated by an individual requester (although the Commissioner notes that it is possible that the complainant was aware of this, given that he did not ask for such detailed information in his request) but it would be known by officials and Ministers, such that the disclosure of a numerical figure alone, would be unlikely to have a chilling effect in those officials and Ministers engaging with the relevant processes.
68. Similarly, the Cabinet Office have contended that were there any expectation that this **advice** (Commissioner's emboldening) could potentially be made public it would lose that necessary quality of frankness that allows very senior decision makers to consider issues promptly and appropriately. The Commissioner would accept that if there was any reasonable expectation by Ministers or PET officials that advice could be potentially made public then this would be likely to have some degree of chilling effect. However, the complainant did not ask for the advice given by the PET in his request and as noted above, the Commissioner does not consider that the disclosure of the number of occasions when the PET had provided advice would lead to a reasonable assumption or expectation that the details or nature of specific advice would also be disclosed.
69. The Commissioner notes that Mr Tierney's response to the PACAC that 'there have been some examples' (of his providing advice to the Prime Minister about the propriety and ethics of ministerial behaviour). I am not going to go through what they are' is consistent with the Cabinet Office's revised response to the request and illustrates why the previous NCND response was not appropriate. However, the Commissioner considers that the Cabinet Office highlighting that Mr Tierney's appearances before the PACAC had reiterated the need for confidentiality in individual cases and did not disclose details of cases or advice given to the Prime Minister is of little relevance to the specifics of this particular request, as the complainant is not seeking the details of individual (advice) cases.
70. The Commissioner acknowledges and recognises that a potential conflict of interest (between a private interest held by a minister or their family member and their ministerial portfolio or duties) is not (necessarily) the same as wrongdoing but this may not be the way that such matters are

publicly presented by the media and others in the public sphere. However, concerns by a Minister or an official giving advice to a Minister, about inaccurate public reporting of ministerial wrongdoing, would only have a reasonable and logical basis if the Minister or official were identifiable from the disclosed information. Since the disclosure of a numerical figure alone would not lead to such identification, the Commissioner is not persuaded that it would inhibit the requesting and/or provision of advice.

71. The Commissioner accepts that there is a longstanding precedent/convention that preserves the confidentiality of advice given to the Prime Minister. Given that the disclosure of the numerical figure requested would not breach or otherwise impinge upon the confidentiality of that advice (since no information relating to individual advice cases would be disclosed), the Commissioner does not consider that it would be 'a significant erosion' of the precedent/convention.
72. More importantly, within the context of section 36(2)(b)(i) and (ii), the Commissioner is not persuaded, for the reasons given above, that the disclosure of the numerical information alone would, or would be likely to inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. Consequently, the Commissioner finds that sections 36(2)(b)(i) and (ii) are not engaged in respect to part 1 of the complainant's request.
73. The Commissioner considers that the arguments provided by the Cabinet Office in support of section 36(2)(c) are more persuasive and apposite. 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')².
74. The 'otherwise' prejudice claimed by the Cabinet Office in this case is the effects of making the requested information public and the long-standing precedent of not disclosing information regarding individual cases or advice to the Prime Minister. For the reasons previously explained in respect of section 36(2)(b), the Commissioner does not accept that the latter of these prejudices applies in this specific case (i.e. because the request does not seek information about **individual** cases or advice to the Prime Minister).
75. However, the Commissioner accepts that the former of the two 'otherwise' prejudices above, apply in the present case. The Commissioner agrees with the Cabinet Office that making information public about advice given by the PET to the Prime Minister and Cabinet

² Evans v Information Commissioner and the Ministry of Defence (EA/2006/0064)

Secretary, even numerical data alone, would encourage media speculation and comment about the ministerial interests and ministerial appointments processes. That speculation and comment would be prejudicial as inaccurate inferences or assumptions could very easily be made, based upon the information disclosed. For example, if the number of occasions on which the PET had provided advice to the Prime Minister and the Cabinet Secretary were disclosed, and this was compared to media reporting of examples of alleged Ministerial misconduct during the year in question, were there to be an apparent discontinuity between the two, this could lead to inaccurate or wrongful assumptions being made.

76. As the Cabinet Office have contended, if the figure held (for pieces of advice) was disclosed, this could be misconstrued by the public as being very large or very small, leading to 'erroneous assumptions from the public that there are a very large number of propriety issues that need to be considered, or that the process of providing advice is not thorough enough, respectively'. The Commissioner considers that either outcome would be damaging to public confidence in the ministerial interests process, and would, consequentially, prejudice the effective conduct of the process by the PET.
77. The Commissioner considers that section 36(2)(c) is therefore engaged in respect to part 1 of the request.

Public interest test

78. Section 36 is a qualified exemption and in accordance with the requirements of section 2 of FOIA, 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.
79. 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.
80. 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, in this case, is whether disclosure of the information would, or would be likely to otherwise prejudice the effective conduct of public affairs.

The position of the complainant

81. The complainant has contended that very little information about how the PET operates is in the public domain, raising concerns about how effectively it operates and whether advice about the risks of political appointments are being appropriately made to the Prime Minister, or whether this advice is being followed. The complainant has contended that, 'there is a clear public interest in some basic statistical information about the case handling process being put in the public domain, and what is done with the advice which PET provides'.

82. The complainant has further contended that the little public information about the process, 'raises concerns about how it operates', and that if PET advice in handling conflicts is not being actioned by Ministers in all cases, this raises serious concerns about the effectiveness of the PET's role as a safeguard for our political system, 'something about which there is a clear public interest in transparency'.

83. In submissions to the Commissioner the complainant referenced a number of recent cases which he contended had, 'brought the current system into question'. He stated that:

'It appears that the appointment of Richard Sharp to chair the BBC was not properly handled by the Cabinet Office, given his conflicted position with Boris Johnson. It appears that Rishi Sunak's potential conflict with his wife's investments in a childcare firm was not properly handled, at least to the extent that the Prime Minister was advised properly on what declarations to make. And it is not clear what advice was given in relation to the appointment of Nadhim Zahawi as Chancellor, and whether it was followed, given revelations about his tax affairs'.

84. The complainant stated that if advice from the PET is being routinely ignored, and compliance with that advice is not being tracked, then this would raise serious questions about the suitability of the current management of ministerial interests. He contended that:

'If ministers are not following advice from the unit, this is something that the public has a right to know about those that spend their taxes and rule in their name, as it would raise serious questions about whether the rules ensuring propriety of ministers are sufficiently strong'.

85. The complainant stated that the workings of the PET are 'obscure' and there is little or no clear information on the Government website about how it operates in practice. He contended that:

'Apparent failures of the PET to be able to influence on conduct matters raises questions about how effective the unit is in general at ensuring propriety in government. I would argue that these failures strengthen

the argument that there should also be greater transparency about how often their advice is being followed in relation to conflicts of interest’.

The position of the Cabinet Office

86. In submissions to the Commissioner the Cabinet Office noted that the scope of the complainant’s request was limited to advice given by the PET and therefore excluded advice regarding ministerial conflict of interest that might be provided from other sources (e.g. the Independent Adviser on Ministers’ Interests, who is appointed by the Prime Minister to advise him on matters relating to the Ministerial Code. The post holder is independent of government and expected to provide impartial advice to the Prime Minister³). The Cabinet Office stated that this means that any information in scope of the request as worded may necessarily only be a partial picture and could thus give an inaccurate or misleading picture about the totality of the ministerial interests process.
87. The Cabinet Office noted that the complainant’s request:
- ‘Appears to mix together the appointment of ministers, the appointment of the Chairman of the Board of Directors of the BBC (Richard Sharp), the spouse of the current Prime Minister, the general ‘propriety of ministers’/conduct matters’, and the overall work of the PET. We suggest that there is a risk of unhelpful conflation of ministerial interests and ministerial conduct when considering the public interest across these areas’.
88. Fundamentally, the Cabinet Office contended to the Commissioner that the complainant’s premise for the public interest in this case appears to be based on misunderstandings and that disclosure of the information held would not meet the public interest arguments advanced by the complainant.
89. The Cabinet Office advised that the request, ‘assumes a certain model of ‘compliance’ which does not reflect the reality of the ministerial interests process’. The Cabinet Office stated that there is no ministerial ‘compliance function’, and the PET does not audit or enforce compliance with ministers (though officials do play an important role in the ministerial interests process, in particular, permanent secretaries, as set out in the Ministerial Code). The Cabinet Office opined that, ‘such an assumption appears to reflect a misunderstanding of the general relationship between ministers and civil servants’.

³ [Independent Adviser on Ministers' Interests - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

90. Rather than being 'obscure', the Cabinet Office advised that the role and various teams of the PET has been explained to Parliament, including to the PACAC on 28 June 2022. The Cabinet Office cited the following response from Mr Tierney to a question from the Committee:

Q456: **Tom Randall:** Can you say what the current size of the propriety and ethics team is, and broadly what your main tasks are?

Darren Tierney: There are about 20 people in the core propriety and ethics team. We are split across three main teams. The first is a casework team that does a lot of the reactive work. It is very demand-led. It depends on what issues people are raising. I remain very encouraged that it gets so much incoming traffic from Ministers, special advisors and Permanent Secretaries, because they are asking about the right way to do stuff. That team spends a lot of its time advising people on the best way to get Government business done within the codes and rules.

There is another team that does a lot of the policy work. They also sponsor the Civil Service Commission and they are responsible for sponsoring ACOBA and some of the other wider policy considerations. Then there is a small team that provides direct support to the independent adviser when in post'.

91. The Cabinet Office also drew the Commissioner's attention to the following PACAC transcripts:

- The work of the Cabinet Office, 26 April 2021 – in particular questions 711-14 and 729-30
- Propriety of governance in light of Greensill, 28 June 2022 – in particular questions 415-6 and 456
- The work of the Cabinet Office, 26 January 2023 – in particular questions 211-28
- The work of the Cabinet Office, 21 July 2023 – in particular questions 378-82 and 395-404⁴

92. The Cabinet Office advised that further information about the ministerial interests process is set out in the twice-yearly List of Ministers' Interests⁵, and has been discussed in Parliament extensively. The Cabinet Office cited a number of specific examples in their submissions

⁴ The Commissioner notes that the last two transcripts post-date the complainant's request.

⁵ <https://www.gov.uk/government/publications/list-of-ministers-interests/list-of-ministers-interests-april-2023-html>

to the Commissioner but as these dated from between February and July 2023 and therefore post-dated the complainant's request, the Commissioner has not taken these specific examples into consideration in his decision in this case.

93. The Cabinet Office stated that the complainant's submissions around advice being 'ignored', 'is an unduly loaded phrase and does not reflect the constitutional settlement whereby officials give advice and ministers make decisions'. The Cabinet Office cited the following from the Ministerial Code:

'It is not the role of the Cabinet Secretary or other officials to enforce the Code. The Prime Minister's Independent Adviser has a role, set out in Terms of Reference published by the Prime Minister, in advising the Prime Minister and Ministers about adherence to the Code. 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'⁶.

94. The Cabinet Office noted that the assumption that officials do enforce compliance with the Ministerial Code appears to be based on a misunderstanding of the Code.

95. In submissions to the Commissioner the Cabinet Office highlighted the Commissioner's decision in FS50849464 (March 2020) which concerned a request to the Cabinet Office for information on the number and distribution of Ministerial Misconduct complaints for a number of specified years⁷. In that case, which involved section 40(2)(third party personal data) and not section 36, the Commissioner found that in relation to a breakdown of how many complaints were made against each named Minister for each of the specified years, the Cabinet Office had been correct to withhold the information under section 40(2).

96. The Commissioner found that:

'The information is purely numerical and does not take into account the severity of a complaint, for example, a procedural matter versus an allegation of harassment. The information will also include, as the Cabinet Office notes, vexatious complaints and complaints ultimately not upheld. As a result, the Commissioner is not persuaded that disclosure of the requested information provides any real effective scrutiny of

⁶ <https://www.gov.uk/government/publications/ministerial-code/ministerial-code>

⁷ [FOIA-EIR decision notice template \(ico.org.uk\)](#)

Ministerial conduct or the robustness and effectiveness of the complaints investigation process’.

97. The Cabinet Office stated that they believed that the Commissioner’s above finding as to information concerning ‘ministerial conduct’, ‘would also be an apt assessment of information in scope of this part of the request (i.e. ministerial conflicts of interest).
98. The Commissioner appreciates that there are parallels between the information requested in FS50849464 and the present case. However, whilst the Cabinet Office withheld the number of complaints made *against each named Minister* for each of the specified years, they **did** disclose the information requested in part 1 of the request in FS50849464, specifically, ‘how many Ministerial Misconduct complaints did the UK Government receive’ for each of the specified years. That information was not linked or specific to any individual Minister, and nor is the information requested in part 1 of the complainant’s request in this case.
99. Despite drawing some degree of comparison by citing the Commissioner’s decision in FS50849464, the Cabinet Office contended that comparison of the ministerial interests process with that of ministerial conduct is flawed.
100. The Cabinet Office stated that it is not correct that there is a lack of transparency around the management of ministerial interests when the Independent Adviser on Ministers’ Interests seeks to publish the List of Ministers’ Interests twice-yearly. They advised that these publications include a description of how this process is conducted, as does the Independent Adviser’s annual report⁸. The Independent Adviser also appears at select committees to explain his work.
101. The Cabinet Office noted that whilst the complainant had included a public interest argument around whether advice about the risks of political appointments are being appropriately made to the Prime Minister, of the three specific cases which he had cited, (Richard Sharp, Nadhim Zahawi and the interests of the current Prime Minister’s wife), two do not concern ministerial appointments, and all three have been subject to extensive public transparency, including via information put into the public domain via government publications or with cooperation and input from government. The Cabinet Office added to this the Independent Adviser’s letter to Prime Minister Johnson regarding the

⁸ <https://www.gov.uk/government/publications/list-of-ministers-interests/list-of-ministers-interests-april-2023-html>

then Chancellor (now Prime Minister's) interests declaration regarding his US 'green card'⁹.

102. The Commissioner recognises that some degree of public transparency has previously taken place about the above matters, but notes that at the date of this decision notice some of the links below provided by the Cabinet Office do not lead to the relevant information (i.e. they result in a 'page not found' on GOV.UK).

103. The Cabinet Office contended that the disclosure of the information in scope of part 1 of the complainant's request would add very little, if anything at all, to the public understanding of these matters. The Cabinet Office stated that, 'it is hard to see a logical link between the release of such high-level information and the particular cases cited by the requester, for example, how it would help public understanding of 'what advice was given in relation to the appointment of Nadhim Zahawi as Chancellor, and whether it was followed'.

Commissioner's consideration

104. As explained in paragraph 44, the public interest factors attached to the complainant's request are necessarily dictated by its wording and scope. The complainant's request is clearly limited to advice given by the PET in respect of ministerial conflict of interest issues as opposed to ministerial conduct issues. As the Cabinet Office have correctly noted, some of the examples which the complainant has cited in support of disclosure of the withheld information, e.g. the departures from government of Mr Rabb and Mr Pincher, and the circumstances surrounding each, raise ministerial conduct issues rather than ministerial conflict of interest issues, and are therefore outside the scope of the Commissioner's public interest consideration in this case.

105. One of the central arguments in the complainant's public interest case for disclosure is his contention that there is very little information in the public domain about how the PET operates and that its workings are obscure. The Cabinet Office have disputed that contention and have

⁹ https://publicappointmentscommissioner.independent.gov.uk/wp-content/uploads/2023/04/2023-04-28-OC_PA-DECISION-NOTICE-IN-RELATION-TO-THE-APPOINTMENT-OF-CHAIR-OF-THE-BBC-BOARD-MR-RICHARD-SHARP.pdf
<https://www.gov.uk/government/publications/advice-from-the-independent-adviser-on-ministers-interests-january-2023>
<https://www.parliament.uk/globalassets/documents/pcfs/rectifications/rt-hon-mr-rishi-sunak-mp-rectification.pdf> <https://www.gov.uk/government/publications/advice-from-the-independent-adviser-on-ministers-interests-about-the-chancellor-of-the-exchequers-outside-interests/advice-from-the-independent-adviser-on-ministers-interests-about-the-chancellor-of-the-exchequers-outside-interests>

sought to refute it by highlighting, by way of example, the appearance before the PACAC on 28 June 2022 of the Director General of the PET, Mr Tierney (see paragraph 90 above).

106. The Commissioner recognises and accepts that on that occasion Mr Tierney provided significant information about the structure and size of the PET and made clear that the team is very busy, being approached for advice by Ministers, special advisors and permanent secretaries. However, this information did not reveal much detail as to how the PET actually operates in practice, such transparency effectively being limited to the team spending, 'a lot of its time advising people on the best way to get Government business done within the codes and rules'.
107. The Commissioner notes that the Institute for Government states that the PET, 'support the prime minister and cabinet secretary when they need to take decisions about complaints or concerns about individuals' behaviour under the Ministerial or Civil Service codes'¹⁰. However, this is similarly very broad based information and does not provide any detail as to how the PET go about providing that support.
108. Consequently, the Commissioner would agree with the complainant that in respect of its actual case handling process and detailed operational workings, it would appear that there is little information in the public domain about the PET.
109. However, the Commissioner does not consider that the disclosure of a numerical figure, **in of itself**, would provide any useful or insightful information as to the processes of the PET in terms of its advice facility to the Prime Minister and Cabinet Secretary.
110. In addition, the already very limited public interest value and weight of the withheld information, is further reduced by the fact, as the Cabinet Office have noted, that the PET is not the only source of advice in respect of ministerial conflict of interest matters. This can be seen from the following evidence to the PACAC on 26 April 2021 by the Cabinet Secretary, Simon Case, and Mr Tierney:

'Simon Case: The Independent Adviser on Ministerial Interests is an important role. It is, of course, only one part of the jigsaw underpinning propriety and ethics. The Independent Adviser has a couple of specific

¹⁰ [Cabinet Office | Institute for Government](#)

functions, one relating to ministerial interests and the other to do with investigations’.

And

‘Darren Tierney: The principal source of advice for Ministers on propriety and ethics is their Permanent Secretaries. They have still had access to that during this last period. Of course, they can come to me and my team if there is something particularly complex’.

111. Therefore, the disclosure of the numerical figure held by the Cabinet Office, would not necessarily provide the complete picture as to advice given to the Prime Minister or Cabinet Secretary in respect of ministerial conflict of interest matters. For example, it would exclude any advice provided by Permanent Secretaries or the Independent Adviser on Ministerial Interests¹¹. Consequently, the Commissioner agrees with the Cabinet Office that the disclosure would give an inaccurate or misleading picture about the totality of the ministerial interests process. The Commissioner similarly agrees that some of the examples cited by the complainant (such as the Prime Minister’s wife and Richard Sharp) do not concern ministerial conflict of interest matters and are therefore outside the scope of the request.
112. Conversely, it clearly cannot be the case, as contended by the Cabinet Office, that the public interest in the transparency of the ministerial interests and ministerial appointments processes, ‘is already met by regular publications from the Prime Minister’s Independent Adviser on Ministers’ Interests’. As the Cabinet Office have noted, the Independent Adviser on Ministers’ Interests is only one source of advice to the Prime Minister and is separate to any advice which might be provided to the Prime Minister (or Cabinet Secretary) by the PET, and it is the PET with which the complainant’s request is concerned.
113. However, because the assumptions which lie behind the request appear to be flawed (i.e. the request appears to assume that all and any advice to the Prime Minister and the Cabinet Secretary on matters of ministerial conflicts of interest will come from the PET), the Commissioner agrees with the Cabinet Office that disclosure of the withheld information (numerical figure) could well lead to inaccurate and unhelpful inferences about the ministerial interests process. Seen in isolation from the wider picture and context of ministerial conflict of interest matters, the figure

¹¹ The Commissioner notes that between the resignation of Lord Geidt on 15 June 2022 and the appointment of his successor, Sir Laurie Magnus on 22 December 2022, the post of Independent Adviser on Ministerial Interests was unfilled.

could, as the Cabinet Office have contended, be misconstrued as very large or very small.

114. The Commissioner considers that attempts could well be made to cross reference/connect the number of occasions when the PET provided the relevant advice to the Prime Minister and/or Cabinet Secretary to the number of ministerial conflict of interests matters reported in the public domain during 2022. However, such an exercise would be unreliable and of limited public interest value in terms of transparency and accountability, since the PET are not the only source of advice to the Prime Minister and/or Cabinet Secretary on such matters.
115. For the reasons set out above, the Commissioner is satisfied that the public interest in maintaining section 36(2)(c) to the information requested in part 1 of the complainant's request, outweighs the limited public interest in disclosure of the information.

Part 2 of the request

116. As previously noted, in their initial response to the complainant's request, and at the subsequent internal review, the Cabinet Office adopted a NCND position, under section 36(3) whether they held the information requested in part 2 of the request, namely, the number of occasions in the 2022 calendar year that the PET gave advice to the Prime Minister and Cabinet Secretary about a ministerial conflict of interest where the advice was actioned by the relevant minister and not actioned by the relevant minister. During the Commissioner's investigation the Cabinet Office revised their position and confirmed that they did not hold this requested information.
117. In submissions to the Commissioner, the Cabinet Office stated that:
- 'Importantly, we should clarify that this (the fact that they do not hold the information) should not be taken to indicate the level of seriousness that the Cabinet Office attributes to the ministerial interests process, but that it reflects the way that the request is worded, and the flawed premise on which it appears to be based. As the Ministerial Code sets out, "it is not the role of the Cabinet Secretary or other officials to enforce the Code[...] 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".'
118. The Cabinet Office advised that to provide an answer to this part of the request would require the creation of new information, which they are not obliged to do under FOIA.
119. The Commissioner notes that the complainant's request appears to be based on the premise that the PET (or other part of the Cabinet Office) would have recorded information as to whether any advice given by the

PET to the Prime Minister or Cabinet Secretary about a ministerial conflict of interest matter was, or was not, 'actioned' by the relevant minister. In this context, the Commissioner considers that 'actioned' means followed or heeded (or not followed or heeded).

120. In supplemental submissions to the Commissioner, the Cabinet Office stated that they did not agree that 'actioned' specifically means 'followed' or 'heeded'. They cited the Cambridge Dictionary definition of 'actioned' as being, 'to do something to deal with a particular problem or matter', or 'to do something to deal with a particular task, problem, or plan'. By this definition, the Cabinet Office contended that the word 'actioned' appears to have much broader connotations than meaning 'followed' or 'heeded'. 'For instance, it could cover choosing not to 'follow' advice, reading advice and choosing not to respond to it, choosing not to read advice at all, and so on'. The Commissioner would note that the complainant's request included occasions where the advice was 'not actioned' by the relevant minister, which would encompass all the above potential scenarios.
121. The Cabinet Office stated that 'the meaning of 'actioned' is thus so broad that it is not meaningful in relation to Ministerial decisions on advice, and is not something that would constitute information which civil servants **formally** record' (Commissioner's emboldening).
122. The Cabinet Office went on to advise that even if the word 'actioned' is used to mean 'followed' or 'heeded', they do not agree that this reflects the system of decision making in government, which works on the basis that officials advise, and Ministers decide. They contended that, 'ultimately, this means that we do not agree that the request as worded represents a request for recorded information, and instead requires a value judgment which goes beyond the scope of the Act'.
123. As the Cabinet Office have stated above, it is not the role of the Cabinet Secretary or other officials (including those in the PET) to enforce the Ministerial Code. That is to say, advice may be given by the PET, but whether or not that advice is 'actioned' by the relevant minister is not a matter with which the PET or the Cabinet Secretary would have any powers to enforce. The Commissioner accepts that this is the position and notes that paragraph 7.2 of the Ministerial Code specifically addresses ministerial conflict of interests and states:
- 'It is the personal responsibility of each Minister to decide whether and what action is needed to avoid a conflict or the perception of a conflict, taking account of advice received from their Permanent Secretary and the Independent Adviser on Ministers' interests'.
124. Although not specifically stated above, the Commissioner would presume that advice given by the PET to the Cabinet Secretary and/or

Prime Minister may also be taken account of by the minister if relayed to them. Likewise any advice from the PET where a minister contacted the PET directly for the same. The Commissioner notes that this paragraph of the Ministerial Code also supports the Cabinet Office position (examined earlier in this notice) that advice given by the PET is only one source of advice (and one not explicitly referenced in the Code) regarding ministerial conflict of interest matters.

125. The complainant's request included advice given by the PET to the Prime Minister. However, the Cabinet Office submissions make no reference to the Prime Minister. Unlike the Cabinet Secretary, the Prime Minister does have a role in enforcing the Ministerial Code. The Commissioner notes that paragraph 1.6 of the Ministerial Code¹² states:

'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. 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'.

126. Therefore, were the Prime Minister to receive advice from the PET (or indeed the Independent Adviser on Ministers' interests) that a minister had a conflict of interests in a particular matter which potentially breached the Ministerial Code, it would be for the Prime Minister to decide whether there had been such a breach and any sanction for the same.

127. In supplemental submissions to the Commissioner, the Cabinet Office stated that:

'The principle of officials advise, Ministers decide, applies to all aspects of advice given to ministers, from making policy decisions across departments, to operational decisions, to decisions on their own outside interests, which this FOI request concerns. Across all of these categories of decision-making, officials may receive a readout on the Minister's decision based on the advice that they have provided. These readouts, where they are provided, are used to enable officials to deliver whatever it is that the Minister has decided. Civil servants do not, however, make value judgements about whether Ministers have 'actioned' their advice; instead, readouts are used to understand what officials need to do next to heed the Minister's decision. This also applies with Ministerial interests; a Minister's office may provide a

¹² [Ministerial Code - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

readout on the next steps following a conversation with a Minister. However, this is not a necessity and Ministers choose to handle advice in different ways'.

128. The Cabinet Office further stated that:

'When a Minister makes a decision following the provision of official advice, they may choose to pursue all, some or none of what was advised in the paper. However, the Civil Service team which provided the advice will not formally record whether this was 'actioned' or even 'followed', instead they will interpret any readout or follow up with the Minister and their office to understand what the decision is, before beginning to take the relevant next steps. Any follow up or readout from a Minister or their office would constitute a record of a Minister's decision based on the advice provided, and not what they have 'actioned'. The idea that Ministers might 'action' advice represents a misunderstanding of the process of providing Ministers with advice and the subsequent steps that may follow this. The Cabinet Manual sets out that, 'Ministers also have a duty to give fair consideration and due weight to informed and impartial advice from civil servants, as well as to other considerations and advice in reaching policy decisions'. It is Ministers who consider the advice provided, and it is for Ministers to make the final decision, based not only on the advice itself, but also giving due consideration to other factors, including political elements, as necessary. Therefore, information on whether advice was 'actioned' or indeed 'followed' is not something that is recorded in the way envisioned by the requester or the ICO – a further value judgement would be required'.

129. The Commissioner does not agree with the Cabinet Office's contention that the complainant's request, as worded, requires a value judgement and therefore does not constitute a valid information request for recorded information. The fact that civil servants would not **formally** record whether or not a Minister had actioned advice received does not necessarily mean that the Cabinet Office would not hold information showing whether or not a Minister had actioned (i.e. followed or heeded) the advice. Specifically, just because the PET are not responsible for Ministerial accountability does not necessarily mean that they (or the Cabinet Office) would not hold recorded information which shows or indicates whether a Minister has or has not actioned advice provided by the PET to the Prime Minister or the Cabinet Secretary.

130. For example, it could be the case that a Minister, upon being made aware of advice from the PET on a ministerial conflict of interest, declined to follow that advice, or provided new information which required further advice from the PET. Such scenarios would most likely involve communications between the Minister (either directly or via their private office or departmental officials) and the PET. It may well be clear

from the content of those communications (e.g. emails) whether or not the Minister intended to action the advice received from the PET on the conflict of interest issue. In that event the Cabinet Office would hold recorded information showing or indicating whether the Minister had actioned (or intended to action) the advice or not. The Cabinet Office would hold such information, regardless of whether or not there had been any formal record by officials of that Minister having actioned, or not actioned, the particular advice. The Commissioner provides an example of this in a Confidential Annex attached to this notice.

131. The Cabinet Office have unfortunately, and unhelpfully, approached this part of the request from a misconceived procedural perspective, rather than from the substantive fact as to whether they hold any recorded information which indicates/shows whether a Minister has or has not actioned the advice received. Based on the information provided by the Cabinet Office (including that contained in the Confidential Annex) and the clearly erroneous approach taken, the Commissioner is not satisfied, on the balance of probabilities, that the Cabinet Office do not hold the information requested. The Commissioner finds, on the balance of probabilities, that the Cabinet Office do hold recorded information within scope of the complainant's request, and orders that they either disclose the information held to the complainant, or else provide him with a fresh response to the request explaining why the information is exempt from disclosure.

Part 3 of the request

132. As previously noted, the Cabinet Office originally refused the request for the name of any case management system database used by the PET for managing cases of a potential ministerial conflict of interest as vexatious, but revised their position at internal review and instead advised that they could NCND whether the requested information was held, under section 36(3).

133. The review advised that the Cabinet Office could NCND whether the requested information was held because, in the opinion of the qualified person, to do so would have the effects set out in section 36(2)(c), namely, it would prejudice the effective conduct of public affairs.

134. During his investigation, the Commissioner put to the Cabinet Office that whilst it was clear that the disclosure of details as to any case management database used by the PET could be "beneficial to malicious actors, who may use this insight to better target their efforts to malign ends", it was not clear or apparent from their responses to the request how the Cabinet Office simply confirming or denying that any such case management system database for the PET exists, could possibly provide such actors with information which they could use for such nefarious purposes.

135. In submissions to the Commissioner, the Cabinet Office accepted that whilst there is a higher risk of targeting by malign actors if the specific name of such a database were disclosed into the public domain, they contended that there is such a high degree of public interest in maintaining information security of sensitive government (particularly personal data), that there should be no erosion of such confidentiality. They advised that 'this extends to confirming the existence (or not) of specific databases'. The Cabinet Office emphasised that information about ministerial interests is extremely sensitive and needs to be subject to high levels of information security (and importantly, needs to be *seen* to be subject to such security, in order that ministers can have confidence in the overall system).
136. The Cabinet Office stated that a confirmation or denial that information is held, would not just confirm the existence of a database in general, but also the specific team it was held by, from which further information could potentially be gleaned. They contended that any such attempts to erode the confidentiality of specific information depositories should be strongly resisted.
137. In addition, the Cabinet Office contended that it would be highly unusual for a specific, small team to reveal the existence or not of an internal database that contains personal information, let alone release the name of such a database. They stated that the expectation that confirmation or denial (or release) of such information would be the norm would be problematic for teams across government, who also have strong rationales for maintaining the highest levels of information and cyber security.
138. The Commissioner recognises and accepts the need for government to employ an appropriately careful and consistent approach to any IT systems which it may have in a particular area, especially where these involve sensitive personal data, as would be the case with ministerial conflict of interest matters. Whilst the Commissioner does not consider that the simple confirmation or denial by the Cabinet Office as to whether the PET uses such a case management database would provide malign actors with appreciably useful information for nefarious purposes, it would nevertheless provide such actors with information which they do not currently have.
139. For the PET to be able to carry out their work effectively in this area, the Commissioner recognises the need to maintain the confidence of ministers. The Commissioner accepts that in order for this confidence to be maintained, ministers must be assured that all information relating to their personal data, including any IT systems in which the same is processed or stored, is treated with the highest levels of information security. The Commissioner considers that a public confirmation by the Cabinet Office whether or not the PET have a case management

database, would potentially risk undermining ministerial confidence in the security of such information and consequentially the work of the PET. Therefore, the Commissioner accepts the reasonable opinion of the qualified person that section 36(3) is engaged to this part of the request, though the Commissioner finds that the prejudice is at the lower end of the 'would be likely to' scale.

140. In respect of the public interest in confirming or denying whether the PET have a case management database for managing cases of potential ministerial conflict of interest, the complainant has contended that, 'there is a clear public interest in understanding whether PET is tracking its caseload through a basic tool such as a compliance database', and that if there is no such database, 'it would raise concerns about how previous ministerial interest issues raised to it are being recorded and tracked'.

141. The Commissioner does not accept the suggestion that, if no such database existed, this would necessarily mean that the PET were not properly recording and tracking cases. A case management database is only one method, if a commonly used one, of recording and tracking cases. It would be entirely possible for the PET to efficiently and effectively process cases of potential ministerial conflict of interest without employing a specific case management database. This being the case, any confirmation or denial by the Cabinet Office as to whether the PET use such a system would not reliably or helpfully advance the public interest in transparency as to the PET's case processing efficiency.

142. Given the negligible public interest value in confirming or denying whether the PET use a case management database for managing cases of a potential ministerial conflict of interest, the Commissioner considers that the balance of the public interest favours maintaining the Cabinet Office's NCND position under section 36(3).

Procedural matters

143. Section 10(1) of FOIA states that a public authority must respond to a request promptly and 'not later than the twentieth working day following the date of receipt'. In this case the complainant submitted his request on 30 November 2022 but the Cabinet Office did not provide a substantive response until 20 February 2023. Therefore, the Cabinet Office breached section 10(1) of FOIA by not providing the response within 20 working days.

Other matters

144. Internal reviews are not subject to statutory timescales but the Commissioner's guidance to public authorities is clear and well established in that he expects most internal reviews to be provided within 20 working days of being requested, with a maximum of 40 working days in exceptional cases.
145. In this case the complainant requested an internal review on 21 February 2023 but the Cabinet Office did not provide the review until 3 May 2023, and then only following intervention from the Commissioner. The Commissioner considers that given the public interest considerations surrounding this request it would not have been unreasonable for the Cabinet Office to have taken 40 working days to provide the internal review in this case. It is disappointing and unsatisfactory that the Cabinet Office took longer than this time to provide the review.

Right of appeal

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

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

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

147. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

148. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Gerrard Tracey
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