



Neutral citation number: [2024] UKFTT 344 (GRC)

Case Reference: EA/2021/0267

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

**Decided without a hearing
Decision given on: 26 April 2024**

Before

**JUDGE GRIFFIN
TRIBUNAL MEMBER COSGRAVE
TRIBUNAL MEMBER SAUNDERS**

Between

EDWARD WILLIAMS

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) THE CABINET OFFICE**

Respondent(s)

Decision: The appeal is Dismissed

REASONS

Background

1. The National Security Council (NSC) is a committee of the Cabinet Office, chaired by the Prime Minister. The NSC is the main forum for collective discussion of the government's objectives for national security. A key purpose of the Council is to ensure that ministers consider national security in a strategic way. An unauthorised disclosure of information occurred after the meeting on 23 April 2019. The information disclosed related to Huawei's potential involvement in the UK's 5G network.
2. Sir Mark Sedwill who acted as secretary to the NSC and was also the Cabinet Secretary conducted an investigation. The outcome of his investigation led to former Prime Minister The Rt Hon Theresa May MP losing confidence in The Rt Hon Sir Gavin Williamson CBE MP and he was asked to leave the Government. Sir Gavin denied being involved in the leak

personally or that it had originated in the Ministry of Defence. He ceased to be Secretary of State for Defence on 1 May 2019¹.

The request

3. Mr Williams made a request for information to the Cabinet Office (a public authority) on 1 May 2019 as follows

“Today, 1 May 2019, Gavin Williamson Secretary of State for Defence of the United Kingdom was sacked for being the Huawei mole.

Request.

All data held regarding the investigation into, and resignation of, Gavin Williamson.”

4. In response to the request the Cabinet Office stated that it held information within the scope of the request but that it relied on the exemption within section 31(1) FOIA and that they were extending the time for responding to his request by virtue of section 10(3) FOIA which provides that a public authority may extend the usual time limit of 20 days to provide a response within section 10(1) FOIA until such a time as is reasonable in the circumstances in order to consider where the balance of the public interest lies; i.e. whether the public interest is in favour of disclosing the requested information or in favour of maintaining the exemption(s) cited.
5. The Cabinet Office provided the response on 15 August 2019². It stated that it considered the information requested was exempt from disclosure on the basis of sections 31(1)(g) and 31(2)(b) FOIA which are the provisions relating to Law Enforcement. In addition, the Cabinet Office considered some of the information within scope of the request was exempt on the basis of section 41(1) FOIA (Information provided in confidence) and section 24(1) FOIA (National Security).
6. Mr Williams was not satisfied with the response and requested an internal review the same day. The result of the review sent to Mr Williams on 28 October 2019 upheld the original decision to rely on the exemptions at sections 31(1)(g), 41(1) and 24(1) FOIA.
7. Mr Williams did not agree and made a complaint to the Information Commissioner under section 50 FOIA. He said *“I apply for a s50 DN...I do not agree that the exemptions can be applied. I will not be making further representations to IC.”*

The Commissioner’s decision

8. In the decision notice reference IC-48449-Z9R5 dated 15 September 2021 the Commissioner decided that the public authority was entitled to withhold the disputed information on the basis of the exemption at sections 31(1)(g) (by virtue of 31(2)(b)) FOIA. No further steps were required from the public authority.

¹ Sir Gavin became Secretary of State for Education on 24 July 2019, under Prime Minister Boris Johnson who took office on 23 July 2019.

² In addition to the request for data relating to the investigation, the Cabinet Office also considered a request from the complainant: “Please note: I am particularly interested in the 11 minute phone call record”. In due course in its response to the request for an internal review the Cabinet Office said this information was not held by them. Mr Williams confirmed to the Information Commissioner in the course of the investigation into his complaint that he accepted that the public authority did not hold that material.

9. The Commissioner concluded that the Cabinet Office appropriately relied upon section 31(1)(g) FOIA to withhold the information because
 - a. The Cabinet Office has been entrusted with a function to investigate unauthorised disclosures of official information and whether there had been an unauthorised disclosure of such information in this case.
 - b. Disclosure of the withheld information would be likely to cause prejudice to the Cabinet Office's ability to carry out the above function under section 31(1)(g) for the purpose set out in section 31(2)(b) FOIA.
 - c. The public interest in maintaining the exemption under section 31(1)(g) outweighs the public interest in disclosure of the withheld information on the facts of the case.
10. The Commissioner also found the Cabinet Office in breach of section 17(1)(b) for failing to issue a refusal notice specifying the application of the above exemptions within 20 working days following the request and indicated that, except in exceptional cases, when applying section 10(3) a public authority should take no more than an additional 20 working days to consider the balance of the public interest.

The appeal

11. Mr Williams (hereafter "the appellant") filed a notice of appeal dated 20 September 2021. His grounds of appeal are reproduced in whole below

"The information was not covered by section 31 FOIA as it did not relate to law enforcement. The explanatory note to s31 states:-

115. Subsection (2) sets out the purposes referred to in subsections (1)(g), (h) and (i).

These include:

- *investigations into whether circumstances exist or may arise justifying regulatory*
- *action under any enactment;*
- *regulatory investigations relating to unfitness or incompetence of company*
- *directors;*
- *investigation of persons in regulated professions or who carry out activities which require a licence;*
- *investigations into accidents;*
- *action relating to charity management;*
- *action relating to health and safety.*

The [sic] was wrong to state at para 43: -

However, the Commissioner considers that there was a real and significant risk that releasing the disputed information so soon after the investigation would undermine the effectiveness of future investigations across government. There is a real risk that officials and politicians, particularly those still serving in government, would not provide information freely and openly in similar investigations if they felt that the information provided is likely to be revealed prematurely.

The release of information would not prejudice any future investigation by any public authority.

The DN fails to state when it would be appropriate to release the information.

The PIBT favours release.

Release would allow the public to form a fully informed view of GW's guilt or innocence. GW was widely reported in the press as saying "*I realise my obituary will say I did, but I swear on my children's lives I did not.*"

The date of the internal review was 28 October 2019.

On 24 July 2019 GW became SoS for Education.

So, whilst the request was being considered, GW was back in government. This adds to the PIBT favouring release."

12. The Commissioner responded to the appeal in which those grounds were helpfully and accurately summarised as follows
 - i. The Commissioner erred in concluding that the exemption under s.31(1)(g) FOIA was engaged on the ground that the requested information did not relate to law enforcement;
 - ii. The Commissioner erred in concluding that disclosure would be likely to prejudice the investigatory function of the Cabinet Office.
 - iii. The Commissioner erred in concluding that the public interest in maintaining the exemption under section 31(1)(g) outweighed the public interest in disclosure.

13. In response the Commissioner submitted (in relation to each ground as summarised above):
 - i. The test of whether the exemption under section 31 FOIA is engaged is not whether the requested information relates to law enforcement. The test is whether the disclosure under FOIA of requested information "would or would be likely to prejudice" in this case "the exercise by any public authority of its functions for any of the purposes specified in subsection (2)";
 - ii. The appellant does not set out in his grounds why the Commissioner erred in this conclusion so the Commissioner maintains the position set out in the decision notice. There is nothing in the appellant's grounds which cast any doubt on this position. There was no error of law;
 - iii. The Commissioner accepts that the withheld information could have provided the public with some context to the information in the public domain contained in the previous Prime Minister's letter of 1 May 2019 to Sir Gavin Williamson and his widely reported reaction to the contents of the letter. However, the Commissioner maintains the conclusion that on balance such a public interest is outweighed on the facts of this case by the strong public interest in not undermining the effectiveness of investigations across government, particularly in relation to unauthorised disclosures. Furthermore, the fact that Sir Gavin became Secretary of State for Education in between the request and the internal review may have added to the public interest in disclosure would have been sufficient to tip the balance of the public interest away from maintaining the exemption on the particular facts of this case.

14. The Cabinet Office was made second respondent to the appeal and filed a response opposing the appeal. The Cabinet Office submitted that:

- i. Whether the requested information relates to law enforcement does not determine whether the conduct is covered by section 31 in general and/or sections 31(1)(g) or 31(2)(b) in particular;
- ii. The release of the information would prejudice future investigations by the Cabinet Office;
- iii. The public interest balance does not favour disclosure.

15. I apologise to the parties for the time it has taken to promulgate this decision.

The evidence

16. In taking our decision we have considered the open bundle [151 pages in pdf] and a closed bundle. We have considered the withheld material within scope of the request and considered whether any might be disaggregated, see below. We are satisfied that the documents in the closed bundle of withheld material includes all the material held by the Cabinet Office within scope of the request made on 1 May 2019. The request asked for “*All data held regarding the investigation into, and resignation of, Gavin Williamson*”. We have excluded from consideration any documents in the closed bundle that were not held on 1 May 2019.

Legal Framework

17. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

“If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

18. Section 31 of the FOIA creates an exemption stated in the heading as for the purposes of “law enforcement”. Section 31(1) provides as relevant:

“(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

...

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)”.

19. Section 31(2) provides as relevant:

“(2) The purposes referred to in subsection (1)(g) to (i) are—

...

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper”.

20. The meaning of “ascertain” is to “determine or decide an issue” , see DVLA v Information Commissioner & Williams [2020] UKUT 334 (AAC). The Upper Tribunal found the following definition persuasive: “the word ‘ascertain’ connotes some element of determination with regard to ... responsibility for conduct which is otherwise improper” (paragraph 69). Whether a public authority is ascertaining responsibility is fact specific.
21. ICO Guidance on section 31 FOIA defines “improper” as conduct concerning “how people conduct themselves professionally. For conduct to be improper it must be more serious than simply poor performance. It implies behaviour that is unethical”. The Upper Tribunal noted in DVLA that this term had not been the subject of any decision of the courts and cited the ICO guidance at paragraph 71.
22. In WS v Information Commissioner [2013] UKUT 181 (AAC) the Upper Tribunal stated

“The words “law enforcement” were in my judgment intended as a broad summary or indication of the scope of and reason for the exemptions in section 31. It is plain from reading the activities listed in s.31(1), and the purposes specified in s.31(2), that they include activities and purposes which go beyond actual law enforcement in the sense of taking civil or criminal or regulatory proceedings. They include a wide variety of activities which can be regarded as in aid of or related to the enforcement of (i) the criminal law, (ii) any regulatory regime established by statute, (iii) professional and other disciplinary codes, (iv) standards of fitness and competence for acting as a company director or other manager of a corporate body (v) aspects of the law relating to charities and their property and (vi) standards of health and safety at work.”
23. When considering the issue of whether disclosure would or would be likely to prejudice the identified interest the following principles should be applied, see inter alia, Department for Work and Pensions v Information Commissioner and FZ [2014] UKUT 0334 (AAC) and Hogan and Oxford City Council v the Information Commissioner (EA/2005/0026 and 0030:
 - a. The prejudice claimed must be real, actual or of substance;
 - b. There must be a causal relationship between the potential disclosure and the prejudice;
 - c. The likelihood of occurrence of prejudice should be considered, if a public authority claims there ‘would’ be prejudice by disclosure, such prejudice must be ‘more probable than not’. However, if the public authority claims that prejudice ‘would be likely’ to occur, there must be more than a hypothetical or a remote possibility, and there must be a ‘real and significant risk’ of prejudice;
 - d. Prejudice should be considered in the context of any disclosure being to the world under FOIA and cannot be made subject to conditions of use.
24. If the Tribunal decides that disclosure under FOIA would, or would be likely to, prejudice the identified interest it must go on to consider whether in all the circumstances of the case,

the public interest in maintaining the exemption outweighs the public interest in disclosing the information, see section 2(2)(b) FOIA.

25. In general terms, the greater the likelihood of prejudice, the more likely that the balance of public interest will favour maintaining whatever qualified exemption is in question. The date at which the public interest is to be assessed is the date on which the request was refused. There is no presumption in favour of disclosure.
26. In cases where there are issues of national security, Tribunals should attach weight to the views of the government “because of their relevant experience and expertise” (Savic v Information Commissioner [2016] UKUT 535 (AAC) at paragraph 116; All Party Parliamentary Group on Extraordinary Rendition (APPGER) v The Information Commissioner and the Foreign & Commonwealth Office [2015] UKUT 377 (AAC) at paragraph 101); and should apply a “precautionary approach...in dealing with potential threats to national security” (APPGER at paragraph 103).

The issues

27. The Appellant has not appealed the Commissioner’s conclusion that the Cabinet Office was exercising a function as a public authority.
28. There are three issues, these are whether:
 - i. the Cabinet Office was exercising its functions for “the purpose of ascertaining whether any person is responsible for any conduct which is improper” and
 - ii. the disclosure “would, or would be likely to, prejudice” the exercise of the functions of any public authority
 - iii. the public interest is in favour of maintaining the exemption.

Analysis and conclusions

29. The appellant has argued that section 31 FOIA cannot be applied outside the context of law enforcement given its subheading within the statute. He relies upon the explanatory note which reads

“Section 31: Law enforcement

114. Subsection (1)(a) to (f) exempts information the disclosure of which would, or would be likely to, prejudice certain specified law enforcement matters. Subsection (1)(g) exempts information which would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2). This subsection essentially protects the conduct of investigations and proceedings which may lead to prosecutions...”

30. An explanatory note cannot alter the meaning of the words of a statute. We note the words of the Upper Tribunal in WS v Information Commissioner [2013] UKUT 181 (AAC) as to the broad application of section 31 in different contexts. A sub-heading could not capture

that range of applications. The explanatory note attempts to capture the essence of section 31(1)(g) much as the sub heading sign posts a reader to the essential content that follows.

31. We do not accept the appellant's submissions on the extent of section 31. It is not restricted to the context of "law enforcement" as its substance makes clear. Even if we are wrong about that it makes no difference in this case because even if the only investigations or proceedings to be protected were those that may lead to prosecutions this case would be included in that category. As we note below any unauthorised disclosure by a public official of material relating to national security might amount to a criminal offence under the Official Secrets Act 1989.

Issue (i) whether the Cabinet Office was exercising its functions for "the purpose of ascertaining whether any person is responsible for any conduct which is improper".

32. The test in section 31(1)(g), when read with section 31(2)(b), is whether disclosure would, or would be likely to, prejudice any public authority in exercising its function of ascertaining whether any person is responsible for any conduct which is improper.
33. We note that the appellant does not dispute that the Cabinet Office was exercising its functions when investigating the alleged unauthorised disclosure.
34. We have concluded that the Cabinet Office exercised its function to "ascertain" who was responsible for "improper" conduct.
35. Improper conduct is simply behaviour which is "unethical". It is not to be equated with unlawful behaviour. Improper conduct includes the unauthorised disclosure of information that relates to the UK's national security. Such conduct would be contrary to the codes of conduct applicable to civil servants and ministers respectively. The Civil Service Code provides that you must not "misuse your official position, for example by using information acquired in the course of your official duties to further your private interests or those of others" . The Ministerial Code provides that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained.
36. An unauthorised disclosure may be a breach of the common law duty of confidentiality. The Cabinet Office maintains that disclosures such as the one in this case are an actionable breach of confidence. We accept that the Cabinet Office's submission is arguable, it is not necessary for us to go further to decide whether that submission is correct as a matter of law.
37. Moreover, any unauthorised disclosure by a public official might amount to a criminal offence under the Official Secrets Act 1989 if that person makes a "damaging disclosure of any information...relating to security or intelligence" and does so "without lawful authority". That would amount to improper conduct even if it was also a failure to comply with the law.
38. The Commissioner was correct to conclude that the public authority had the authority to determine whether there had been an unauthorised disclosure of official information.

39. We have concluded that the Cabinet Office was exercising its functions for “the purpose of ascertaining whether any person is responsible for any conduct which is improper”.

Issue (ii) whether the disclosure “would, or would be likely to, prejudice” the exercise of the functions of any public authority.

40. We note that the appellant’s position was that disclosure would not prejudice the investigatory function of the Cabinet Office, or indeed, any public authority. The Commissioner found that disclosure would be likely to prejudice the Cabinet Office’s investigatory function. The Cabinet Office took the position in their response that disclosure would prejudice their investigatory function. In the Cabinet Office’s letter to the Commissioner dated 12 August 2020 not only is the phrase “would prejudice” used but also language that indicates that its position was that disclosure “would be likely to prejudice” its investigatory function. By the time of the response the Cabinet Office position was that disclosure would prejudice the exercise of the functions of any public authority.
41. The appellant did not provide any explanation in support of his submission that “the release of information would not prejudice any future investigation by any public authority” [sic] nor as to why he argues that the Commissioner’s conclusions were wrong.
42. We accept the submissions of the Cabinet Office that investigations into unauthorised disclosures rely on the willing participation and cooperation of people in the investigative process. In our view it is essential that participants are able to provide information freely and openly in an environment where they can trust that their information will not be prematurely disclosed. If individuals have reason to believe that information they provide might be inappropriately published, future investigations by the Cabinet Office of improper conduct would be seriously impacted as people would be less likely to co-operate with the investigation. Disclosure risks eroding the trust that is necessary for open and truthful communication that is the hallmark of a successful investigation.
43. Disclosure would provide details of how the investigation had been conducted, who had been spoken to as well as in what order and what they had said. Furthermore, the investigative capabilities deployed and the investigative techniques used would be revealed. Release of these details would prejudice a future investigation because the information would allow a person to predict the course of any investigation of a similar nature. Such knowledge may allow a person to interfere with the process or attempt to avoid being held responsible.
44. It does not matter as a point of principle whether an investigation is closed or not as the prejudice being contemplated is to future investigations, and this must be assessed on the facts of an individual case as we have done in this case.
45. The appellant argued that the Commissioner was wrong to consider the impact of disclosure on public authorities other than the Cabinet Office. We have concluded that the disclosure would not only be likely to prejudice the exercise of the Cabinet Office’s functions but also would be likely to undermine the effectiveness of future investigations across government. The Commissioner was correct to recognise this issue. Any disclosure under FOIA would be

made not just to the appellant, but to the public as a whole. Significant media attention would be likely given the circumstances. This disclosure would thereby be likely to have an adverse, prejudicial affect on future investigations across the government as a whole. Moreover, other public authorities beyond the government would be similarly affected.

46. The words of the statute in section 31(1)(g) are clear and unambiguous. The potential prejudice to be considered is not restricted to the public authority which holds the information requested but extends to potential prejudice to the exercise by “**any public authority of its functions**” (emphasis added). The Commissioner was correct not to restrict consideration to potential prejudice to the functions of the Cabinet Office.
47. Although there is some force in the Cabinet Office’s position that the higher “would prejudice” threshold is met, we have decided that disclosure of the requested material under FOIA **would be likely** to prejudice the exercise by any public authority of its functions for the purpose of ascertaining whether any person is responsible for any conduct which is improper.
48. We have considered whether disaggregation of the material would reduce the prejudice and we have concluded that such a partial release would risk being misleading which would of itself damage confidence in the process and would not remove the prejudice to future co-operation nor the prejudice caused by the disclosure of methodology, capabilities and techniques.

Issue (iii) whether the public interest is in favour of maintaining the exemption.

49. The balance of the public interests must be considered as at the date of the refusal of the request by the public authority.
50. The Commissioner considered that the public interest in not undermining the investigation may have diminished by the time of the internal review of the Cabinet Office’s response to the appellant’s request for information. However, that is not the time at which the public interest should be assessed. We agree that as time passes the weight to be attached to any public interest may change. However, in this case the time period was not such that the circumstances had altered to the extent that the balance of the public interest changed.
51. The public interest in maintaining the integrity of an ongoing investigation may be greater than where an investigation is long closed but the fact that an investigation is closed does not mean that there is no public interest in maintaining the exemption. These are not points for us to determine in this case. In so far as the Commissioner considered the public interest on the date of the internal review this was an error but not, in our view material to the outcome. We have focused on the facts of this case and determining the balance of the public interest on 15 August 2019, the date of the public authority’s response to the request for information.
52. The appellant submits that there are two factors in favour of release of the requested information:

- a. “release would allow the public to form a fully informed view of GW’s guilt or innocence”
 - b. “whilst the request was being considered, GW was back in government. This adds to the PIBT favouring release”
53. We find that there is a public interest not only in transparency but also in accountability of those in Government as to their conduct. There is a further public interest in the transparency and accountability of the administration of investigations. Informing the public of the full circumstances could have provided more context to the then Prime Minister May’s request to Sir Gavin to leave her government. However, that does not equate to giving the public a right to conduct their own investigations or to second guess the outcome.
54. Sir Gavin rejoined the government as Secretary of State for Education in July 2019 when a new government was formed under Prime Minister Boris Johnson. The appellant argues that this fact increases the public interest in disclosure. We do not agree. The terms of the request were for “*All data held regarding the investigation into, and resignation of, Gavin Williamson.*”
55. We have identified the following public interests in favour of maintaining the exemption:
- a. In this case there is a very strong public interest in safeguarding the effectiveness of investigations across government;
 - b. The public are less likely to have confidence in the outcome of an investigation if they think that evidence has been gathered against a background of fear of disclosure;
 - c. The public interest in protecting against the risk of breaches of the law;
 - d. The public interest in the maintenance of confidentiality in circumstances in which information has been imparted on a confidential basis;
 - e. The public interest in not deterring the voluntary supply of information to those charged with investigations.
56. Special considerations apply where the information relates to national security, the information handled by the NSC relates to the national security of this country. We have adopted the precautionary approach and place weight upon the decision of the Cabinet Office that disclosure is contrary to the public interest due to its institutional competence in the field.
57. We have concluded that the Commissioner was correct to find that the public interest in maintaining the exemption outweighs the public interest in disclosure of the requested information. In our view, in the circumstances of this case, the public interest in maintenance of the exemption heavily outweighs the public interest in disclosure.
58. On the three issues before us we conclude that:
- i. the Cabinet Office was exercising its functions for “the purpose of ascertaining whether any person is responsible for any conduct which is improper” and
 - ii. the disclosure “would be likely to prejudice” the exercise by any public authority (including the Cabinet Office) of its functions for the purpose of ascertaining whether any person is responsible for any conduct which is improper, and

iii. the public interest is in favour of maintaining the exemption.

59. In the light of our decision above there is no need for us to consider any other exemptions that might apply to the withheld material.

60. There is no closed decision/annex in this case. These open reasons fully set out our reasons for our decision.

61. The Commissioner's decision notice in this case is not in error of law and does not involve the wrongful exercise of a discretion.

62. For all of these reasons, we dismiss the appeal.

Signed

Judge Griffin

Date:

26 April 2024