Neutral citation number: [2023] UKFTT 00935 (GRC)

Case Reference: EA/2022/0078

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: remote video hearing (cloud video platform)

Heard on: 16 November 2022 and 31 March 2023
Decision given on: 02 November 2023

Before

TRIBUNAL JUDGE STEPHEN ROPER
TRIBUNAL MEMBER JO MURPHY
TRIBUNAL MEMBER DAVE SIVERS

Between

SECRETARY OF STATE FOR WORK AND PENSIONS

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) OWEN STEVENS

Respondents

Representation:
For the Appellant: Azeem Suterwalla of Counsel, instructed by the Government Legal Department
For the First Respondent: Leo Davidson of Counsel, instructed by the Information Commissioner's Office
For the Second Respondent: in person

Decision: The appeal is Dismissed

Substituted Decision Notice:

The Tribunal's Decision Notice in case reference EA/2022/0078, set out below, is substituted for the Commissioner's Decision Notice reference IC-113450-B1Z0 dated 3 March 2022 with regard to the request for information made to the Department for Work

and Pensions by Owen Stevens dated 24 January 2020.

Substituted Decision Notice

1. The Department for Work and Pensions is not entitled to rely on section 35(1)(a) of the Freedom of Information Act 2000 to withhold the requested information because that section is not engaged.

2. The Department for Work and Pensions is not entitled to rely on sections 36(2)(b)(i), 36(2)(b)(ii) or 36(2)(c) of the Freedom of Information Act 2000 to withhold the requested information because, whilst those sections are engaged, the public interest favours disclosure.

3. The Department for Work and Pensions must disclose the withheld information which was provided to the Tribunal, subject to any redactions of personal data pursuant to section 40(2) of the Freedom of Information Act 2000.

4. In addition, the Department for Work and Pensions must make a fresh response to the request for information. Unless the duty to confirm or deny does not arise in accordance with any applicable provision of the Freedom of Information Act 2000:

    a. the fresh response must make clear what further searches were undertaken, and whether or not any further information (beyond that referred to in point 4 above) is held within the scope of any parts of the request; and

    b. if such further information is held, the Department for Work and Pensions must either disclose it (subject to any redactions of personal data pursuant to section 40(2) of the Freedom of Information Act 2000) or claim any relevant exemptions to disclosure.

5. The Department for Work and Pensions must disclose the withheld information (subject to any applicable redactions of personal data) and issue the fresh response within:

    a. 35 days after the date on which this decision is promulgated; or

    b. (only if there is an appeal of this decision or permission to appeal is sought) within 14 days after any unsuccessful outcome to such appeal, or within 14 days after permission to appeal has been refused by the First-tier Tribunal or (if an application is made to the Upper Tribunal) by the Upper Tribunal.

6. The fresh response (pursuant to point 4 above) will be subject to the rights given under section 50 of the Freedom of Information Act 2000 to make a new complaint to the Information Commissioner.

7. Failure to comply with this decision may result in the Tribunal making written certification of this fact pursuant to section 61 of the Freedom of Information Act 2000 and may be dealt with as a contempt of court.

Directions

8. The previous directions of the Tribunal issued pursuant to rule 14 of The Tribunal

Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 preventing or restricting the disclosure of the withheld information shall cease to apply at the point of its disclosure in accordance with the above Substituted Decision Notice.

REASONS

NOTE: this is an open version of the decision. References to certain withheld information are redacted in this version and are contained (unredacted) in a closed version of the decision. An unredacted version will be promulgated by the Tribunal after expiry of the date on which (if applicable) the Appellant would be required to issue the withheld information pursuant to paragraph 5 of the above Substituted Decision Notice.

Preliminary matters

1. In this decision, we use the following abbreviations to denote the meanings shown:

Appellant	Secretary of State for Work and Pensions.
Commissioner:	Information Commissioner.
Decision Notice:	The Decision Notice of the Information Commissioner dated 3 March 2022, reference IC-113450-B1Z0.
DWP:	Department for Work and Pensions.
FOIA:	The Freedom of Information Act 2000.
Ground 1:	The Appellant's ground of appeal summarised at paragraph 23.a.
Ground 2:	The Appellant's ground of appeal summarised at paragraph 23.b.
Ground 3:	The Appellant's ground of appeal summarised at paragraph 23.c.
Ground 4:	The Appellant's ground of appeal summarised at paragraph 24.a.
Ground 5:	The Appellant's ground of appeal summarised at paragraph 24.b.
Public Interest Test:	The test as to whether, in all the circumstances of the case, the public interest in maintaining an exemption outweighs the public interest in disclosing the information, pursuant to section 2(2)(b) of FOIA (set out in paragraph 42).
Request:	The request for information made by the Second

	Respondent dated 24 January 2020, more particularly described in paragraph 10.
Requested Information:	The information which was requested by way of the Request (or, where the context requires, the remaining information which was not disclosed to the Second Respondent in response to the Request).
Review:	The review which was undertaken by the DWP in connection with safeguarding measures to support vulnerable claimants (as referred to in paragraph 13).
Second Respondent:	Owen Stevens.

2. We refer to the Commissioner as 'he' and 'his' to reflect the fact that the Information Commissioner was John Edwards at the date of the Decision Notice, whilst acknowledging that the Information Commissioner was Elizabeth Denham CBE at the date of the Request and the date of the Second Respondent's subsequent complaint to the Commissioner.

3. Certain aspects of this decision have been redacted, as they refer to contents of the closed material. A separate 'closed' decision has been provided with those elements unredacted and will be shared with the Appellant and the Commissioner. The closed decision will be released to the Second Respondent and more widely promulgated after any rights relating to a potential appeal of the decision have expired.

4. Unless the context otherwise requires (or as otherwise expressly stated), references to numbered paragraphs are to paragraphs of this decision so numbered.

Introduction

5. This was an appeal against the Decision Notice, which (in summary) held that the DWP could not rely on section 35(1)(a) of FOIA (formulation of government policy) in order to withhold some of the Requested Information and which accordingly required the DWP to disclose the relevant information, subject to certain redactions.

Mode of Hearing

6. The proceedings were held by the cloud video platform. The Tribunal panel and the parties all joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

7. The Appellant was represented by Azeem Suterwalla of Counsel. The Commissioner was represented by Leo Davidson of Counsel. In attendance were various representatives of the parties. Also attending was the Appellant's witness.

8. During the hearing, there were some occasional minor interruptions, including related to connection problems, but in each instance the interruptions were very short and the proceedings were briefly paused. The Tribunal was satisfied that no participant had missed anything as a result of these interruptions and that there was no adverse impact on the proceedings. There were no other issues with the hearing.

Background to the appeal

9. The background to this appeal is as follows.

The Request

10. On 24 January 2020, the Second Respondent made a request to the DWP for information in the following terms:

> *"This FOI refers to reporting here: https://www.disabilitynewsservice.com/the-deathoferrol-graham-man-starved-to-death-after-dwp-wrongly-stopped-his-benefits/*
>
> *The story reports various comments by an assistant coroner, including the following:*
> *The assistant coroner said: "There simply is not sufficient evidence as to how he was functioning, however, it is likely that his mental health was poor at this time - he does not appear to be having contact with other people, and he did not seek help from his GP or support agencies as he had done previously."*
> *[...]*
> *But she decided not to write a regulation 28 report demanding changes to DWP's safeguarding procedures to "prevent future deaths" because the department insisted that it was already completing a review of its safeguarding, which was supposed to finish last autumn.*
>
> *Please send me:*
> *a) The terms of reference or any similar document setting out the scope of the review referred to in that news story*
> *b) The results of the review referred to in that news story".*

The Appellant's reply and subsequent review

11. The DWP responded on 20 February 2020, denying holding any information within the scope of the Request and it upheld this position in a subsequent internal review. The Second Respondent complained to the Commissioner and, following an investigation, the Commissioner issued a decision notice[1] holding that, on the balance of probabilities, the DWP did hold information falling within the scope of the Request and required the DWP to issue a fresh response which did not deny that the information was held.

12. On 26 April 2021, the DWP issued its revised response and confirmed that it held information falling within the scope of the Request.

13. In response to part "a" of the Request (for information on the scope of the Review), the DWP explained that the review of safeguarding cited in the Request referred to ongoing conversations within DWP to develop its approach to improving safeguarding measures to support vulnerable claimants. The DWP explained that internal stakeholder groups taking part in these discussions participated without formal review roles and no terms of reference, scoping paper or plan was created or used.

14. The DWP confirmed that following the above decision notice, it had looked again at

[1] IC-48363-C8Q51 dated 22 March 2021

the request to supply "any information setting out the scope of the review". The DWP provided a meeting invitation from December 2018 which invited departmental stakeholders to a series of meetings to review policy and instructions for customers who declare an intention to attempt suicide or self-harm. The DWP explained that the ensuing conversations aimed to identify areas for improvement and included participants' perspectives and experiences. The DWP confirmed that it had redacted the identities of the civil servants invited to the meetings under section 40(2) as it considered disclosure was not necessary or justified in order to satisfy the request for information. The DWP considered that there was no strong legitimate interest that would override the rights and freedoms of the data subjects.

15. In response to part "b" of the Request (for the results of the Review), the DWP explained that the disclosed invitation mentions two pieces of work, the conversations mentioned above and putting in place policy and instructions around safeguarding arrangements for citizens who the DWP staff felt may be at risk of harm. The DWP explained that the conversations regarding improving the DWP's safeguarding measures initiated by the email invitation were still ongoing. The DWP explained that the invitation refers to the two pieces of work as "separate but linked" as there is a clear overlap between reviewing all current policy and instructions and the task of putting in place policy and instructions for staff who have concerns about a customer's safety. The DWP provided the Second Respondent with a document titled *'Guidance – Helping Customers Who Require Additional Support'* and explained that this is an internal guidance document which was developed during 2020 and shared on its staff intranet on 24 March 2021. The DWP confirmed that it was not in existence at the time of the Request. The DWP explained that this guidance drew together and updated previous policy and instructions on advanced customer support, and that the prominence of certain themes within its structure was partly determined by the work initiated by the invitation provided.

16. The DWP confirmed that it holds summaries of the ongoing discussions on advanced customer support and other pieces of work currently under development which have arisen from them. The DWP confirmed that it was withholding this information under section 35(1)(a) of FOIA (formulation of government policy) and that this exemption protects the private space within which Ministers and their advisers discuss policy. The DWP acknowledged the public interest in transparency which makes government more accountable to the electorate and increases trust. The DWP also acknowledged the public interest in being able to assess the quality of advice being given to Ministers and the subsequent decision making.

17. The DWP considered that good government depends on good decision making and that this needs to be based on the best advice available and a full consideration of all the options without fear of premature disclosure. The DWP considered that disclosure would risk decision-making becoming poorer and inadequately recorded. The DWP confirmed that it was satisfied that the public interest in maintaining the exemption outweighed the public interest in disclosure.

18. On 17 May 2021, the Second Respondent requested an internal review of the DWP's handling of the Request. The DWP provided the outcome of its internal review on 16 June 2021. In respect of part "a" of the Request (for information on the scope of the Review), the DWP explained that it had reviewed the Second Respondent's comments and the information available and that it had not been able to locate additional

documents that outline anything similar to a scope or terms of reference. The DWP explained that there was no information to suggest that these meetings developed the scope of the work beyond that which it had already advised the Second Respondent existed. In respect of part "b" of the Request (for the results of the Review), the DWP acknowledged that the previous decision notice[2] had drawn the distinction between the further work undertaken and the original Review and that it had also concluded that the identification of the further work was within part "b" of the Request. The DWP confirmed that it had provided all documents within the scope of the Request that were not exempt under section 35 of FOIA.

19. The Second Respondent contacted the Commissioner on 21 June 2021 to complain about the DWP's response to the Request. The Second Respondent disputed the DWP's position that no further information was held regarding part "a" of the Request (for information on the scope of the Review), and the DWP's reliance on section 35 of FOIA to withhold the information falling within part "b" of the Request (for the results of the Review). The Second Respondent did not dispute the DWP's reliance on section 40(2) to redact personal data.

The Decision Notice

20. The Commissioner decided, by way of the Decision Notice, that:

    a. the DWP had disclosed some information regarding the scope of the Review and that, on the balance of probabilities, the DWP did not hold any further information relating to the scope of the Review; and

    b. section 35(1)(a) of FOIA (formulation of government policy) was not engaged in relation to the withheld information regarding the results of the Review.

21. The Decision Notice required the DWP to disclose the information which had been withheld under section 35(1)(a) of FOIA, subject to redactions in respect of information which engaged section 40(2) of FOIA.

22. The Commissioner's reasoning in the Decision Notice was relied on in the appeal and generally addressed by way of his submissions in the appeal, on which we comment below.

The appeal

Grounds of appeal

23. The Appellant's grounds of appeal were essentially that the Commissioner had incorrectly interpreted section 35(1)(a) of FOIA (formulation of government policy) and, in particular, that the Commissioner had unlawfully and irrationally:

    a. failed to appreciate that the DWP's policy is itself part of government policy ("Ground 1");

    b. determined that the formulation and/or development of government policy cannot involve the implementation and/or delivery of existing policy (and/or the Commissioner had wrongly characterised the nature of the relevant policy)

[2] Referred to in paragraph 11 above.

("Ground 2"); and

c. determined that the extent of Ministerial involvement was insufficient for the withheld information to relate to the formulation and/or development of government policy ("Ground 3").

24. The Appellant also raised the following further or alternative grounds of appeal:

a. the Appellant relied upon exemptions contained in section 36 of FOIA (prejudice to effective conduct of public affairs) - namely sections 36(2)(b)(i), 36(2)(b)(ii) and/or 36(2)(c) of FOIA – on the basis of a qualified person's opinion for the purposes of that section (which was to be provided subsequent to the filing of the appeal) and maintaining that the public interest in maintaining the exemption outweighed the public interest in disclosure of the withheld information ("Ground 4"); and

b. the Appellant relied upon the exemption contained in section 38 of FOIA (health and safety) on the basis that the withheld information was within the scope of that exemption as it was intimately concerned with vulnerable customers which clearly involves the health and safety of individuals ("Ground 5").

25. The Appellant's position generally was that it relied upon the reasons given to the Second Respondent at the time of declining the Request, in the subsequent internal review and in the responses to the Commissioner as part of the related investigation.

26. Various submissions were made by the Appellant in support of the appeal. The material points were addressed by Counsel at the hearing on behalf of the Appellant and we refer to the relevant submissions below (including the Appellant's subsequent position on the issue of the qualified person's opinion).

The Commissioner's response

27. In response to Ground 1, Ground 2 and Ground 3, the Commissioner maintained the position set out in the Decision Notice – namely (in summary) that the withheld information did not engage section 35(1)(a) of FOIA.

28. In respect of Ground 4, the Commissioner reserved his position pending the provision of the qualified person's opinion and the associated submissions.

29. In respect of Ground 5, the Commissioner considered that this was a bare assertion and that the Appellant had not demonstrated why the exemption was engaged. The Commissioner's position was that this ground should accordingly be dismissed.

30. The Commissioner also considered that the Appellant had argued that, in saying that the Appellant would rely on the same factors in respect of the Public Interest Test in relation to sections 36 and 38 of FOIA as in relation to section 35(1)(a) of FOIA, the Appellant was therefore seeking to aggregate the public interest factors for all of the exemptions relied upon. The Commissioner argued that this aggregation was not permitted by law.

31. The material points made by the Commissioner were addressed by Counsel at the hearing on behalf of the Commissioner and we refer to the relevant submissions below

(including the Commissioner's subsequent position on the issue of the qualified person's opinion).

The Appellant's reply

32. In reply to the Commissioner's response, the Appellant submitted, in essence, that the Commissioner had failed to appreciate the fundamental nature of delegated decision-making and policy formulation and development in a government department. The Appellant addressed various specific points in the Commissioner's response in support of the Appellant's position.

33. The Appellant also addressed the issue of the alleged aggregation of the Public Interest Test. The Appellant's view was that the Commissioner did not take account of the fact that the exemptions in section 35 of FOIA (formulation of government policy) and section 36 of FOIA (prejudice to effective conduct of public affairs) are mutually exclusive.

34. In respect of the exemption contained in section 38 of FOIA (health and safety), the Appellant noted that the subject matter under discussion in the withheld information was emotive and that disclosure may have an adverse impact upon an individual who was otherwise unknown to the public.

Second Respondent's submissions

35. We outline the submissions of the Second Respondent further below.

The Tribunal's powers and role

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

"*(1) 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.

(2) On such an appeal, the Tribunal may Review any finding of fact on which the notice in question was based."

37. In summary, therefore, the Tribunal's remit for the purposes of this appeal is to consider whether the Decision Notice was in accordance with the law, or whether any applicable exercise of discretion by the Commissioner in respect of the Decision Notice should have been exercised differently. In reaching its decision, the Tribunal may review any findings of fact on which the Decision Notice was based and the Tribunal may come to a different decision regarding those facts.

38. The Tribunal is also empowered to address new grounds which may be relied on by a public authority in connection with an appeal, even if those grounds were not

addressed by the Commissioner in a decision notice (see paragraph 63).

The law

The statutory framework

General principles

39. Section 1(1) of FOIA provides individuals with a general right of access to information held by public authorities. It provides:

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

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

(b) if that is the case, to have that information communicated to him.".

40. In essence, under section 1(1) of FOIA, a person who has requested information from a 'public authority' (such as the Appellant) is entitled to be informed in writing whether it holds that information. If the public authority does hold the requested information, that person is entitled to have that information communicated to them. However, these entitlements are subject to the other provisions of FOIA, including some exemptions and qualifications which may apply even if the requested information is held by the public authority. Section 1(2) of FOIA provides:

"*Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.*".

41. It is therefore important to note that section 1(1) of FOIA does not provide an unconditional right of access to any information which a public authority does hold. The right of access to information contained in that section is subject to certain other provisions of FOIA, including section 2 of FOIA.

42. Section 2(2) of FOIA provides:

"*In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –*

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.".

43. Accordingly, certain exemptions to the right of access to information are set out in Part II of FOIA. Sections 35, 36 and 38 are included within Part II of FOIA and are applicable for current purposes. The effect of section 2(2) of FOIA is that some exemptions set out in Part II of FOIA are absolute and some are subject to the application of the Public Interest Test. Where an applicable exemption is not absolute and the Public Interest Test applies, this means that a public authority may only withhold requested information under that exemption if the public interest in doing so outweighs the public interest in its disclosure.

44. Section 2(3) of FOIA explicitly lists which exemptions in Part II of FOIA are absolute. Pursuant to that section, no other exemptions are absolute. Section 36 is referred in that list, but only applies so far as relating to information held by the House of Commons or the House of Lords. Sections 35 and 38 are not included in that list.

45. Accordingly, in summary, the applicable exemptions for current purposes (in sections 35, 36 and 38 of FOIA) are qualified exemptions, so that the Public Interest Test has to be applied, even if those sections are engaged.

Section 35

46. So far as is relevant for the purposes of this appeal, section 35 of FOIA provides:

> "*(1) Information held by a government department… is exempt information if it relates to –*
>
> *(a) the formulation or development of government policy…*
>
> *(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded –*
>
> *(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy…*

47. Section 35 of FOIA is a class-based exemption, in that (unlike the relevant provisions of section 36 of FOIA) the relevant government department does not need to demonstrate prejudice for the exemption to be engaged.

Section 36

48. So far as is relevant for the purposes of this appeal, section 36 of FOIA provides:

> "*(1) This section applies to –*
>
> *(a) information which is held by a government department…and is not exempt information by virtue of section 35…*
>
> *(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.*
>
> *(5) In subsections (2) and (3) "qualified person" –*
>
> *(a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown…*".

49. In summary, therefore, for the purposes of this appeal, the above provisions of section

36 of FOIA provide that (subject to the Public Interest Test) the Requested Information is exempt from disclosure if, in the reasonable opinion of a Minister of the Crown:

a. disclosure of it would, or would be likely to, inhibit either: (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation; or

b. disclosure of it would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 38

50. Section 38(1) of FOIA provides:

"*Information is exempt information if its disclosure under this Act would, or would be likely to –*

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual.".

Relevant case law

Information held by a public authority

51. In determining whether or not information is actually held by a public authority for the purposes of section 1(1) of FOIA, the test to be applied is the balance of probabilities. This was stated to be the position by the First-tier Tribunal in the case of *Bromley v Information Commissioner & the Environment Agency*[3]. The decision in *Bromley* is not binding on this Tribunal, but we note that this test has become established and a similar approach has been taken in numerous Tribunal decisions since. We see no reason to depart from that view.

52. In accordance with the test in *Bromley*, when a public authority claims that applicable requested information is not held, whether this is the case should be determined on the balance of probabilities and an assessment of the adequacy of the public authority's search for the information and any other reasons explaining why the information is not held.

53. In the case of *Oates v Information Commissioner*[4], another decision of the First-tier Tribunal, it was concluded that:

"*As a general principle, the IC was …entitled to accept the word of the public authority and not to investigate further* ***in circumstances where there was no evidence as to an inadequate search, any reluctance to carry out a proper search or as to motive to withhold information actually in its possession***." (emphasis added).

54. Again, that decision is not binding on this Tribunal, but we note that this principle has become established and a similar approach has been taken in numerous Tribunal

[3] EA/2006/0072, paragraph 13
[4] EA/2011/0138, paragraph 11

decisions since. Again, we see no reason to depart from that view.

Section 35

55. The Upper Tribunal held, in the case of *Department of Health and Social Care v Information Commissioner*[5], that the purpose of section 35(1)(a) of FOIA is to protect "*the efficient, effective and high quality formulation and development of government policy*".

56. The *Department of Health and Social Care* case also confirmed, in summary, that:

    a. the exemption in section 35 of FOIA relates only to the formulation and development of policy, as distinct from delivery of policy objectives and from implementation[6];

    b. ongoing work in relation to a policy area or objective generally does not mean that individual policies or measures remain in a state of formulation or development[7]; and

    c. there is no absolute divide between policy formulation and its implementation, such that officials may need to dip in and out of safe spaces[8].

Section 36

57. Whether the exemption under section 36 of FOIA is engaged depends on the 'reasonable opinion' of the qualified person (section 36(2) of FOIA, as set out above). This means substantively reasonable and not procedurally reasonable, as established in the case of *Information Commissioner v Malnick and ACOBA*[9].

58. In relation to 'chilling effect' arguments, the following paragraphs from the Upper Tribunal's decision in the case of *Davies v Information Commissioner and The Cabinet Office*[10] provide a useful summary of the relevant case law:

    "*There is a substantial body of case law which establishes that assertions of a "chilling effect" on provision of advice, exchange of views or effective conduct of public affairs are to be treated with some caution. In Department for Education and Skills v Information Commissioner and Evening Standard EA/2006/0006, the First-tier Tribunal commented at [75(vii)] as follows:*

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

    Although not binding on us, this is an observation of obvious common sense with which we agree. A three judge panel of the Upper Tribunal expressed a similar view in DEFRA v

[5] [2020] UKUT 299, paragraph 24
[6] See paragraph 30 of that case.
[7] See paragraph 70 of that case.
[8] See paragraph 71 of that case.
[9] [2018] UKUT 72 (AAC), paragraphs 51-56.
[10] [2019] UKUT 185 (AAC) , paragraphs 25-30.

Information Commissioner and Badger Trust [2014] UKUT 526 (AC) at [75], when concluding that it was not satisfied that disclosure would inhibit important discussions at a senior level:

> *"75. We are not persuaded that persons of the calibre required to add value to decision making of the type involved in this case by having robust discussions would be inhibited by the prospect of disclosure when the public interest balance came down in favour of it...*
>
> *76. ...They and other organisations engage with, or must be assumed to have engaged with, public authorities in the full knowledge that Parliament has passed the FOIA and the Secretary of State has made the EIR. Participants in such boards cannot expect to be able to bend the rules."*

In Department of Health v Information Commissioner and Lewis [2015] UKUT 0159 (AAC), [2017] AACR 30 Charles J discussed the correct approach where a government department asserts that disclosure of information would have a "chilling" effect or be detrimental to the "safe space" within which policy formulation takes place, as to which he said:

> *"27. ...The lack of a right guaranteeing non-disclosure of information ...means that that information is at risk of disclosure in the overall public interest ... As soon as this qualification is factored into the candour argument (or the relevant parts of the safe space or chilling effect arguments), it is immediately apparent that it highlights a weakness in it. This is because the argument cannot be founded on an expectation that the relevant communications will not be so disclosed. It follows that ... a person taking part in the discussions will appreciate that the greater the public interest in the disclosure of confidential, candid and frank exchanges, the more likely it is that they will be disclosed...*
>
> *28. ...any properly informed person will know that information held by a public authority is at risk of disclosure in the public interest.*
>
> *29. ...In my view, evidence or reasoning in support of the safe space or chilling effect argument in respect of a FOIA request that does not address in a properly reasoned, balanced and objective way:*
> *i) this weakness, ... is flawed."*

Charles J discussed the correct approach to addressing the competing public interests in disclosure of information where section 35 of FOIA (information relating to formulation of government policy, etc) is engaged. Applying the decision in APPGER at [74] – [76] and [146] – [152], when assessing the competing public interests under FOIA the correct approach includes identifying the actual harm or prejudice which weighs against disclosure. This requires an appropriately detailed identification, proof, explanation and examination of the likely harm or prejudice.

Section 35 of FOIA, with which the Lewis case was concerned, does not contain the threshold provision of the qualified person's opinion, but these observations by Charles J are concerned with the approach to deciding whether disclosure is likely to have a chilling effect and we consider that they are also relevant to the approach to an assessment by the qualified person of a likely chilling effect under section 36(2) and so to the question whether that opinion is a reasonable one.

Charles J said at [69] that the First-tier Tribunal's decision should include matters such as identification of the relevant facts, and consideration of "the adequacy of the evidence base for the arguments founding expressions of opinion". He took into account (see [68]) that the

assessment must have regard to the expertise of the relevant witnesses or authors of reports, much as the qualified person's opinion is to be afforded a measure of respect given their seniority and the fact that they will be well placed to make the judgment under section 36(2) – as to which see Malnick at [29]. In our judgment Charles J's approach in Lewis applies equally to an assessment of the reasonableness of the qualified person's opinion as long as it is recognised that a) the qualified person is particularly well placed to make the assessment in question, and b) under section 36 the tribunal's task is to decide whether that person's opinion is substantively reasonable rather than to decide for itself whether the asserted prejudice is likely to occur. Mr Lockley agreed that the considerations identified by Charles J were relevant. We acknowledge that the application of this guidance will depend on the particular factual context and the particular factual context of the Lewis case, but that does not detract from the value of the approach identified there.".

Prejudice-based exemptions

59. The relevant exemptions in sections 36 and 38 of FOIA use the phrase 'would or would be likely to'. This means that the matter in question is more probable than not or that there is a real and significant risk of it happening.

60. The following statement from a First-tier Tribunal case was subsequently confirmed by the Court of Appeal in the case of *Department for Work and Pensions v Information Commissioner & Frank Zola*[11] as being the correct approach:

"*On the basis of these decisions there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not.*".

61. Therefore if a public authority is to rely on any such section, it must show that there is some causative link between the potential disclosure of the relevant information and (as applicable):

    a. the inhibition of the free and frank provision of advice or exchange of views for the purposes of deliberation;

    b. the prejudice to the effective conduct of public affairs; or

    c. the endangerment of the safety of, or the physical or mental health of, any individual.

62. The public authority must also show that the inhibition or prejudice (as applicable) is real, actual or of substance. It must also relate to the interests protected by the exemption.

Timing of reliance on exemptions

63. The Court of Appeal confirmed in the case of *Birkett v Department for the Environment, Food and Rural Affairs (DEFRA)*[12] that that a public authority is entitled to rely on new exemptions on bringing an appeal before the First-tier Tribunal. This is so even if those

[11] [2016] EWCA Civ 758, paragraph 27 – see also Carolyne *Willow v Information Commissioner and Ministry of Justice* [2017] EWCA Civ 1876 at paragraph 27.
[12] [2011] EWCA Civ 1606

exemptions have not been raised by the public authority at an earlier stage (whether in its response to a request for information under FOIA, any subsequent review of that response or in its subsequent dealings with the Commissioner when the Commissioner is investigating a complaint relating to that request).

The Public Interest Test

64. The correct approach to the Public Interest Test was set out by the Upper Tribunal in the case of *All Party Parliamentary Extraordinary Rendition (APPGER) v The Information Commissioner and Foreign and Commonwealth Office*[13], and cited with approval by the Court of Appeal in the case of *Department of Health v Information Commissioner & Simon Lewis*[14]:

"*when assessing competing public interests under the [2000 Act] the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This … requires an appropriately detailed identification, proof, explanation and examination of both (a) the harm or prejudice, and (b) benefits that the proposed disclosure of the relevant material in respect of which the exemption is claimed would (or would be likely to or may) cause or promote.*".

65. The case of *Montague v The Information Commissioner and the Department for International Trade*[15], dealt with the question of the aggregation of the public interest factors in respect of the application of relevant exemptions under FOIA. The Upper Tribunal held that[16]:

"*As to the aggregation issue, we conclude that FOIA does not permit aggregation of the separate public interests in favour of maintaining different exemptions when weighing the maintenance of the exemptions against the public interest which favours disclosure of the information sought.*"

"*If no absolute exemption applies the public authority needs to consider, sequentially, the public interest in maintaining each qualified exemption that is engaged and balancing that exemption-specific public interest against the public interest in disclosure*.".

66. In the case of a prejudice-based exemption under FOIA, the fact that the exemption is engaged means that there is automatically some public interest in maintaining it, which this should be taken into account in the Public Interest Test. See, for example, the view of the Court of Appeal in the case of *Carolyne Willow v The Information Commissioner and Ministry of Justice*[17] (in the context of the prejudice-based exemption contained within section 31(1)(f) of FOIA).

67. Where the public interests in favour of disclosure and against disclosure are evenly balanced, then the information ought to be disclosed. As explained by the Court of Appeal in the *Department of Health* case[18]:

[13] [2013] UKUT 0560 (AAC), paragraph 149
[14] [2017] EWCA Civ 374, paragraph 43.
[15] [2022] UKUT 104 (AAC), paragraphs 3 and 5
[16] Paragraphs 4 and 29, respectively, of that case.
[17] [2017] EWCA Civ 1876, paragraph 28
[18] [2017] EWCA Civ 374, paragraph 46.

"*...when a qualified exemption is engaged, there is no presumption in favour of disclosure; and that the proper analysis is that, if, after assessing the competing public interests for and against disclosure having regard to the content of the specific information in issue, the decision maker concludes that the competing interests are evenly balanced, he or she will not have concluded that the public interest in maintaining the exemption (against disclosure) outweighs the public interest in disclosing the information (as section 2(2)(b) requires).*".

The hearing and evidence

68. The Tribunal read and took account of an open bundle of evidence and pleadings. The Tribunal also read and took account of a closed bundle. The closed bundle contained the withheld material and additionally contained some unredacted material which had been redacted in the open bundle. The Tribunal was also provided with a separate bundle of case law authorities prior to the hearing. Various other documents were also provided to the Tribunal in connection with the appeal (including some informal statements to which we refer below).

69. We heard evidence from a witness on behalf of the Appellant in addition to a written witness statement provided by them which was included within the open and closed bundles. To avoid identifying the witness personally in this decision, we refer to them just as "the witness" and we mean no disrespect in doing so.

70. We also read and took account of skeleton arguments from each of the parties. We heard oral submissions from Mr Suterwalla on behalf of the Appellant, from Mr Davidson on behalf of the Commissioner and from the Second Respondent in person.

71. The closed material, and submissions relating to the closed material and associated issues, were dealt with in closed session (with only Appellant and the Commissioner and their representatives in attendance). A gist of the separate closed session was agreed by the Appellant and the Commissioner (and approved by the Tribunal) and was subsequently provided to the Second Respondent.

The Appellant's witness evidence

72. Various points were addressed in the witness's written witness statement and by way of oral evidence during the hearing. Relevant material issues are referred to below.

73. The witness's evidence was given in the capacity of a Senior Civil Servant employed in a Deputy Director role in the DWP. The witness stated that they joined the DWP in 1998 and had worked in most areas of the DWP in that time, with extensive experience in policy analysis, strategy development, delivering change programmes and operational delivery. They also explained that, for a specified period, they were Director for Customer Experience in the DWP with lead responsibility for, amongst other things, the formulation and operationalisation of policy regarding Advanced Customer Support (namely, the support provided to benefit customers who may have additional vulnerabilities or support needs), which included direct responsibility for colleagues who would provide support for those vulnerable customers, as well as ensuring that the right support and training was in place for colleagues who were dealing with customers in their role.

74. The witness explained that the DWP's key function is to ensure that eligible claimants receive the correct benefit entitlement at the right time. They stated that the DWP does

not have a statutory safeguarding duty or duty of care and that use of the term 'safeguarding' was not intended to convey a legal duty by which the DWP is required to take charge of the safety and wellbeing of claimants. Rather, the term was used by the DWP in common parlance to communicate, in a practical way, what actions may need to be taken by staff when they have concerns about an individual. This may include helping to direct customers to the most appropriate body to meet their needs.

75. The witness explained that the Request arose as a result of a news story following the tragic death of Mr Errol Graham. Mr Graham's case was subsequently considered by a Coroner in inquest proceedings and themes arising from the administration of his benefit, and related policy and guidance, had been the subject of judicial review proceedings.

76. The witness explained that the DWP has a team which undertakes 'Internal Process Reviews' in certain cases, including those similar to the circumstances of Mr Graham's death. The witness stated that these reviews are not designed to identify or apportion blame but to consider whether policies were followed correctly and what learning could be derived. They also explained that there is a 'Serious Case Panel' which meets quarterly to consider systemic themes and issues which have arisen across DWP service lines. That panel is made up of the DWP's most senior directors, including the Permanent Secretary and minutes from its quarterly meetings are published on the gov.uk website.

77. Various points were made by the witness, in both their written witness statement and in oral evidence, in respect of government policy and section 35(1)(a) of FOIA (formulation of government policy). Whilst we acknowledge all of the points made, the material ones were as follows:

    a. At its heart, policy is about the decisions made by the Government in the light of the advice provided by civil service policy professionals to deal with relevant issues, which are not always covered by existing legislation.

    b. The first step in developing policy was becoming aware of a concern involving the DWP's work. After that, the DWP would consider the issues that the policy was attempting to resolve - which would involve analysis, expert opinions and stakeholder views and understanding any assumptions and the impacts and outcomes of the policy. At a high level, any policy development involved the strategic development of the policy together with political involvement and the delivery of the policy.

    c. Government policy was a plan or a course of action aimed at achieving a certain objective and was not limited to consulting on and drafting legislation. There are other layers of policy used or adopted by Government, which include developing operational policy to make case decisions based on legislation or decisions about service delivery (for example, decisions about the design and content of forms). The witness acknowledged that not all instances of these non-legislative approaches will amount to government policy, but he said that many will.

    d. Ministerial involvement in operational policy and delivery matters occurred because these are important to achieving a particular outcome, but in other circumstances Ministers are not involved. These situations will vary depending

on the issue, department and Minister. In developing government policy through operational areas, Ministers can provide direction to officials, work with other Ministers and get involved in the multi-levels of government and financing of a policy. The nature of these discussions and decisions can be dynamic and can take place over several meetings between Ministers and officials.

e. Whilst the DWP does not have a statutory safeguarding duty or duty of care. the DWP is required by law to pay eligible customers' benefits. The operational policy is designed to ensure as best as possible that all eligible customers are paid the correct amount at the right time. The DWP and its Ministers have a commitment to supporting vulnerable people, which includes ensuring that the DWP understands vulnerable customers' circumstances as well as possible. This is important to achieve the correct legislative policy and social outcomes that Government intends. Paying the correct amount of money also reduces additional concerns for vulnerable people who may be at risk. This is an example of the extent that officials support government in delivering social and legislative policy.

f. The role of the DWP's Chief Psychologist is principally a policy role, which includes supporting meetings convened by Ministers and advising on the implementation of policy. Their work relates to how the DWP might better support vulnerable customers who might be at risk of harm. That work engages wider government social policy. This is a policy matter, also linked to the formulation and development of legislation so as to ensure that claimants are paid the right amount at the right time.

g. It was common for the Chief Psychologist to be asked for advice on the policy and service delivery issues that can arise where claimants may be considered vulnerable and require additional support.

h. The Chief Psychologist led the Review. As part of this role, the Chief Psychologist received feedback from time to time in respect of the DWP's policies and procedures around vulnerable claimants. This work began in December 2018, prior to the inquest (in June 2019) into Mr Graham's death.

i. The Chief Psychologist also provided written and oral evidence to the Coroner on behalf of the DWP at the inquest. The Chief Psychologist's evidence and the Coroner's observations as interpreted and reported in Disability News Services' article dated 23 January 2020 are referred to in the Request.

j. The Review was not a formal review, nor was it formally commissioned. It was a series of very broad conversations focusing on the subject, to inform policy making. It was a 'review' in the very broadest sense. The Chief Psychologist took the lead on this because there was no central area which held this responsibility at that time.

k. The Chief Psychologist never gave or intended to give an undertaking to the Coroner that the DWP would produce a formal written report following the Review. The DWP's intention was to consider the issues and introduce improved practices and policies, rather than to produce a specific report.

l. Due to the nature of the Chief Psychologist's work, this work quickly became visible to Ministers. The Minister for Disabled People, Health and Work led discussions on how the DWP could develop support to vulnerable claimants.

m. The work on the Review concluded with responsibility for providing further support to vulnerable customers being passed on to the DWP's Customer Experience Directorate and that the discussions referred to informed the work carried out by that Directorate. There continues to be Ministerial oversight over aspects of this work, including Secretary of State involvement in complex cases and the development of the Serious Case Panel which feeds into policy in this area. The ongoing work of the Customer Experience Directorate is being carried out through Internal Process Reviews, the Serious Case Panel and a Strategy team.

n. The guidance supplied by the DWP to the Second Respondent in connection with Request was drafted by the Customer Experience Directorate rather than the Chief Psychologist who initiated the Review. However, it is the closest product in terms of time and content to the items considered by the Review.

o. The DWP's guidance relating to core visits and ineffective safeguarding visits had also been revised. The strategy work was still going on because of differences in how each of the different benefits operate. These areas included 'benefit delivery' teams such as Universal Credit, Job Seekers Allowance and other DWP delivery functions including Health, Safety and Inclusion, or Disability Benefits and Appeals.

78. In response to questions during the hearing, the witness accepted that the term 'policy' was sometimes used to refer to matters which were actually procedural in nature. They gave further explanations regarding how some decisions are made and the involvement of Ministers. They also explained how procedures could be modified regarding how the DWP dealt with vulnerable customers. It was put to them that this was not the making of policy 'on the fly' but rather the mere application of existing policy. The witness accepted that individuals have to follow and apply policy when dealing with vulnerable customers but their view was that this was still an outward-facing policy (not an internal procedure matter).

79. The witness agreed that it was not the role of civil servants to develop policy. They stated that whilst aspects of legislation or matters such as bidding for funds will involve Ministerial sign off, Ministers are also involved in the day-to-day running of the Department, including for the purposes of learning lessons if things go wrong and ensuring that there is an effective implementation of legislation on the ground. The witness accepted that Ministerial involvement does not necessarily mean that it relates to government policy and there were lots of areas (for example, relating to administrative matters) which they would also become involved in.

80. In respect of the particular circumstances of this case, it was put to the witness that the Minister was not formulating or developing policy but just dealing with practical steps to achieve the objective of what the Government had already set out. The witness's view was that the Minister was learning from the outcomes and hence this related to the development of policy regarding the support and treatment of vulnerable customers.

81. Relating to the point already made in their written statement about the 'Internal Process Reviews', the witness explained in the hearing that learnings from those reviews (and the involvement of others referred to) would enable the development of policy. He also stated that this does not always need a formal review, but sometimes submissions were made to Ministers. He further explained that, whilst the work of the Chief Psychologist in this case was not a formal review, that did not mean that it would not be referred to Ministers further down the line or that a Minster would not be involved in decision making relating to it.

82. Various questions were put to the witness (by the Second Respondent and the Tribunal Panel) regarding the information within the scope of the Request. The witness considered that certain information was outside of the scope of the Request as it did not exist at the time. For example, the Customer Experience Directorate did not exist at the time of the Request and the Chief Psychologist had no further involvement with producing guidance. However, the witness considered that the later work undertaken by the Customer Experience Directorate was a continuation of the earlier work led by the Chief Psychologist (prior to the date of the Request) to take the learnings and understand what more could be done to support vulnerable customers.

83. Commenting on the Public Interest Test, the witness stated that the relevant information had been withheld so that colleagues advising on the policy and guidance referred to could work on it without the risk of premature disclosure (and that work was ongoing). He stated that it was 'only proper' that the DWP be afforded the time and space to consider and develop policies without the need to release information prematurely. His view was that a premature release of information could be taken out of context and inferences could be drawn where there aren't any – and that this was especially the case in a sensitive area as in the current case. For those reasons, the witness considered that the public interest in maintaining the exemption outweighed the public interest in disclosing the withheld information.

84. In respect of section 36 of FOIA (prejudice to effective conduct of public affairs), the material points made by the witness were as follows:

    a. The withheld information related to discussions that were held between internal stakeholders in a safe and open environment. Those discussions are imperative in the DWP's ability to develop and improve the processes and policies within it as well as the services that the DWP offers its claimants.

    b. The disclosure of the withheld information would not only inhibit colleagues' willingness to fully engage in these types of discussions, but it would also restrain frank and candid exchanges, which are required to develop new ideas and progress existing projects.

    c. The development of a policy regarding vulnerable customers within the DWP is ongoing. Other related work was also ongoing.

    d. The same factors as outlined above (paragraph 83) apply in respect of the Public Interest Test for the purpose of section 36 of FOIA.

85. In respect of section 38 of FOIA (health and safety), the material points made by the witness were as follows:

a. The withheld information is intimately concerned with vulnerable customers and clearly involves the health and safety of individuals, and was therefore within the scope of the exemption contained in section 38 of FOIA.

b. Whilst the application of section 38 of FOIA does not relate to a specific concern for psychological wellbeing, it was applicable in the current case because the nature of the policy development could raise unnecessary anxiety for claimants who may have had or be experiencing mental health issues or have other personal concerns.

c. The risk of endangerment that disclosure of the withheld information could cause is neither trivial nor insignificant. Amongst other things, individuals who may be struggling with a mental health issue or condition could deteriorate, could engage in self-harm behaviours or take their own life. Similarly, release of sensitive information could cause serious distress to others such as family members, particularly if they were not previously aware of it or the subject matter in itself caused an adverse reaction and detriment to health and wellbeing.

d. In respect of the Public Interest Test, the balance lay in favour of maintaining the exemption in section 38 of FOIA.

The Appellant's Submissions

86. Whilst acknowledging all of the specific points made, the material points made by the Appellant in support of the appeal (including submissions made by Mr Suterwalla on behalf of the Appellant) were as follows.

87. In respect of Ground 1:

a. The Commissioner accepted that the withheld information related to the creation of a DWP safeguarding policy (paragraph 75 of the Decision Notice). Regardless of whether or not the creation of that policy was the "formulation or development" of policy within the terms of section 35(1)(a) of FOIA, it was clearly "government policy".

b. The Commissioner's finding (at paragraph 75 of the Decision Notice) that the withheld information contains discussions relating to the creation of a DWP safeguarding policy could only have led to a lawful and rational conclusion that the withheld information engaged the exemption in section 35(1)(a) FOIA.

c. The Crown is one and indivisible - and individual departments do not have separate legal personality from that of the relevant Secretary of State and any Secretary of State may exercise the functions of another. The Secretary of State is herself part of the Government, as are DWP policies. If DWP policy does not constitute government policy, the same would apply to the policy of any department of state, thus rendering the term effectively meaningless.

d. If Parliament had intended to give "government policy" such a restricted meaning (which would be entirely contrary to its natural meaning) very clear words would have been required.

88. In respect of Ground 2:

a. The Commissioner erred in finding that the DWP's policy was excluded from the scope of section 35(1)(a) FOIA because it merely "gives effect" to the Government's social policy and is involved with delivering and implementing it, which is not part of the "formulation or development" of policy.

b. The Commissioner erred in considering that the relevant policy was "operational" or "administrative" policy and that such policy did not engage the exemption in section 35(1)(a) FOIA.

c. The Commissioner appeared to suggest that "formulation" relates to the early stages of the policy process, that "development" related to the improvement or alteration of existing policy and that there was a requirement for "something that is actually happening to policy" thereafter. The Commissioner's view of the formulation and development of policy was wrong and the Commissioner erred in reading such a constraint into the clear words of the legislation and accordingly finding that the withheld information did not relate to the formulation or development of government policy.

d. Implementation of a policy will inevitably involve a constant and iterative process of considering its impact, the possible benefits and disadvantages of making changes, and giving effect to such changes. Those activities clearly fall within the term "formulation and development" giving those words their natural reading.

e. Even if the Commissioner was correct to characterise the withheld information as relating to the "implementation" of policy, that did not mean that the withheld information did not also properly fall within the scope of the "formulation or development" of government policy. The Commissioner was also wrong if he considered that the relevant policy was "operational" or "administrative".

f. The withheld information revealed that something "dynamic" was happening in any event, so this would satisfy the Commissioner's own approach regarding the scope of "formulation and development" of the policy. The nature of the withheld information (namely, conversations) was such that it involved a consideration between individuals not only of existing policy, but of its impacts and possibilities for development, which was clearly a dynamic process.

89. In respect of Ground 3:

a. The Commissioner erred in considering that there was insufficient Ministerial involvement in order to determine whether section 35(1)(a) FOIA was engaged.

b. It is established law that officials are empowered to take decisions on behalf of Ministers. That applies to the formulation and development of policy (of all kinds) just as much as to other matters. However, even where policy is formulated and developed by officials (to whatever degree), Ministers are ultimately accountable for all government policy. There is no separate policy which is that of officials and not Ministers.

c. Consequently, the extent of Ministerial involvement and/or the issue of whether or not any particular matter has been the subject of "final decision" by a Minister is irrelevant to the question of whether section 35(1)(a) FOIA is engaged. There is

nothing on the face of that section to restrict its ambit to circumstances where there has been any particular degree of Ministerial involvement. Parliament will have been well aware of the way in which government policy is developed by officials, whether under the direct supervision or under the delegated authority of Ministers. In any event, in this case Ministers were well aware of the work being undertaken by officials.

90. In respect of Ground 4:

    a. If the Commissioner was correct to find that the withheld information was not within the scope of the exemption contained in section 35(1)(a) of FOIA, it was otherwise within the scope of the exemption contained in sections 36(2)(b)(i), 36(2)(b)(ii) and/or 36(2)(c) of FOIA.

    b. A qualified person's opinion was obtained for the purposes of those sections and the public interest in maintaining the relevant exemptions outweighed the public interest in disclosure of the withheld information.

91. For the purposes of Ground 4, the qualified person (Minister) was Baroness Stedman-Scott. We comment below on the opinion which was provided.

92. In respect of Ground 5: the withheld information was within the scope of the exemption contained in section 38 of FOIA. The withheld information was intimately concerned with vulnerable customers which clearly involves the health and safety of individuals. However, the Appellant's final skeleton argument stated that the Appellant was no longer relying on this ground.

93. In respect of the Public Interest Test regarding the application of the exemptions in section 35(1)(a) and 36 of FOIA, the Appellant argued that the balance of public interest lay in favour of maintaining the relevant exemption and against disclosure of the withheld information. In addition to the points made by the witness:

    a. the Appellant maintained its position as summarised by the Commissioner in paragraphs 16 and 17 of the Decision Notice – namely that:

        - the DWP acknowledged the public interest in transparency which makes Government more accountable to the electorate and increases trust. The DWP also acknowledged the public interest in being able to assess the quality of advice being given to Ministers and the subsequent decision making;

        - the DWP considered that good government depends on good decision making and this needs to be based on the best advice available and a full consideration of all the options without fear of premature disclosure. The DWP considered that disclosure would risk decision-making becoming poorer and inadequately recorded;

    b. the Appellant also submitted that:

        - the issue around vulnerable customers is one which is intrinsically and intimately connected to the mental and physical well-being of individuals. Whilst direct personal information can be redacted, there is a risk of still

being able to identify people by reference to information already in the public domain – high weight must be accorded to the harm that may arise from disclosure; and

- when considering the public interest in disclosure of information (having regard to the issue of transparency of the Government's policy on vulnerable customers), regard must be had to the other sources of public information. The Appellant referred in particular to the appearances of the Secretary of State, other Ministers and officials before Parliamentary Select Committees and information provided by way of response to Parliamentary Questions.

The Commissioner's Submissions

94. Whilst acknowledging all of the specific points made, the material points made by the Commissioner in response to the appeal (including submissions made by Mr Davidson on behalf of the Commissioner) were as follows.

95. In respect of Ground 1:

a. The Commissioner agreed with the Appellant that the DWP is part of the Government and accepts that a policy agreed at Ministerial level in a particular department of State such as the DWP will also represent government policy. However, the Appellant had misunderstood the Commissioner's arguments at paragraph 75 of the Decision Notice. The Commissioner was not stating that DWP policy cannot be government policy. The distinction on the facts of this case was that there was no evidence of a Ministerial decision made on the policy.

b. The Commissioner accepted that Ministers are responsible for the actions of their civil servants, and that civil servants have delegated authority to make decisions. On the facts of this particular case, the Commissioner's position was that the decisions being taken by civil servants, referred to in the withheld information, were around internal policies and procedures for implementing an already decided policy (namely that certain individuals are entitled to certain benefits) and the Customer Experience Directorate took the policy forward.

c. The Commissioner accepted that FOIA does not define 'government policy'. The Commissioner considered that, in general terms, government policy can be seen as a government plan to achieve a particular outcome or change in the real world (having regard to the description of policymaking in the 'Modernising Government White Paper' dated March 1999). The Commissioner stated that government policy can include both high-level objectives and more detailed proposals on how to achieve those objectives.

d. On the facts of this case, there did not appear to be any change in the political vision but rather simply an issue of reviewing the practices adopted by the DWP to put that vision into practice in light of any lessons learnt from the death of Mr Graham.

e. As such, the Commissioner's view was that the withheld information in this particular case did not represent government policy.

96. In respect of Ground 2:

a. The Commissioner considered that the terms "formulation" and "development" broadly refer to the design of new policy and the process of reviewing or improving existing policy. However, the Commissioner considered that the exemption will not cover information relating purely to the application or implementation of established policy. The Commissioner's view was that there is an important distinction between policy formation/development on the one hand, and policy implementation/operational decisions on the other. This distinction can be seen from section 35(2) of FOIA, referring to the position "*once a decision as to government policy has been taken*".

b. The dividing line between policy development and implementation is a question of fact, which can vary from case to case. However, the Commissioner considered that the following factors will be indicators of the formulation or development of government policy:

- the final decision will be made either by the Cabinet/Executive Committee or the relevant Minister;
- the Government intends to achieve a particular outcome or change in the real world; and
- the consequences of the decision will be wide-ranging.

c. The Commissioner considered that the term 'formulation' of policy refers to the early stages of the policy process where options are generated and analysed, risks are identified, consultation occurs and recommendations or submissions are put to a Minister who then decides which options should be translated into political action. The Commissioner's view (referring to a First-tier Tribunal decision in support of this) was that a public announcement of the decision is likely to mark the end of the policy formulation process.

d. The Commissioner considered that decisions on detail of a policy are more likely to constitute policy formulation if they require Ministerial approval. The Commissioner's view was that if, on the other hand, the remaining decisions were taken below Ministerial level, they are managerial or administrative in nature, or they did not significantly affect overall outcomes in the wider world, then it was likely that they were really decisions on implementation.

e. The Commissioner considered that the term 'development' of policy includes the process of reviewing, improving or adjusting existing policy. If a policy is a plan to achieve a particular outcome in the real world, the development of that policy is likely to involve a review of its intended outcomes, or a significant change to the original plan. By contrast, minor adjustments made in order to adapt to changing circumstances, avoid unintended consequences, or better achieve the original goals might more accurately be seen as decisions on implementation.

f. In that context, the Commissioner considered that the policy can be seen as a framework of 'rules' put in place to achieve a particular objective. This framework will set some fundamental details in stone, but will also inevitably leave more detailed discussions for those implementing the plan, thus giving

some inbuilt flexibility on how it can be delivered. Any such adjustment or decision that can be made within this inbuilt flexibility (without altering the original objectives or rules) is likely to be an implementation decision rather than policy development.

g. The Commissioner's position was that he was correct to conclude that the matters being considered by the DWP in the withheld information were implementation issues (or 'operational' and 'administrative' decisions), rather than the further development of the substantive government policy. This was because the Commissioner considered that the discussions reflected in the withheld information were more about how to effectively deliver the social policy (and in particular the DWP's safeguarding procedures) to ensure that vulnerable claimants are able to access the benefits they are entitled to.

h. The Commissioner disagreed with the Appellant's arguments outlined at paragraph 88.d. The Commissioner did not accept that there is inevitably a continuous or 'seamless web' of policy review and development. The Commissioner considered that, in most cases, the formulation or development of policy is likely to happen as a series of discrete stages, each with a beginning and end, with periods of implementation in between. The Commissioner recognised that the experience of implementing a policy may identify issues which trigger the further development of a policy, but considered that issues of implementation are distinct from policy development until such time as a decision is taken that the policy needs further development.

i. In respect of the Appellant's arguments outlined at paragraph 88.f, the Commissioner's view was that the review of safeguarding procedures resulting in an identification of the areas of work where further support could be introduced did not amount to policy development, but merely 'fine tuning' the implementation of that policy.

97. In respect of Ground 3:

a. The Commissioner set out his views on how decisions are made by government cabinets, citing Chapter 4 of the Cabinet Manual (1st edition October 2011). The Commissioner accepted that not all government policy will need to be discussed in Cabinet (or Executive Committee) and be jointly agreed by Ministers. Some policies will be formulated and developed within a single government department and approved by the Minister responsible for that area of government. However, the Commissioner considered that the important point is that government policy will ultimately be signed off either by the Cabinet/Executive Committee or the relevant Minister.

b. The Commissioner's position was that only Ministers have the mandate to make government policy rather than civil servants. If the final decision is taken by someone other than a Minister, that decision will not in itself constitute government policy. Therefore the Commissioner considered that any decisions or adjustments made by someone else other than a Minister will therefore be implementation or management decisions, rather than policy development.

c. The Commissioner accordingly considered that he was correct to conclude in the

Decision Notice that the withheld information does not constitute government policy in the absence of evidence that the final decision with regard to the Review, or its resulting policy, was taken by a Minister.

98. In respect of Ground 4:

    a. The Commissioner accepted that (if section 35 of FOIA was not engaged) the opinion of Baroness Stedman-Scott amounted to the reasonable opinion of a qualified person for the purposes of section 36 of FOIA.

    b. The Commissioner agreed with the Appellant's position regarding the Public Interest Test and accordingly was of the view that the public interest in maintaining the exemption in section 36 of FOIA outweighed the public interest in disclosure of the Requested Information.

99. The Commissioner also set out his view (as noted above) that the Appellant was unlawfully seeking to aggregate the public interest factors for all of the exemptions relied upon. The Commissioner referred to the *Montague* case as authority for such aggregation not being permitted.

100. In respect of Ground 5:

    a. The Commissioner agreed with the assertions of the Appellant and the witness that the withheld information was "intimately concerned with vulnerable customers which clearly involves the health and safety of individuals" but argued that that was not the statutory test.

    b. The Commissioner disputed that disclosure of the withheld information would, or would be likely to, endanger the physical or mental health, or the safety, of any individual. The Commissioner therefore considered that section 38 of FOIA was not engaged.

The Second Respondent's Submissions

101. The Second Respondent supported the Commissioner's position, except in respect of the application of the Public Interest Test for Ground 4. The Second Respondent disagreed with the other parties that the Public Interest Test favoured maintaining the relevant exemptions relied on in Ground 4.

102. In respect of the Public Interest Test for the purposes of Ground 4, the Second Respondent's position was that the Public Interest Test favoured the disclosure of the Requested Information. The Second Respondent considered that:

    a. the Appellant was wrong to take the view that disclosure of the Requested Information would lead to further releases in future (the Second Respondent's view was that disclosure in this case would not set any precedent); and

    b. civil servants should not be easily deterred from giving impartial and robust advice by the possibility of future disclosure.

103. The Second Respondent provided some information regarding views of the Coroner at the inquest into the death of Mr Graham and some associated news stories, which

prompted the Request. The Second Respondent considered that the release of the relevant Requested Information, which he stated was the only recorded output of the Review, would help coroners to more accurately assess future commitments by the DWP to carry out reviews and place such commitments into their proper context. The Second Respondent considered that this would help to ensure the proper functioning of the inquest system and that this would be in the public interest.

104. The Second Respondent denied the assertions of the Appellant that the Second Respondent's 'real' complaint was that the DWP failed to properly represent to the Coroner the nature of the review work being undertaken. He stated that the Appellant had no reason for holding that view and that he had never asserted that the DWP misrepresented the Review at the inquest. The Second Respondent noted that the Appellant did not, however, dispute that the Coroner appeared to have misunderstood what would take place as part of the Review.

105. The Second Respondent also explained that, whilst some information had become known in connection with a judicial review, the subject matter of the judicial review was not the Review. Also, the detail of what actually did happen during the Review and what areas for concern were identified as a result were not common knowledge. He stated that it was known, however, that the Review did not lead to the production of a report and it did not amount to a formal review.

106. The Second Respondent cited other instances where he considered that the public interest favoured disclosure of the Requested Information. Whilst acknowledging the various points made by the Second Respondent, in summary these were materially that release of the Request Information:

    a. would improve future agreement between the DWP and the Equality and Human Rights Commission (in connection with work which had been conducted by the latter regarding whether the DWP was making reasonable adjustments to its processes for people with mental health conditions and learning difficulties, as required under the Equality Act 2010);

    b. could be relevant in respect of the managed migration of Universal Credit and previous concerns raised by the Social Security Advisory Committee and the Work and Pensions Select Committee about that and its impact on vulnerable claimants (and the Second Respondent cited examples of cases, other than Mr Graham's, which he stated illustrated weaknesses in the DWP's safeguarding processes). In essence, the Second Respondent considered that publication of the Requested Information would help to provide information about the ways in which DWP could better engage with and support vulnerable claimants going through managed migration and that this would also help to inform bodies, such as the Work and Pensions Select Committee, which are seeking to scrutinise the managed migration process.

Discussion and conclusions

Outline of relevant issues

107. In respect of the Decision Notice, we needed to determine:

    a. whether section 35(1)(a) of FOIA (formulation of government policy) was

engaged in respect of the relevant Requested Information; and

b. if that section was engaged, whether (in all the circumstances), the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

108. As noted, during the course of this appeal (subsequent to the issue of the Decision Notice), the Appellant also raised Ground 4 and Ground 5, which of course were not addressed in the Decision Notice but the Appellant subsequently withdrew his reliance on section 38 of FOIA (Ground 5). For the purposes of the appeal, therefore, we also needed to determine:

a. whether the relevant exemptions in section 36 of FOIA (prejudice to effective conduct of public affairs) were engaged in respect of the relevant Requested Information; and

b. if any such exemption was engaged, whether (in all the circumstances), the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

109. We address each of those issues below, after some preliminary points. For completeness, we also set out our comments on the application of section 38 of FOIA (Ground 5) given the previous inclusion of this in the pleadings and in the witness's written witness statement, whilst acknowledging this was ground was subsequently withdrawn by the Appellant.

Remit of the Tribunal

110. During the hearing, the Tribunal Panel queried the position regarding the qualified person's opinion and the scope of the withheld information (both of which we comment on below). Mr Suterwalla objected on the basis that these issues were not within the scope of the Appellant's appeal and were not disputed by the Commissioner (nor the Second Respondent, who mainly adopted the Commissioner's position).

111. As we have noted (and as we explained during the hearing), the powers of the Tribunal are set out in section 58 of FOIA and the Tribunal may review any relevant findings of fact and may come to a different decision regarding those facts. Essentially, the Tribunal is empowered to undertake a 'full merits review' of the appeal before it. Accordingly, we were not constrained to consider only the points which the parties raised or asked the Tribunal to focus on.

Exemptions relied by the Appellant during the course of the appeal

112. As noted, a public authority is entitled to raise new exemptions which it may wish to rely on before the Tribunal. Accordingly, the Appellant was entitled to raise Ground 4 and Ground 5 as part of the appeal, notwithstanding that they were not raised earlier (including as part of the Commissioner's investigations leading to the Decision Notice). We also note that the Commissioner did not object to the Appellant's subsequent reliance on these exemptions (neither did the Second Respondent, whose position generally reflected that of the Commissioner).

The extent of information falling within the scope of the Review

113. As noted, the Decision Notice held that the DWP had disclosed some information regarding the scope of the Review and that, on the balance of probabilities, the DWP did not hold any further information relating to the scope of the Review. The Commissioner upheld this view during the hearing. The Appellant also agreed with this, but the Second Respondent disputed whether all relevant information had been identified.

114. In our view, inadequate searches have been undertaken to sufficiently ascertain whether or not more information was held which was within the scope of the Request. We consider that, on the balance of probabilities, more information is likely to be held than is contained within the withheld information which was provided to the Tribunal. We raised these concerns during the first part of the hearing and the Appellant was given the opportunity to consider its position before the second part of the hearing. The Appellant maintained its view that no further information was held, providing some further information in support of that position (including some informal statements from members of staff, to which we refer below).

115. Information provided to the Second Respondent in response to the Request included a meeting invitation issued to a significant number of stakeholders. The Second Respondent was also informed by the DWP (in connection with its response to the Request) that there was a series of meetings to review the DWP's policy and instructions for customers who declare an intention to attempt suicide or self-harm and which aimed to identify areas for improvement, and included participants' perspectives and experiences. [redacted]

116. [redacted]

117. Further, the Appellant's position was, of course, that the Review comprised the formulation and development of government policy. Given that (and notwithstanding the view of the Appellant and the witness regarding the nature of the Review and the relatively informal basis on which government policy could be developed), we consider it unlikely that no person attending any of the meetings made any record in connection with any of them (whether by way of notes in preparation for any meeting, notes of matters discussed at the meeting or any subsequent follow-up records or emails). It is also difficult to accept that the DWP's Chief Psychologist had not taken any notes of the meetings they attended relating to the Review that they were leading and in respect of which they were ultimately looking to produce a report, briefing note or recommendations. The nature and purpose of the Review (involving several meetings and the input of a significant number of people representing different

departmental areas and functions, and the related ongoing work and involvement of other teams as referred to by the witness) should not be overlooked. We do not consider it plausible that that could all be done: (i) without the Chief Psychologist or their delegates recording any aspect of the meetings or any other feedback received; and (ii) without anyone else making notes of issues to discuss, of issues which were discussed or otherwise providing any written comments in connection with the Review. [redacted]

118. The Chief Psychologist provided an informal statement[19] to the Tribunal after the first part of the hearing, stating that he made a further check of his files and that he did have some documents linked to the work that was undertaken. However, he stated that none of that information related to the Request or specifically to the withheld information. Without further details or sight of those documents, we could not determine one way or another whether this additional information was relevant. However, if it related to the work which was undertaken by the Chief Psychologist as part of the Review (as appeared to be suggested in that statement) then it is difficult to see how it could not be relevant to the Request.

119. We also note that the meeting invitation provided to the Second Respondent in response to the Request referred to "members of the drafting team" (copied into the meeting invitation), stating that they may approach the stakeholders with queries. We also consider it implausible that no members of that drafting team would have emailed anyone with those queries nor taken any notes in respect of the responses to their queries, or in respect of any other matters to be addressed in the 'drafting' that this team was tasked with.

120. Moreover, the meeting invitation stated that the stakeholders would be sent a copy of the existing policy and instructions for customers who declare an intention to suicide or self-harm. We consider that this information itself is relevant to the Request, noting that it was stated to form the basis of the Review.

121. A member of the DWP's staff (the author of the meeting invitation) provided an informal statement[20] to the Tribunal after the first part of the hearing, stating that there were no other additional outputs from those meetings and relevant parts of the withheld material already provided to the Tribunal were the only recordings of those meetings. However, the statement did not address the basis on which that person could provide that confirmation, in that it did not set out what checks had been made and which (if any) of the recipients of the invitation had been contacted to verify whether or not they held any relevant information or what instructions they had been given. Rather, it appeared to have been based merely on that person's view of the records they personally held or were responsible for. Another member of staff who also provided an informal statement[21] stated that they no longer had access to the relevant files to re-check searches which they stated were previously undertaken. There was no suggestion that they asked anyone else (such as the IT department) to

[19] It was in the form of a letter and did not include a statement of truth.
[20] It was in the form of a letter and did not include a statement of truth.
[21] It was in the form of a letter and did not include a statement of truth.

check the records they could no longer access.

122. When the witness was asked about what searches had been undertaken, they stated that the 'Advanced Customer Support Strategy' team had been asked to search their electronic files. However, the witness also explained that that team was not in existence at the time of the Request. Therefore we consider that there is a possibility that relevant people were not contacted relating to the search for information (namely, any stakeholders who were invited to the meetings but who were not members of that group which was subsequently formed). Again, there was no further evidence in respect of the nature and extent of the searches which were stated to have been undertaken.

123. The above examples (which are not exhaustive) demonstrate that documents are, or may be, in existence but which were neither disclosed in response to the Request nor included in the withheld information provided to the Tribunal. In our view, it was remiss of the Commissioner to not consider more fully the potential extent of the relevant information which may be held by the Appellant, particularly having regard to the matters we have referred to.

124. We therefore conclude that, on the balance of probabilities, there is a likelihood that other information is held within the scope of the Request. We also find that insufficient searches had been undertaken by the DWP regarding the information which may be held within the scope of the Request.

Was section 35(1)(a) of FOIA engaged?

125. We start by saying that we agree with the Commissioner's view of what constitutes government policy, for the reasons outlined by the Commissioner (and having regard to the case law referred to). We also note that the Appellant agreed with many of the points of the Commissioner in that regard (including the guidance published by the Commissioner in relation to the application of section 35(1)(a) of FOIA), albeit disagreed with the application of relevant points in the current case.

126. Our view is that the relevant policy for the purposes of this appeal is fundamentally that which relates to the payment of benefits to individuals who meet certain criteria. We agree with the arguments put forward by the Commissioner that there does not appear to be any change to the Government's position as to who should qualify for the benefits. Rather, the subject matter at the heart of the Requested Information (and the Review) relates to the manner in which the DWP may approach vulnerable individuals; we do not see that as being any change to the policy in question, nor the formulation or development of that or a new policy.

127. We do not disagree with the Appellant's submissions that 'formulation or development' is a broad phrase and that it was intended to capture a wide variety of policy work undertaken by central government departments. However, we do not accept the Appellant's submissions that 'formulation or development' may encompass aspects of the implementation of policy. In our view, if Parliament had intended the exemption to extend to the implementation of policy then section 35 of FOIA would have included reference to that and not simply used the words 'formulation or development' of government policy.

128. We agree with the position of both the Appellant and the Commissioner that not all

government policy will need to be discussed in Cabinet and jointly agreed by Ministers and that civil servants will also be involved at various stages of the policy process. However, we also accept the Commissioner's position that government policy will ultimately be signed off either by the Cabinet or the relevant Minister. If that were not the case, then many operational, procedural or administrative decisions made by civil servants within a government department could be said to constitute government policy. That cannot be correct as a matter of principle and common sense. It could also mean that many records of those decisions would fall within the scope of the exemption within section 35 of FOIA and we do not believe that that was the intention of Parliament. In this regard, we are also mindful of the findings of the Upper Tribunal in the *Department of Health and Social Care* case that the purpose of section 35(1)(a) of FOIA is to protect "the efficient, effective and high quality formulation and development of government policy" (in contrast to operational, procedural or administrative decisions made by civil servants).

129. As noted, the witness accepted that the term 'policy' was sometimes used to refer to matters which were actually procedural in nature. We consider that is the case with regard to the Review, in that the term 'policy' has been used in respect of matters which are essentially procedural or administrative. We also consider that the Commissioner may have done likewise in referring to a 'safeguarding policy' in the Decision Notice.

130. As stated by the witness, the DWP's 'Internal Process Reviews' were designed to consider whether policies were followed correctly and what learning could be derived. We find that to be the case with regard to the Review, namely that it concerned how policies were followed and therefore related to the implementation of policy and operational matters, rather than the formulation or development of policy itself. Likewise the witness referred to 'operational policy' which was designed to ensure that eligible customers are paid the correct amount at the right time and the DWP's commitment to supporting vulnerable people to ensure that the correct legislative policy was achieved. Again, we see this as relating to the implementation or delivery of policy, which is consistent with the witness's own statement that this was an example of how officials support government in *delivering* social and legislative policy.

131. Accordingly, we agree with the Commissioner's position that the Review and the associated decisions being taken by civil servants related to internal procedures for implementing an already decided policy (namely that certain individuals are entitled to certain benefits). Likewise we consider that the Review and any resulting output is relevant to making operational adjustments to better achieve the original goals of that policy – namely to ensure that vulnerable claimants are able to access the benefits they are entitled to - and accordingly is implementation of a policy rather than formulation or development of it.

132. We accept the witness's evidence that there was Ministerial oversight of the Review. However, that does not mean that the Review related to the formulation or development of government policy. As the witness also explained, there was also Ministerial involvement in the day-to-day running of the Department and they accepted that Ministerial involvement does not necessarily mean that it relates to government policy. We find that that was the case in respect of the Review and therefore the Requested Information.

133. We also accept that the Review may be ongoing. Accordingly, there would be no formal Ministerial decision or 'sign-off' which the Commissioner referred to as being relevant to government policy. However, for the reasons given above, we find that the Review was fundamentally related to the implementation of policy and so the absence of a Ministerial decision is not relevant either way, even though the Review may be ongoing.

134. The witness also gave evidence that the withheld information related to discussions which were necessary to develop and improve the DWP's "processes and policies". Therefore, even by the witness's own evidence, the Review was not limited to matters of policy but also related to procedural issues. We also note that the DWP's explanation to the Second Respondent (in connection with its response to the Request) was that the Review related to a Review of "our policy and instructions". [redacted] Therefore even the DWP drew a distinction between policy and "instructions", both of which it identified as being relevant for the basis of the Review in question. [redacted]

135. We do not accept the various arguments of the Appellant that the above all constituted government policy or the formulation and development of government policy. Based on our own analysis of the withheld information (and in conjunction with the reasons we have outlined above), we consider that it related to the implementation of policy and/or related merely to operational processes rather than comprising government policy.

136. For all of the above reasons, we find that section 35(1)(1) of FOIA was not engaged in respect of the Requested Information. As we have determined that that section is not engaged, it is not necessary for us to go on to consider the Public Interest Test in respect of it.

Were the relevant exemptions in section 36 of FOIA engaged?

137. If any exemption in section 36 of FOIA is to apply then, pursuant to section 36(1)(a) of FOIA, the information in question must be held by a government department and must not be exempt information by virtue of section 35 of FOIA. It is evident (and not disputed) that relevant information was held by a government department (the Department for Work and Pensions). For the reasons given above, we have concluded that section 35 of FOIA was not engaged. Accordingly, the potential engagement of section 36 of FOIA is not precluded.

138. As we have noted:

    a. the Requested Information is, pursuant to the relevant provisions of section 36 of FOIA, exempt from disclosure (subject to the Public Interest Test) if, in the reasonable opinion of a Minister of the Crown:

        - disclosure of it would, or would be likely to, inhibit either: (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation; or

- disclosure of it would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs;

b. the qualified person (Minister) in the current case was Baroness Stedman-Scott;

c. the 'reasonable opinion' of the Minister must be substantively reasonable (rather than procedurally reasonable), in accordance with the *Malnick* case.

139. The Minister's opinion was sought by way of an internal submission to her (dated 21 June 2022) which requested her opinion such that the Requested Information could be withheld for the purposes of the exemption in section 36 of FOIA. The submission included some comments regarding the alleged harm which could be caused by disclosure of the Requested Information (essentially being 'safe space' and 'chilling effect' points) and set out certain arguments for and against disclosure for the purposes of the Public Interest Test.

140. We were not provided with a copy of the Minister's opinion in this case; nor any document containing her signature in response to the internal submission. Rather, we were provided with a copy of an email sent by a member of the Minister's staff (a 'Diary Manager') stating that Baroness Stedman-Scott had given her opinion for the purposes of section 35(1)(a) of FOIA. During the hearing (on the first hearing date) we queried the validity of this with the Appellant and the Appellant was directed to produce (between the first and second hearing dates) a copy of the Minister's opinion itself. Nevertheless, no such copy was provided. Instead, further informal statements (as noted above) were provided from members of the DWP's staff explaining the process taken to obtain the opinion and what the normal process was.

141. We have to say that we were a little puzzled by the Appellant's approach to this issue. We accept that FOIA does not require the qualified person's opinion to be given in any specific form (and could even be given verbally). However, informal statements (as noted above) were provided to the Tribunal by members of the DWP's staff to the effect that that a record of the qualified person's opinion was held on file. However, as noted, no such record was provided.

142. The main, if not the only, reason for maintaining a record of the qualified person's opinion would be to demonstrate to the Commissioner and/or to the Tribunal that the qualified person's opinion had indeed been obtained. There is no discernible reason for maintaining such a record, if it is not for the purposes of producing it as evidence in the event of any challenge regarding the application of section 36 of FOIA. The Appellant proffered no valid reason as to why the record of the qualified person's opinion could not be provided to the Tribunal when explanations had been provided to the effect that a copy of it was held. It seems to us that, rather than the Appellant providing various explanations as to what happened in this instance and what the process might normally be, it would have been quicker and easier to simply obtain and provide the document recording the qualified person's opinion itself.

143. As noted, we accept the point made by the Appellant that section 36 of FOIA does not prescribe the form in which an opinion must be provided. However, the fact remains that section 36 does require a qualified person to provide an opinion (in whatever form it might take). Accordingly, the need for a qualified person's opinion is a pre-requisite to the engagement of the applicable exemptions in section 36(2) of FOIA. This was

therefore a point on which we needed to be satisfied before we could turn to the issue as to whether or not that opinion was reasonable for the purposes of that section.

144. The fact that the Appellant did not produce a record of the qualified person's opinion following a direction of the Tribunal, despite ample opportunity to do so, did cause us to question whether or not the qualified person's opinion had actually been obtained. However, we were provided with the documents and evidence referred to regarding obtaining the qualified person's opinion and there was no evidence before us to refute the explanations that had been provided in that regard. On the evidence before us, we concluded, on the balance of probabilities, that the qualified person's opinion had been obtained. We should also note that the Commissioner took no issue with this point and was satisfied that the qualified person's opinion had been obtained (likewise for the Second Respondent, who supported the Commissioner's position).

145. The internal submission for the qualified person's opinion included little detail by way of the alleged harm that would be caused by disclosure of the Requested Information. Notwithstanding that, we find that the Minister did provide an opinion which meets the requirements of the relevant provisions of section 36 of FOIA, including that the opinion was a reasonable one which could be held. We formed this view partly based on the content of that submission, but we have also had regard to the following observations of the Upper Tribunal in the *Malnick* case[22]:

"*In particular, it is clear that Parliament has chosen to confer responsibility on the QP*[23] *for making the primary (albeit initial) judgment as to prejudice. Only those persons listed in section 36(5) may be QPs. They are all people who hold senior roles in their public authorities and so are well placed to make that judgment, which requires knowledge of the workings of the authority, the possible consequences of disclosure and the ways in which prejudice may occur. It follows that, although the opinion of the QP is not conclusive as to prejudice… it is to be afforded a measure of respect.*".

146. Accordingly, we find that all of sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA were engaged in respect of the relevant Requested Information. We also note that this was common ground between the parties.

Did the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

147. Having determined that sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA were engaged, we now address whether the public interest in maintaining the exemptions in those sections outweighs the public interest in disclosing the information. We remind ourselves that this is to be assessed 'in all the circumstances of the case' as per section 2(2)(b) of FOIA.

148. We start by addressing the Commissioner's view that the Appellant had sought to aggregate the public interest factors, contrary to the position established in the *Montague* case. In our view, that was not the Appellant's position but rather that the Appellant was simply saying that the same points put forward for its reliance on the Public Interest Test applied regardless of which exemption was engaged. Therefore we do not agree with the Commissioner that the Appellant was seeking to aggregate

[22] Paragraph 29 of that case.
[23] (Qualified Person for the purposes of section 36 of FOIA.)

the public interest factors.

149. In respect of the Public Interest Test, the Appellant recognised that (with regard to factors favouring disclosure) overall decision making may be improved by debate if there is greater public input and that there may be public interest advantages in people understanding subsequent policy changes and approaches regarding vulnerable people and their welfare. The main argument of the Appellant in respect of maintaining the exemption was, fundamentally, a 'chilling effect' argument in the sense that the Appellant's concerns were essentially about future behavioural changes of relevant stakeholders in response to the disclosure of the Requested Information and the perceived likelihood of disclosure of similar information in the future. In other words, the Appellant's position was that disclosure of the Requested Information would risk inhibiting relevant individuals from participating in full and frank discussions. The Appellant and the witness also considered that disclosure would risk decision-making becoming poorer and inadequately recorded.

150. We accept that there is a risk of a 'chilling effect' and that this is a relevant factor in assessing the Public Interest Test in this case. In reaching this view, we were assisted by the observations of Charles J in the *Department of Health* case[24] in relation to the approach to deciding whether disclosure is likely to have a chilling effect.

151. However, based on the evidence which was before us and taking into account the submissions of the parties (and considering all the circumstances of the case), we find that the public interest in disclosure of the Requested Information outweighs the public interest in maintaining the relevant exemptions in section 36 of FOIA. Our reasons are as follows.

152. First, we considered that the content of the relevant Requested Information was not particularly sensitive or controversial. Whilst we accept that the relevant subsections of FOIA are engaged, when applying the Public Interest Test we do not consider that disclosure would cause the harm which the Appellant has alleged to any material degree such that it is in the public interest not to disclose it and to maintain the exemptions. In our view, the withheld information contains material which many members of the public might reasonably expect to see in the context of a safeguarding review relating to vulnerable individuals. Accordingly, we do not accept that the withheld information is sufficiently sensitive or controversial to support the argument that stakeholders would be inhibited from providing input in the future to the Review (to the extent it is continuing). We also do not see, having regard to the content of the withheld information, that disclosure of it would, in any material way, preclude or adversely affect any participation in, or contributions in respect of, the Review or any relevant future projects or initiatives.

153. We do not expect all civil servants to be 'highly educated' and 'politically sophisticated' (as referred to in the *Davies* case). However, we would expect at least a basic understanding by all civil servants of the fact that all information held by a public authority is potentially subject to disclosure in response to a freedom of information request. We think that this is especially true in respect of stakeholders working on the Review, given the nature of the issues involved and the likely public interest and potential need for transparency and openness. In this regard, we are mindful that the

[24] Cited by the Upper Tribunal in the *Davies* case; see paragraph 58 above.

witness did not give any specific examples in support of any of the 'chilling effect' arguments which had been cited by the Appellant; only general points were made regarding the chilling effect and the need for a safe space.

154. We acknowledge that there does not necessarily need to be specific evidence of the chilling effect in any given case[25]. However, even if we were to accept that there was a chilling effect to some degree, such that participation in the Review or relevant projects or initiatives would be made more 'difficult' in the future, that does not necessarily mean that such participation or the output of the reviews or initiatives would be materially adversely affected, or that they would no longer be productive. Further, for the reasons cited in the *Davies* case, relevant stakeholders should not be dissuaded from providing input to any projects or other initiatives in a robust and forthright manner simply because a disclosure of information was previously made under FOIA.

155. We also do not agree with the witness's views that disclosure of the Requested Information (even if the Review was ongoing) could be taken out of context or inferences could be drawn where there aren't any. Based on our assessment of the withheld information, we do not see that those concerns would materialise.

156. We also think that an important factor in the Public Interest Test is that the Coroner did not write a 'preventing future deaths' report and/or may have thought that the DWP was undertaking a review of its safeguarding procedures in light of Mr Graham's death. We are not saying that the Coroner was misled in any way or misunderstood that the DWP was undertaking a review, or that the Coroner was wrong to not write a 'preventing future deaths' report (and, to be clear, these issues are outside of our remit and we make no finding on any of them). We also acknowledge the point made by the witness that the DWP's Chief Psychologist never gave or intended to give an undertaking to the Coroner that the DWP would produce a formal written report following the Review.

157. However, the fact remains that the public may have had an expectation that there was a review being undertaken by the DWP (whether or not this would result in a formal report) and/or that the public knew that the Coroner did not produce a 'preventing future deaths' report. We therefore think it is highly important, given the wider public interest in the circumstances regarding Mr Graham and the safeguarding of vulnerable people generally, that there is some transparency and openness in respect of the work that the DWP has done. We acknowledge and accept the witness's comments that the DWP does not have a statutory safeguarding duty or duty of care. However, for the reasons given by the witness the DWP was nevertheless undertaking the Review and we consider that there is strong public interest in the public being aware of what was (or is) being done by the DWP to help safeguard vulnerable people, particularly in light of the tragic circumstances of Mr Graham's death.

158. We also note the point made by the Appellant that other sources of public information should be taken into account in assessing the Public Interest Test and the Appellant's view that this was a significant factor in favour of maintaining the exemptions. We

[25] See the comments of Mrs Justice Farbey CP (at paragraph 28) in the Upper Tribunal's decision in the *Department of Health and Social Care* case, citing *The Department of Work and Pensions v Information Commissioner, JS and TC* [2015] UKUT 0535 (AAC), paragraph 13.

acknowledge that this could be a relevant factor for the purposes of the Public Interest Test (as part of the consideration of all of the circumstances). However, we are mindful that FOIA itself is centred around the actual disclosure of recorded information which is held by a public authority. More importantly, there was no evidence before us regarding how much of the Requested Information (or any other relevant information) had been publicly discussed or otherwise publicly made available, nor any evidence regarding any specific duty on the Appellant to publicly disclose any such information. We therefore find that little (if any) weight should be afforded to this factor.

159. In contrast, the points made by the Appellant about other sources of public information could also be used to support arguments in favour of disclosure. As the witness explained, there is a 'Serious Case Panel' which meets to consider systemic themes and issues which have arisen across DWP service lines and minutes from its quarterly meetings are published on the gov.uk website. We consider that, to some extent at least, this negates the arguments regarding the need for a safe space and chilling effect. This is because the 'systemic themes and issues', which will be relevant to the Review and the ongoing work related to it, will be (or will become) public information in any event.

160. We consider that there are also other factors in favour of disclosure of the relevant Requested Information, most of which are based on the need for openness and transparency, including:

    a. the number of people potentially affected by the Review;

    b. wider general public interest in the issues relevant to the Review, including how vulnerable people are dealt with by the DWP; and

    c. the need for public scrutiny and potential challenge or debate regarding the relevant issues.

161. We also consider that, with one exception, the factors put forward by the Second Respondent in respect for the Public Interest Test are factors weighing in favour of the disclosure of the Requested Information. The exception is that we agree with the Appellant that little weight (if any) should be afforded to the potential benefit of the involvement of the Equality and Human Rights Commission, because it has its own powers to seek relevant information if necessary.

162. Submissions were made by the Appellant, in the closed session and within the closed material, with regard to the content of the withheld information and why the Appellant considered that the disclosure of the withheld information would not assist the public interest factors which had been put forward in favour of disclosure. We do not agree with those submissions as we consider that, notwithstanding those arguments and the Appellant's view on the content of the relevant withheld information, there would still be a public benefit in disclosure for the reasons we have outlined.

163. For the above reasons, we conclude that, taking into account all of the factors we have outlined regarding the Public Interest Test, the resulting balance comes down in favour of disclosure of the relevant Requested Information. We would note that if the

scales were evenly balanced then the information should be disclosed (reflecting the position outlined in the *Department of Health* case we cited at paragraph 67). However, in our view this was not an evenly-balanced matter.

164. Accordingly, applying the Public Interest Test, we find that, in all the circumstances of the case, the public interest in maintaining the relevant exemptions in section 36 of FOIA does not outweigh the public interest in disclosing the applicable Requested Information. Therefore the Appellant cannot rely on those exemptions to withhold the relevant Requested Information.

Was section 38 of FOIA engaged?

165. As noted, the Appellant withdrew Ground 5 in his final submissions but we nevertheless set out our views on the application of section 38 of FOIA, for completeness.

166. In order for section 38 of FOIA to be engaged, the legislation requires that disclosure of the relevant information "would or would be likely to endanger" the health (physical or mental) or the safety of any individual.

167. The Appellant's position had been that the withheld information clearly "involves" the health and safety of individuals. Also, the witness stated in their witness statement that this section was applicable because "*the nature of the policy development could raise unnecessary anxiety for claimants*" (emphasis added).

168. Whilst we acknowledge that the withheld information 'involves' the health and safety of individuals, that is not what is required for the purposes of this section. We would not have accepted the Appellant's position on this ground for two main reasons.

169. First, the word chosen by Parliament in this section was "endanger". We see this as meaning something more than a 'risk' to health or safety, as otherwise no doubt Parliament would have chosen that term instead. Second – and more significantly in the context of this appeal – no evidence had been put forward to support the view that anyone's health or safety could be endangered. There was only mere assertion of this possibility. Moreover, even if there were evidence of a possibility, that is not sufficient to engage this section. Whether something 'could' happen is not the same as whether something 'would' or 'would be likely' to happen (as required by this section and as confirmed by the case law we have referred to).

170. Accordingly, whilst the Appellant withdrew its reliance on section 38 of FOIA, we would not have found that this section was engaged in any event.

Final conclusions

171. For all of the reasons we have given, we conclude as follows.

172. We find that the Commissioner was correct in deciding, by way of the Decision Notice, that section 35 of FOIA was not engaged. However, we find that the Commissioner erred in the exercise of his discretion and/or the Decision Notice involved an error of law in concluding that, on the balance of probabilities, no further information is held within the scope of the Request.

173. We also find that sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA (prejudice to effective conduct of public affairs) are engaged in respect of the Requested Information but that the public interest favours disclosure.

174. We therefore refuse the appeal and we make the Substituted Decision Notice as set out above.

Signed: Stephen Roper
Judge of the First-tier Tribunal

Date: 31 October 2023