IN THE FIRST-TIER TRIBUNAL **EA/2012/0067**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:
Information Commissioner's Decision Notice: FS50390437
Dated: 28 February 2012

Appellant: THE ARTS AND HUMANITIES RESEARCH COUNCIL

Respondent: THE INFORMATION COMMISSIONER

Second Respondent: MICHAEL BIMMLER

Date of hearing: 9 October 2012

Date of Decision: 4 December 2012

Before

Annabel Pilling (Judge)
Alison Lowton
Dave Sivers

Subject matter:

FOIA – Qualified exemptions – Inhibition of free and frank provision of advice s.36(2)(b)(i)
FOIA – Qualified exemptions – Inhibition of free and frank exchange of views for purposes of deliberation s.36(2)(b)(ii)
FOIA – Qualified exemptions – Prejudice to effective conduct of public affairs s.36(2)(c)
FOIA – Absolute exemptions – Personal data s.40

Representation:

For the Appellant:	Alison Lennon
For the Respondent:	Helen Davenport
For the Second Respondent:	Michael Bimmler

Decision

For the reasons given below, the Tribunal allows the appeal in part, refuses the appeal in part and issues a Substituted Decision Notice.

Substituted Decision Notice

Dated 4 December 2012

Public Authority:
The Arts and Humanities Research Council
Address:
1 Victoria Street
London
SW1H 0ET

The Arts and Humanities Research Council did not deal with the request for information in accordance with the requirements of the Freedom of Information Act 2000. It was not entitled to refuse to disclose all the information falling within the scope of the request for information under the exemptions in section 36(2)(b)(i), section 36(2)(b)(ii) or section 36(2)(c).
It was entitled to withhold personal data under the exemption in section 40(2).

It must now disclose the information identified below in the Decision and the Confidential Annex within 35 days.

Signed

Annabel Pilling

Judge 4 December 2012

Reasons for Decision

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 28 February 2012.

2. The Decision Notice relates to a request made by the Second Respondent under the Freedom of Information Act 2000 (the 'FOIA') to the Arts and Humanities Research Council (the 'Council') for:

> *"(1) Any records you hold on the inclusion of the concept of "Big Society" in the AHRC's Delivery Plan 2011-2015. This includes but is not limited to internal and external correspondence as well as records of meetings.*
>
> *(2) Any records you hold on the recent funding settlement with BIS and its negotiation. This includes but is not limited to internal and external correspondence as well as records of meetings."*

3. The Council did not provide any information to the Second Respondent. In response to Request 1, the Council explained that it held no external correspondence on the subject. The information it did hold consisted of a number of drafts of the Delivery Plan which were circulated internally for comments and further iteration. The Council relied on the exemptions in section 36(2)(b)(i) and (ii) in relation to this information that, in the reasonable opinion of the qualified person, disclosure of the information would or would be likely to inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. It considered that the public interest in maintaining the exemption outweighed the public interest in disclosure. The Council stated that the final version of the Delivery Plan was published on its website on 20 December 2010.

4. In response to Request 2, the Council explained that it did hold

correspondence between the Council and BIS relating to its recent funding negotiations and settlement with BIS. The Council relied on the exemptions in section 36(2)(b)(i) and (ii) again, and also section 36(2)(c), that in the reasonable opinion of the qualified person, disclosure of the information would otherwise prejudice or would be likely otherwise to prejudice the effective conduct of public affairs. The Council again concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.

5. The Appellant complained to the Commissioner about the way his request for information had been handled. The Commissioner commenced an investigation, and a Decision Notice was issued on 28 February 2012.

The Commissioner's Decision

6. In summary, the Commissioner concluded that in relation to Request 1, sections 36(2)(b)(i) and (ii) were engaged on the basis that disclosure would be likely to cause the prejudice claimed. He concluded that the public interest favoured disclosure save for certain information referred to in the confidential annex to the Decision Notice.

7. In relation to Request 2, the Commissioner made the same findings, namely that disclosure would be likely to cause the prejudice claimed and that the public interest favoured disclosure in relation to the majority of the withheld information, save for certain information referred to in the confidential annex to the Decision Notice. The Commissioner also found that section 36(2)(c)was engaged but that the public interest favoured disclosure.

8. The Commissioner required the Council to disclose all of the disputed information excluding that marked as withheld in the confidential annex to the Decision Notice.

The Appeal to the Tribunal

9. The Council appeals to this Tribunal. In the unnumbered Grounds for Appeal, the Council raised several points which have been distilled by the Commissioner into six separate grounds of appeal.

    i) The draft Delivery Plans should not be disclosed because "they may contain confidential and sensitive information about job losses where significant funding cuts are being discussed" and it would not be in the public interest to disclose such information;

    ii) That the Commissioner erred in his consideration that disclosure of information relating to the settlement negotiations could lead to the involvement of the academic community and other interested parties which would have a positive impact on the Council's transparency and accountability.

    iii) That "*disclosing documentation concerning funding negotiations would significantly damage the relationship between government and its publicly funded bodies and would go to the very heart of government policy making",* and the Commissioner erred in concluding that disclosure would be likely to rather than would cause the prejudice claimed.

    iv) That the Commissioner failed to give proper weight to *"the expectation that such documents would be routinely disclosed to the general public would set an undesirable and problematic precedent which would certainly prevent future free and frank discussions."*

    v) That the withheld information relates to negotiations between the Council and BIS in relation to the Council's funding for the period 2011-2015 and not how the Council *"..intends to spend its money".*

vi) That it would be unfair to disclose the names of junior members of staff and section 40 applies to this information.

10. Grounds i) to v) deal, broadly, with the application of the public interest balancing exercise by the Commissioner. We do not dealt with each ground of appeal separately in our decision but have taken all the Council's submissions into account.

11. In ground vi), the Council relied for the first time on section 40 in respect of the requirement to disclose information including the "details of junior staff". The Commissioner considered the fairness of disclosing personal data as the regulator for both the Freedom of Information Act and the Data Protection Act. He did not accept that the exemption was engaged "*in the absence of any particularly case specific arguments".* Further submissions on this issue were received in November 2012 after the hearing of the Appeal which explains the delay in this Decision.

12. The Tribunal joined Mr Bimmler as second respondent.

13. In advance of the hearing we were provided with:

i) al bundle of agreed documents;

ii) a closed bundle which contained the disputed information, namely all the documents said to fall within the scope of Requests 1 and 2 and which the Commissioner had ordered the AHRC to disclose save for the few exceptions as shown on the confidential annex to the Decision Notice. This closed bundle was poorly thought out, and was not paginated for any easy reference by the Tribunal.

iii) copies of four authorities relied upon by the Commissioner.

14. Although we may not refer to every document in this Decision, we have considered all the material placed before us.

The Powers of the Tribunal

15. The Tribunal's powers in relation to appeals under section 57 of the FOIA are set out in section 58 of the 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.*
>
> *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

16. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives and hears evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether FOIA has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

17. There is no challenge to the Commissioner's finding that the exemptions in section 36 FOIA are engaged. The question in respect of whether the consequential public interest test was applied properly is a question of law based upon an analysis of the facts.

The Issues for the Tribunal

18. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.

19. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption, it will only be exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)).

20. Section 36(2) of FOIA is a qualified exemption and the relevant parts provide as follows:

> *(2) "Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-*
>
> *(a)…*
>
> *(b) would, or would be likely to inhibit,-*
>
> *(i) the free and frank provision of advice, or*
>
> *(ii) the free and frank exchange of views for the*

purposes of deliberation, or

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

Request 1

Information falling within the scope of the request

21. The Council and the Commissioner identified 12 documents falling within the scope of Request 1, namely 12 draft versions of the Council's Delivery Plan 2011-2015, the final version of which was published on 15 December 2010.

22. We disagree with both the Council and the Commissioner that these 12 drafts fall within the scope of Request 1. Request 1 was for records held by the Council *"on the inclusion of the concept of "Big Society" in the AHRC's Delivery Plan 2011-2015."* We do not consider that the draft versions of the Delivery Plan deal either solely or in the main with the concept of "Big Society"; this forms no more than a very small part of the various drafts and the final version, rarely more than a few lines in each version. The concept of "Big Society" has not been defined for us by any party and we do not consider that we can "read in" what the Council and Mr Bimmler mean when they refer to the "concept of Big Society". In dealing with this aspect, therefore, we have had to rely solely on instances where the phrase 'Big Society' appears.

23. We have therefore examined each document in the closed bundle to identify any passage in information held which was created during the drafting process which appears to us to fall within the scope of the request for information on the inclusion of the concept of "Big Society" in the Council's Delivery Plan 2011-2015.

24. We have identified a passage or a few passages in each version of the draft versions of the Delivery Plan which we regard as falling within the

scope of the request. The vast majority of the draft versions of the Delivery Plan do not fall within the scope of the request and therefore do not fall to be disclosed.

25. The passages which we conclude do fall within the scope of the request are as follows:

Document	**Paragraph**
2	2.2.2
3	2.2.2
4	2.2.2
5	6.4.2, 7.4.2
9	6.3.2, 6.4.2, 7.4.2
11	5, 2.1, 2.5, 2.5.3, 2.11.1, 2.12, 3.9
13	2.5.2
14	2.5.2
15	2.5.2
18	5, 2.1, 2.5.2, 2.5.3, 2.5.4, 2.11.1, 2.12, 3.9
21	2.4.4, 2.10.1, 3.9, 3.12
22	2.4.4, 2.10.1, 3.10, 3.12

26. We also consider that passages within two further documents provided in the Closed Bundle fall within the scope of Request 1, namely documents 10 and 17.

27. It follows therefore that ground i) of the Council's grounds of appeal falls away as we do not consider the draft versions of the Delivery Plans should be disclosed.

Is the exemption engaged in respect of the information falling within the scope of the request?

28. There is no dispute that the qualified person for the Council was Professor Rick Rylance, Chief Executive of the Council. We are told that he gave his opinion that *"draft versions of the delivery plan are exempt from disclosure under section 36(2)(b)"* and that he considered the factors for and against disclosure and deemed it to be in the public interest to withhold this information. During the Commissioner's investigation the Council submitted that this was on the basis that disclosure "would" prejudice the applicable interests, rather than "would be likely to"

29. We were not provided with a copy of any document from the qualified person to support that submission. There was no witness statement or other evidence to that effect in the material before us.

30. There is no challenge to the Commissioner's finding that the exemption is engaged. We accept the Commissioner's reasoning in respect of the draft versions of the Delivery Plan that disclosure would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. In the absence of any material before us, we are not able to agree with the Council that disclosure "would" inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.

31. We therefore conclude that all the information we have identified as falling within the scope of request 1 does engage the exemption in section 36(2)(b)(i) and (ii) FOIA.

Public interest

General Principles

32. As the exemption is engaged, we must carry out our own assessment as to where the balance of public interest lies in relation to the disputed information.

33. The following principles, drawn from relevant case law, are material, both generally and in with particular reference to section 36 of FOIA, to the correct approach to the weighing of competing public interest factors. We remind ourselves that the principles established by these cases do not form a rigid code or comprehensive set of rules and we are, of course, not bound by decisions of differently constituted Panels of this Tribunal, and regard them as highlighting some of the matters that we should properly take into account when considering the public interest test and remind ourselves that each case must be decided on its own facts.

    (i) The "default setting" in FOIA is in favour of disclosure: information held by public authorities must be disclosed on request unless the Act permits it to be withheld *(Guardian Newspapers Limited and Brooke v Information Commissioner and the BBC (EA/2006/0011 and 0013) ('Brooke')* (at paragraph 82).

    (ii) The balancing exercise begins with both scales empty and therefore level. The public authority must disclose information unless the public interest in maintaining the exemption outweighs the public interest in disclosing the information (see, for example, *Department for Education and Skills v IC and Evening Standard* EA/2006/0006 (*DfES*) at paragraphs 64-65).

(iii) The balance of public interest factors must be assessed *"in all the circumstances of the case"* (section 2(2)(b) of FOIA). This will involve a consideration of both direct and indirect consequences of disclosure, including "secondary signals" such as loss of frankness and candour, and the damaging effect of disclosure on difficult policy decisions (see *DfES* at paragraphs 70 and 75).

(iv) Since the public interest must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought. Any policy that the public interest is likely to be in favour of maintaining the exemption in respect of a specific type of information must be applied flexibly, giving genuine consideration to the particular request (*Brooke* at paragraph 87(2)).

(v) The assessment of the public interest in maintaining the exemption should focus on the public interest factors associated with that particular exemption and the particular interest which the exemption is designed to protect (*Hogan and Oxford City Council v Information Commissioner* EA/2005/0026 and 0030).

(vi) The public interest factors in favour of maintaining an exemption are likely to be of a general character. The fact that a factor may be of a general rather than a specific nature does not mean that it should be accorded less weight or significance. *"A factor which applies to very many requests for information can be just as significant as one which applies to only a few. Indeed, it may be more so."* (per Keith J at paragraph 34, *Home Office and Ministry of Justice v Information Commissioner* [2009] EWHC 1611 (Admin)).

(vii) Having accepted the reasonableness of the qualified person's opinion that disclosure of the information would or would be

likely to inhibit the free and frank provision of advice or exchange of views, weight must be given to that opinion *"as an important piece of evidence in [the] assessment of the balance of public interest. However, in order to form the balancing judgment required by s2(2)(b), the Commissioner is entitled, and will need, to form his own view on the severity, extent and frequency with which inhibition of the free and frank exchange of views for the purposes of deliberation will or may occur.* (*Brooke* at paragraph 91-92)

(viii) Considerations such as openness, transparency, accountability and contribution to public debate are regularly relied on in support of a public interest in disclosure. This does not in any way diminish their importance as these considerations are central to the operation of FOIA and are likely to be relevant in every case where the public interest test is applied. However, to bear any material weight each factor must draw some relevance from the facts of the case under consideration to avoid a situation where they will operate as a justification for disclosure of all information in all circumstances (*Department for Culture Media and Sport v Information Commissioner* EA/2007/0090 (*'DCMS'*) at paragraph 28)

(ix) The relevant time at which the balance of public interest is to be judged is the time when disclosure was refused by the public authority, not the time when the Commissioner made his decision or when the Tribunal hears the Appeal (see *CAAT v Information Commissioner and Ministry of Defence* EA/2006/0040 at paragraph 53).

(x) The "public interest" signifies something that is in the interests of the public as distinct from matters which are of interest to the public (*Department of Trade and Industry v Information Commissioner* EA/2006/0007 at paragraph 50).

The Public Interest Test: Opinion of the qualified person

34. Differently constituted Panels of this Tribunal have considered the relevance of the opinion of the qualified person in assessing the public interest test. In *FCO v IC*[1], when rejecting a submission that when considering the balance of public interest the scales should be treated as already having some weight in favour of maintaining the exemption because of the existence of the opinion of the qualified person, the Tribunal said, at paragraph 25,

> *"Clearly a reasoned opinion from a Government Minister may help us to focus on the perceived importance of maintaining secrecy of specific information in a particular context. However, that is just one of a number of factors that we must evaluate and we believe that we would risk distorting our assessment of the overall balance to be achieved if we started from the premise that its very existence had particular inherent significance. The opinion, like any opinion, draws its authority from the reasoning that lies behind it."*

35. In *Brooke* the Tribunal addressed the application of the public interest test to the section 36(2) exemption as a *"particular conundrum"*. It considered that it would be impossible to make the required judgment as to the balance of public interest without forming a view on the likelihood of inhibition or prejudice and concluded, at paragraph 92, that-

> *"In our judgment the right approach, consistent with the language and scheme of the Act is this: the Commissioner, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation, must give*

[1] *(EA/2007/0047)*

weight to that opinion as an important piece of evidence in his assessment of the balance of public interest. However, in order to form the balancing judgment required by s2(2)(b), the Commissioner is entitled, and will need, to form his own view on the severity, extent and frequency with which inhibition of the free and frank exchange of views for the purposes of deliberation will or may occur."

36. If the Commissioner, or the Tribunal, had been provided with a copy of the document containing the reasoning behind the opinion of the qualified person, a view could have been formed, taking into account the rest of the evidence, as to the "severity, extent and frequency" with which the inhibition of the free and frank provision of advice and/or exchange of views for the purposes of deliberation will, or may, occur. We were not provided with this evidence and although we do give some weight to this as a factor in favour of maintaining the exemption, it carries less weight than if we had been provided with some evidence in support.

Public interest in favour of maintaining the exemption

37. The Council submits, in summary, that *"the public interest test in non-disclosure outweighs the test in disclosure"* for the following reasons:

i) the resources needed to manage the impact of releasing sensitive information prior to a decision being made, or following the making of that decision. There would be an increase on the requirement for internal and external discussion which would divert scare resources away from crucial operations and decision making to responding to possible scenarios which were not perused;

ii) the detrimental impact 'behind closed doors' discussions would have on employee relations in the event that funding cuts were likely and difficult staffing scenarios needed to be discussed.

iii) the detrimental impact 'behind closed doors' discussions would have on HEIs, academics and current awardholders in the event that funding cuts were likely and some schemes may no longer be affordable under the different funding scenarios;

iv) disclosure would prevent the free and frank discussion between the CEO, members of the Senior Management Team, the Council and the Chairman when formulating potentially sensitive strategic plans with regard to the delivery of the Council's strategic aims;

v) the development of a new Delivery Plan at a time of funding uncertainty was a sensitive task. Difficult decisions were considered on where cuts may need to be made against different financial outcomes and as a result different programmes were included or omitted from the Delivery Plan dependent upon the ongoing financial modelling.

38. We agree with the Commissioner in dismissing the arguments of the Council addressing what is commonly referred to as the "chilling effect". An assessment of the "chilling effect" can be based only upon the very limited submissions made by the parties, against a background of previous decisions of this Tribunal rejecting many such claims, which were supported by evidence, on the grounds, inter alia, that it was the passing into law of FOIA that generated the chilling effect, no public authority (and this included senior civil servants giving frank advice on matters of significant sensitivity) could thereafter expect that information would automatically remain confidential, and that reliance could be placed on the robustness of those working for public authorities to continue to give robust advice even in the face of a risk of publicity. Each case is to be decided on its own facts. There is no evidence before us of any change in approach taken by officials at the Council. We therefore do not give any weight to this argument.

Public interest in favour of disclosure

39. The Council recognised that there is a need for transparency and accountability with regard to how public funds are spent on arts and humanities research.

40. The Second Respondent submits that the public interest favours disclosure due to the considerable media and public attention on the accusations of undue governmental influence on the content of the research funding strategic plans (which amounts to an alleged violation of the 'Haldane principle' in the inclusion of references to the "Big Society" idea of the governing Conservative party).

41. The Second Respondent has not seen the contents of the Closed Bundle which contains the disputed information which has been provided to us in confidence. Having read the disputed information, we do not consider that there is anything within that information which would lend support to those accusations. We therefore do not consider that this is a factor in favour of disclosure.

42. We reminded ourselves in respect of the general principles we should apply, and in particular that the "general" factors on favour of disclosure, namely openness, transparency, accountability and contribution to public debate, must draw some relevance from the facts of the case under consideration to bear any material weight to avoid a situation where they will operate in themselves as a justification for disclosure of all information in all circumstances. We consider that these factors have minimal relevance to the limited information falling within the scope of Request 1 and do not consider that there would be any particularly beneficial impact on individuals or the wider public in respect of disclosing that information, particularly in isolation. Disclosure would not add to the general knowledge or shed any particular light on the inclusion of the concept of "Big Society" in the Council's Delivery Plan. We do not consider that disclosure of this

disputed information would enhance the quality of internal discussions and decision making.

Balance of the public interest

43. Weighing up the factors we consider apply in this case, we have given some weight to the opinion of the qualified person and to the other factors identified by the Council as set out above. We give particular weight to the fact that the disputed information falling within the scope of request 1 was created at a time when sensitive drafting was underway to set out the Council's Delivery Plan for 2011-2015 and that difficult decisions would have to be made.

44. We do not consider that there are any particularly compelling factors in favour of disclosure of the disputed information falling within request 1.

45. We therefore conclude that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Request 2

Information falling within the scope of the request

46. Request 2 was for any records held by the Council on the recent funding settlement with BIS and its negotiation.

47. The Commissioner identified a number of documents as falling within the scope of this part of the request, broadly described as consisting of internal exchanges and exchanges with BIS in connection with the funding settlement and the Delivery Plan.

48. Again we disagree with the Commissioner's identification of information falling within the scope of the request. With reference to the list compiled by the Commissioner, the documents which we conclude do fall within the scope of the request are as follows:

Document	Within scope or not
1	Within scope
6	Within scope
7	Within scope
8	Within scope
10	Within scope
12	Within scope
16	Not within scope
17	Not within scope
19	Not within scope
20	Within scope
23	Within scope
24	Within scope

49. In respect of the information falling within the scope of request 2, the Council rely on the exemption provided for in section 36(2)(b)(i) and (ii) FOIA, as in respect of request 1, and also rely on the exemption in section 36(2)(c) FOIA (disclosure would prejudice the effective conduct of public affairs.)

Is the exemption engaged in respect of the information falling within the scope of the request?

50. As set out above, there is no dispute that the qualified person for the Council gave his opinion that the *"documents or information relating to the spending review"* are exempt from disclosure under section 36(2)(b

and (c) and that he considered the factors for and against disclosure and deemed it to be in the public interest to withhold this information.

51. We were not provided with a copy of any document from the qualified person to support that submission. There was no witness statement or other evidence to that effect in the material before us.

52. We were unsure whether disclosure of certain information would really cause the prejudice or inhibition claimed (some information appeared very general in respect of the submitting of Delivery Plans, the timetable to be followed and was not aimed solely or specifically at the Council for example), however, we have already concluded in respect of request 1 that the opinion of the qualified person was reasonably arrived at and reasonable in substance. We therefore consider we must again agree with the Commissioner's reasoning in respect of the information falling within the scope of request 2 that disclosure would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation and would be likely to prejudice the effective conduct of public affairs. In the absence of any material before us, we are not able to agree with the Council that disclosure "would" inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.

53. We therefore conclude that all the information we have identified as falling within the scope of request 2 does engage the exemptions in section 36(2)(b)(i) and (ii), and section 36(2)(c) FOIA.

Public interest in favour of maintaining the exemption

54. The Council repeats its submissions set out above in respect of request 2.

55. In particular, it submits that disclosing the documentation concerning funding negotiation would significantly damage the relationship between government and its publicly funded bodies, and would go to the very heart of government policy making. The Council goes on to

say that the *"expectation that such documents would be routinely disclosed to the general public would set an undesirable and problematic precedent which would certainly prevent future free and frank discussions."* There is no dispute that the exemption is engaged, although, as we have set out above, we accept that this was on the basis that disclosure "would be likely" to cause the prejudice claimed. We have already addressed the "chilling effect" of disclosure and the weight that we attach to this argument.

56. We agree with Mr Bimmler that the disputed information falling within the scope of this request is not obviously documentation which could be said to "go to the very heart of government policy making". We have addressed each document in the annex to this decision.

57. We reminded ourselves of what Mitting J said in *ECGD v Friends of the Earth*[2] at paragraph 38:

> *"Likewise, the reference to the principled statements to Lord Turnbull and Mr Britton as "ulterior considerations" was at least unfortunate. The considerations [chilling effects] are not ulterior; they are at the heart of the debate which these cases raise. .There is a legitimate public interest in maintaining confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case. It is not part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between."*

58. We consider that this present case is very different from that to which Mitting J referred; although the decision by Council was important, it

[2] [2008] EWHC 638 (Admin)

did not involve advice being exchanged within and between government departments and would not result in any ministerial decision. We agree with Mr Bimmler's submission that there is no reason to believe that disclosure in this case would create a particularly strong "chilling effect". There have been a number of cases over recent years where submissions of officials to ministers were disclosed in more sensitive and publicly scrutinised areas of policy or decision making than research funding.

59. The Council submitted that;

i) Disclosure would prevent the free and frank discussion between the CEO, members of the Senior Management Team, the Council and the Chairman when formulating potentially sensitive strategic plans with regard to the delivery of the Council's strategic aims;

ii) Disclosure would prevent the free and frank discussion between the CEO, members of the Senior Management Team, the Council and the Chairman when formulating potentially sensitive funding scenarios with regard to the negotiation of the spending review.

iii) That there was significant public interest in not disclosing the information in light of the harm or damage that may be caused by the release of confidential information and discussions, including financial modelling based on different scenarios that informed the outcome of the spending review.

iv) That the release of sensitive information about both funding and where to make value for money savings, may lead to uncertainty within the research community and the wider public about the use of public funds

v) That the development of a new Delivery Plan at a time of funding uncertainty was a sensitive task. Difficult decisions

were considered on where cuts nay need to be made against different financial outcomes and as a result different programmes were included or omitted from the Delivery Plan dependent upon the ongoing financial modelling.

Public interest in favour of disclosure

60. The Council recognised that there is a need for transparency and accountability with regard to how public funds are spent on arts and humanities research

61. In his Decision Notice, the Commissioner also noted that disclosure would enhance the quality of future discussions and decision making in relation to the Council's funding and strategic objectives. He found a significant public interest in knowing the options and criteria considered before the final decisions were taken regarding future funding and considered that disclosure would enhance the quality of discussions regarding decisions to withdraw, reduce and maintain funding for different research activities. It could, he considered, also facilitate and enhance discussions on the Council's strategic objectives especially in relation to how they fit in with the government's community objectives.

62. The Council submits that as it already "consults regularly and on an ongoing basis with its key stakeholders about the expenditure of funds from BIS", the Commissioner's proposal that involving the whole of the academic community and other interested parties in the settlement negotiations would have a positive impact on transparency and accountability to be misplaced. The Council submits that this would be unmanageable burden on resources. The request was for information "on the recent funding settlement with BIS and its negotiation" and not for information about the expenditure of those funds. The Council may consult regularly in respect of the latter but there is no information before us that the Council consulted in respect of its delivery plan or its negotiations with BIS. In fact, the Council has subsequently indicated that it considers that "it would not be appropriate to consult on its

confidential and sensitive negotiations with BIS, considering the financial thresholds outlined, more widely than with its Council."

63. It is important for us to examine the actual content of the information held by the Council which we have identified as falling within the scope of the request. We consider that the Commissioner has applied a "blanket" approach to the disputed information in this case and are not satisfied that he considered each document individually. If he had done so, we do not consider that he would have considered this public interest to be met by the disclosure of all, or even, many of those documents.

64. Both the Commissioner and Mr Bimmler submit that the fact that the request was made four months after the funding settlement had been agreed, the Council's concern about the impact of disclosure on the uncertainty of future funding would not have been significant enough to outweigh "the strong public interest in disclosure."

Balance of the public interest

65. We disagree with the Commissioner's findings in respect of the strength of the public interest in disclosure. Although in respect of some of the information falling within the scope of request 2 there is stronger public interest in disclosure, in respect of other information we consider that the public interest in maintaining the exemption outweighs any public interest in disclosure. We have addressed the balance of the public interest in respect of each identified piece of information falling within the scope of the request in the annex to this decision.

Personal data – section 40 FOIA

66. In its appeal to the Tribunal, the Council relied for the first time on section 40(2) of FOIA in respect of the requirement to disclose personal data, that is, the names of seventeen individuals whose names appear within the disputed information.

67. The exemption provided for in Section 40(2) of FOIA is engaged if it is shown that disclosure of the personal data of third parties would contravene one of the data protection principles set out in Schedule 1 of the Data Protection Act 1998 (the "DPA").

68. The data protection principles regulate the way in which a "data controller" (in this instance, the Council) must "process" personal data. The word "process" is defined in section 1(1) of the DPA and includes:

> *"disclosure of the information or data by transmission, dissemination or otherwise making available."*

69. The first data protection principle provides:

> *Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*
>
> *(a) at least one of the conditions in Schedule 2 is met, and*
>
> *(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.*

70. The conditions in Schedule 2 are:

> *(1) The data subject has given his consent to the processing.*
>
> *(2) The processing is necessary –*
>
> *(a) for the performance of a contract to which the data subject is a party, or*
>
> *(b) for the taking of steps at the request of the data subject with a view to entering into a contract.*
>
> *(3) The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.*
>
> *(4) The processing is necessary in order to protect the vital interests of the data subject.*

(5) The processing is necessary –

(a) for the administration of justice,

(b) for the exercise of any functions conferred on any person by or under any enactment,

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or

(d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

(6) – (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate expectations of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.

71. We consider that the only relevant condition here is paragraph 6(1).

72. There is an inherent tension between the objective of freedom of information and the objective of protecting personal data. It has been observed that section 40(2) of FOIA is a "complex provision"[3]. There is no presumption that openness and transparency of the activities of public authorities should take priority over personal privacy. In the words of Lord Hope of Craighead in *Common Services Agency v Scottish Information Commissioner*[4] (referring to the equivalent

[3] *Blake v Information Commissioner and Wiltshire County Council* EA/2009/0026

[4] [2008] UKHL 47

provisions in the Freedom of Information (Scotland) Act 2002 (the 'FOISA'):

> *"In my opinion there is no presumption in favour of the release of personal data under the general obligation that FOISA lays down. The references which that Act makes to provisions of DPA 1998 must be understood in the light of the legislative purposes of that Act, which was to implement Council Directive 95/46/EC. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data…."*

73. In reaching our decision we considered first whether a condition is met before considering whether the processing is fair and lawful[5], taking that into account "in particular". This is in line with the Awareness Guidance notes issued by the Commissioner[6] which, in the detailed Guidance, advises that:

> *"In the context of the FOIA, we recommend that you consider whether disclosure satisfies one of the specific conditions [in Schedule 2, or 3 as appropriate] first, before moving on to the general consideration of fairness and lawfulness."*

74. In *Corporate Officer of the House of Commons v Information Commissioner, Brooke and others*[7] (EA/2007/0060) and [2008] EWHC 1084 (Admin), the High Court upheld useful guidance on applying paragraph 6 of Schedule 2[8], which can be summarised as the following three part test:

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[5] Following *Common Services Agency v Scottish Information Commissioner*, paragraph 30.

[6] Awareness Guidance on "The exemption for personal information" (Version 3 11 November 2008)

[7] (EA/2007/0060) and [2008] EWHC 1084 (Admin)

[8] At paragraphs 60 and 61.

(1) There must be a legitimate public interest in disclosure;
(2) The disclosure must be necessary to meet that public interest; and
(3) The disclosure must not cause unwarranted harm to the interests of the individual.

75. We consider that this test requires a consideration of the balance between (i) the legitimate interests of those to whom the data would be disclosed (which in this context are members of the public) and (ii) prejudice to the rights, freedoms and legitimate interests of the data subject (which in this case is the individual seventeen individuals whose names appear within the disputed information). However because the processing must be "necessary", for the legitimate interests of members of the public to apply, we find that only where (i) outweighs (ii) should the personal data be disclosed.

76. We agree with the Commissioner that a distinction can be drawn between the information which senior staff should expect to have disclosed about them compared to that which junior staff should expect to have disclosed about them. The rationale for this distinction is that the more senior a member of staff is, the more likely it is that they will be responsible for making influential policy decisions and/or decisions related to the expenditure of significant amounts of public funds and have a higher public profile.

77. We agree with what a differently constituted Panel of this Tribunal said in *Roberts v Information Commissioner and Department for Business Innovation and Skills*[9], at paragraph 32:

> *"We consider the legitimate interest [in disclosure] … must be assessed by reference to its potential value to the public as a whole ... in order to overcome the statutory restriction on*

[9] (EA/2009/0035)

disclosure it must be such as to give rise to a pressing social need for the data in question to be made available …"

78. In relation to these seventeen data subjects, the Commissioner submitted that he would have expected the Council to consider matters such as whether the data subject would reasonably expect their personal data to be disclosed. This may be shaped, in part, by their seniority, but also by the public-facing nature of their role and whether their role involves a significant level of personal judgment and responsibility, especially where public funds are concerned. The Council should also have taken into account the consequences of the proposed disclosure on the data subjects. The Commissioner would expect the public authority to balance these factors with an analysis of the legitimate public interests in disclosure of the personal data in order to reach a rounded conclusion on the fairness or otherwise of disclosure.

79. The Tribunal directed that further information be provided by the Council in respect of the seventeen individuals whose names it sought to be withheld, namely:

i) the level of seniority/civil service grade;

ii) the role of each individual;

iii) what decisions each could make in respect of funding settlement or influence over inclusion of information in the Council's Delivery Plan.

80. This was provided by the Council, however there was still very limited information available to the Tribunal in respect of how, if at all, the exemption in section 40(2) had been considered in respect of each individual case.

81. The Commissioner considered the fairness of disclosing personal data

as the regulator for both the Freedom of Information Act and the Data Protection Act. He had initially indicated that he did not accept that the exemption was engaged, "*in the absence of any particularly case specific arguments",* but made further submissions on receipt of the information referred to in the paragraph above.

82. The Second Respondent did not make any additional submissions in respect of section 40(2) FOIA.

83. Taking all the above into account, we have examined the list of names, their seniority, roles and information in respect of what decision each could make in respect of funding settlement or influence over inclusion of information in the Council's Delivery Plan, the subject of the information requested. Some of these individuals are very junior and have clearly been "copied into" correspondence for administrative reasons rather than because they were expected to make any particular contribution; disclosure would be unfair and section 40(2) is engaged,.. The more senior individuals may have contributed to the process but we do not have sufficient information before us to conclude that they did or, if so, how far their contributions are reflected. We have therefore concluded that on the information available to us, disclosure of their personal data would be unfair and section 40(2) is engaged. All seventeen names are therefore exempt from disclosure.

Conclusion and remedy

84. The Council was entitled to withhold the information falling within the scope of Request 1 on the basis of the exemptions in section 36(2)(b)(i) and (ii) of FOIA.

85. The Council was not entitled to withhold all the information falling within the scope of Request 2 on the basis of the exemptions in section 36(2)(b)(i) and (ii) and section 36(2)(c) of FOIA. In the attached annex we have identified those documents which fall within the exemptions

and in respect of which the public interest in maintaining the exemption is outweighed by the public interest in disclosure.

86. We therefore allow this appeal in respect of the information we have concluded falls outside the scope of the Requests, and in respect of that information identified in the attached annex which fall within the exemptions and in respect of which the public interest in maintaining the exemption outweighs the public interest in disclosure, and in respect of the personal data which is exempt under section 40(2) of FOIA.

87. We refuse this appeal .in respect of the information falling within Request 2 which fall within the exemptions in section 36(2), identified in the attached annex and in respect of which the public interest in maintaining the exemption is outweighed by the public interest in disclosure, and in respect of the personal data which is not exempt under section 40(2).

88. We direct that the information to be disclosed is provided to the Second Respondent within 35 calendar days.

89. Our decision is unanimous.

Signed

Annabel Pilling

Judge

4 December 2012

CONFIDENTIAL ANNEX

Document	Balance of the public interest
1	There is no public interest in maintaining the exemption in respect of this piece of information: i) This is a general letter; ii) sent to all research council heads, iii) is part of the general process, iv) is not "internal", v) is not part of any individual negotiation settlement, vi) does not contain any details. The public interest in knowing how the process starts and develops far outweighs any public interest in maintaining the exemption (this was one of the documents we were reluctant to conclude did engage the exemptions) This document is to be disclosed.
6	We conclude that in light of the time frame that applied, the public interest in maintaining the exemption does outweigh the public interest in disclosure. This document can be withheld.
7	This appears to be a fragment of ongoing discussions that touch on the negotiations but do not contain actual detail about the negotiating. This document is to be disclosed.

8	This document is also in item 1, although this version has an annex. It does not deal with or interfere with any settlement negotiations. The public interest in knowing how the process starts and develops far outweighs any public interest in maintaining the exemption (this was one of the documents we were reluctant to conclude did engage the exemptions). This document is to be disclosed.
10	Again this is a generic document that was sent to many. It is not marked "private and confidential" and we consider that there is no particular public interest in maintaining the exemption. There is public interest in how the process develops which we consider outweighs any public interest in maintaining the exemption. This document is to be disclosed.
12	This is another generic document that was sent to many. We do not consider that BIS would be reluctant to write letters in these terms if this were to be disclosed either in this case or routinely.. This document is to be disclosed.
16	(Not within scope – not about negotiation but about timing of the Delivery Plan)
17	(Not within scope)
19	Not within scope – not about negotiation but about timing of the Delivery Plan)

20	We were unsure whether this document was a draft and, if so, whether there was a final version, and, if so, what that final version contained. This does show the development between the Council and BIS, but we consider that it would be wrong to release this document in isolation without anything more in respect of this chain. There is some information already in the public domain and we consider that there is very little public interest in this being disclosed. We conclude that the public interest in maintaining the exemption does outweigh the public interest in disclosure. This document can be withheld.
23	This is the letter from BIS explaining the allocation, it therefore falls within the scope of the request but is not part of any "full and frank" discussion or "development of policy" and therefore we consider that there is no public interest in maintaining the exemption (this was one of the documents we were reluctant to conclude did engage the exemptions) This document is to be disclosed.
24	This is a "draft" answer to a Parliamentary Question. There is no information in respect of who drafted it, when, and whether this was the version used. We consider the public interest in maintaining the exemption is high and that there is very little public interest in disclosing an unidentified draft such as this. This document can be withheld.