IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL

(INFORMATION RIGHTS)

EA/2013/0119 (remitted)

B E T W E E N:-

THE CABINET OFFICE

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

Tribunal

Brian Kennedy QC
Marion Saunders
Gareth Jones

Oral Hearing: 16 March 2015. (deliberations 26 June 2015).
Location: Field House, London.
Decision: Appeal Refused.

Appearances:

Appellant: James Eadie QC and Rory Dunlop of Counsel.
Respondent: Robin Hopkins of Counsel.

Subject Matter: Public Interest in disclosure of the disputed information in maintaining the exemption, under 35(1)(a) and (b) of the Freedom of Information Act 200 ("FOIA").

Result: Appeal Refused.

Introduction:

1] This is a remitted appeal against a Decision Notice ("the DN"), issued by the Information Commissioner ("the Commissioner") dated on 13 May 2013, (Reference FS50474524) involving the Cabinet Office ("the CO"). The DN related to a request for information made to the on 26 November 2012.

This Tribunal was assisted by, detailed submissions from the parties after an oral hearing on 16 March 2015, helpful guidance from the Upper Tribunal Decision in GIA/2410/2014 in an appeal to the Upper Tribunal from the First Tier Tribunal in the case of The Department of Health V Information Commissioner, promulgated on 30 March 2015, and further submissions from the Appellant on 1 May 2015 and the Respondent on 8 May 2015, with the final deliberations of this Tribunal scheduled at Fox Court London on 26 June 2015.

Background:

2] The background to this appeal arises from an information request made on 21 of August 2012 when the Complainant, a Ms. Beckford who was a BBC journalist, requested the following information ("the disputed information"): from the CO - "*How many times has the Reducing Regulation Committee met since it was established?".*

3] The Reducing Regulation Committee ("the RRC") is a Cabinet sub-committee, established in July 2010 to take strategic oversight of the Government's regulatory framework.

4] The Appellant refused to disclose the disputed information, relying upon the exemptions under section 35(1)(a) and 35(1)(b) of the Freedom of Information Act 2000 ("the Act"), arguing that the public interest in withholding the information outweighed the public interest in disclosure. The CO had assessed that the public interest favoured withholding the information to protect the constitutional convention of Cabinet collective decision making. It is relevant to state their reply and reasons given at that stage;

"*Ministers will reach collective decisions more effectively if they are able to debate questions of policy freely and in confidence. Disclosure of the number of times a Committee met would damage collective responsibility by exposing the committee (and the Cabinet/Committee structure} to external accountability. Essentially, it is for Ministers to determine how often they meet to discuss policy. The maintenance of this convention is fundamental to the continued effectiveness of Cabinet government, and its continued existence is therefore manifestly in the public interest."*

5] This refusal was upheld following an internal review after which the CO wrote to the complainant on 20 November 2012 wherein it stated, inter-alia that although release of the number of meetings might appear innocuous, the Ministerial code made it clear that information about the process by which

government policy was arrived at should not be disclosed. It suggested that disclosure might have a chilling effect on Ministers' willingness to engage in full and frank discussions of all available options as and when they deemed necessary, and to expose them to the pressure of public opinion as to whether the frequency of such meetings was adequate would be detrimental to the policy making process.

6] An appeal of the DN, by the Appellant, to the First Tier Tribunal ("FTT") was heard on 22 October 2013 and in its decision of 27 January 2014 it refused the appeal. Permission to Appeal the Judgment of the FTT to the Upper Tribunal was granted on 28 April 2014, and Judgment allowing that Appeal was delivered on 20 October 2014. The matter has then been remitted to this Tribunal for redetermination.

The Issues for this Tribunal:

7] In his DN, the Commissioner accepted that the exemptions under section 35(1)(a) and 35(1)(b) of the Act were engaged but concluded that the balance of the public interest favoured disclosure of the disputed information.

8] It is not disputed that the exemptions under section 35(1)(a) and 35(1)(b) of the Act are engaged. The Appellant appeals against the Commissioner's decision that, in all the circumstances of the case, the public interest in favour of disclosure of the disputed information, outweighed the public interest in withholding the said information.

9] This Tribunal must decide whether the evidence, in all the circumstances of this particular case supports the assertions of the CO, that is to say, the public interest in maintaining the exemptions outweighs the public interest in disclosure, and whether or not, through the evidence of Ms. MacNamara (who adopts and agrees an earlier statement of Dr. Baldwin – (see paragraph 17 Appellants Skeleton Argument of 2 March 2015), the Appellant has persuaded us that the Commissioner erred or was wrong in the conclusions and supporting reasons in his DN. We find the Appellant has failed to persuade us that the Commissioner erred or was wrong in his reasoning in his DN and the evidence present since has failed to persuade us also. Our reasons follow.

The Legislative Framework:

10] Under section 1 of FOIA:

"(1) 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.

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

11] Section 2(2) FOIA provides that:

"(2) 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."

12] Section 2(3) lists the exemptions under FOIA that are absolute. Section 35 FOIA is not included in this list and therefore it is not a provision conferring absolute exemption. It is therefore a qualified exemption and subject to the public interest test.

13] Section 35 FOIA provides as follows, so far as material: -

"35. – Formulation of government policy. Etc.

(1) Information held by a government department - - - - is exempt information if it relates to: -
(a) the formulation or development of government policy.
(b) Ministerial communications.

(5) In this section –

"government policy" includes, the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the Welsh Assembly Government: --

"Ministerial communications " means any communications: -
(a) between Minister of the Crown,
(b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
(c) between members of the Welsh Assembly Government,

and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet - - - -"

14] In his DN the Commissioner found, after careful consideration of the relevant factors, that the balance of public interest favoured disclosure and set out his reasons at paragraphs 13 to 48 of the DN – See Pages 3 – 10 of the Open Bundle ("OB"). We refer to the following paragraphs, which are of particular interest in this case;

"*41. Most of the Cabinet Office's arguments have centered on disclosure interfering with Ministerial autonomy over how best to go about developing policy.*

It is argued that disclosure would lead to the unwarranted manipulation of established ways of working that are not in the interests of good government, purely to satisfy the pressures of public scrutiny."

"42. The Commissioner is familiar with such "safe space " and "chilling effect" arguments in the context of section 35(1)(a) and (b). He is satisfied that they represent a cogent and legitimate response to the general issue of preserving private thinking space during policy development and good working relationships, both for ministers and for civil servants.

"*43. However he does not agree that they are applicable in this case. The content of the requested information is key here. The Commissioner has considered the detrimental effect of releasing the number of times the RRC has met and simply does not agree that the Cabinet Office has shown that it would lead to Ministers' becoming more circumspect and less effective in the way they approach their work. It is hard to believe that Ministers would consider themselves inhibited as a result of the disclosure of this piece of information."*

15] This Tribunal is also familiar with the arguments on *"safe space"* and*" the chilling effect*, although undoubtedly has not as much experience as the Commissioner and we bear this in mind at the outset in prima facie accepting and adopting the Commissioners reasoning in his DN. It is for the Appellant now to persuade us that the Commissioner erred or was wrong in his reasoning.

REASONS:

The Appellant's Grounds:

16] In their Skeleton Argument of 2 March 2015, for this Tribunal at paragraph 18, the CO make the following points;

*a) – **First** there is no material public interest in disclosure. See especially Ms. MacNamara at Pars: 14 – 16 (Pages 314 – 315 OB).*

1) The disputed information provides nothing of value.

2) Indeed, there is likely, if anything, to be positive public interest disadvantage in disclosure on the basis that the information is more likely to mislead than inform.

3) And there is already material in the public domain that is more than sufficient to meet any more general public interest that may be in play in terms of understanding how government policy on reducing regulation functions.

*b) - **Secondly**, there is a strong public interest in maintaining the exemption. Ms. MacNamara's evidence is that it is likely that some Ministers would so change their behaviour: see especially Ms. MacNamara at Paras. 17 – 25 (Pages 315 – 318 OB).*

There would be nothing improper in their doing so. Nor would their doing properly be regarded as some form of dereliction of duty or as demonstrating

insufficient robustness. Ministers react to the "public agenda". That they are highly conscious of it is a fact of political life."

17] We have considered the evidence in the Open Bundle OB including the correspondence from Roger Smethurst in his letter of 6 February 2013 (Pages 50 – 56 OB), at the time of the Commissioners' investigation and the reason for withholding the requested information developed later in the witness statement of Dr. Geoffrey Baldwin (Pages 57 – 69 OB). This evidence was available to the Commissioner at the time of his investigation and we are not persuaded that this evidence undermines or should have undermined the Commissioners' reasoning in his DN. Much of the common ground recognised by the Commissioner is set out in the evidence available in the Open Bundle ("OB") provided to the Tribunal and in particular the evidence about the formation and purpose of the RRC, the need for transparency and accountability in government while exercising the balancing need for safe space and the danger of the chilling effect as envisaged under the Section 35 exemptions. All of these matters have been dealt with at length throughout these proceedings and as we have accepted properly and carefully considered by the Commissioner in his investigation.

18] Dr. Baldwin, was a Senior Civil Servant and Deputy Director in the Economic and Domestic Affairs Secretarial and Head of Growth and Economic Affairs, working in the Cabinet Office since July 2011. In his witness statement, he notes in relation to the request, that the Commissioner accepts the application of these exemptions, and only disputes where the balance of public interest lies. Dr. Baldwin refers to how, " -- *on one view it may appear that the number of times a Cabinet Committee has met is information, which is "innocuous", particularly when taken in isolation",* however, he adds in the general sense; *"—information which appears innocuous but which has been taken out of context may in fact be very damaging".* He refers to the Ministerial Code and how it makes It clear that it is important to keep confidential the process by which a decision is reached. He states, in a general sense how he believes Prejudice to Cabinet and Cabinet Committee procedures arise and how Ministers would be adversely affected by disclosure of the disputed information. However his general assertions, of what is really common ground, fail to persuade us that he has undermined the Commissioners' reasoning as applied to the particular figure that makes up the disputed information, and would be disclosed in the particular circumstances of this case. Dr. Baldwin concludes that while there is little public interest in disclosure of the disputed information, there is what he describes as a; " - *clear risk that disclosure of this information would prejudice ministers' freedom to decide when and how to make their decisions on matters of policy".* He continues; "*Disclosing the number of meetings could not only provide information which was misleading, misrepresentative and out of context, it would (whatever the number itself) focus attention on a procedural point that is entirely trivial in the wider context of policy formulation in this area. "* and adds "*This would for the reasons I have given, damage the working of government policy making and accountability."*

While the Tribunal fully recognises and respects the position and experience of Dr. Baldwin, and we acknowledge his concern, we are not persuaded that there is evidence to establish danger of the disclosure of one piece of apparently

innocuous information leading to speculation about what other information may exist. We are not persuaded and do not accept that such, or any significant risk arises on the facts of this case. This is particularly so in light of the "*raison d'aitre"* of the RRC, the background to its formation and because of the large amount of information that has already been voluntarily put into the public domain. Nothing in Dr. Baldwin's' statement persuades us that the clear reasoning in the Commissioners' DN is wrong or does not address his concerns, which although acknowledged in general terms, cannot be taken to be universal or applicable in the circumstances of the specific requested information in this particular case. The ideals are not absolute and we have not been persuaded that the disclosure of the "actual figure" in this case in all the circumstances would cause the damage of the nature or to the extent described throughout the statement of evidence by Dr. Baldwin who did not in fact give evidence before this Tribunal at this remitted appeal.

The Commissioner has argued, in any event, that the public interest in disclosure was not determined by whether the withheld information would operate as a reliable indicator of the governments overall prioritisation and commitment - the public interest lay in improving the transparency of the RRC's work. The frequency of its meetings had relevance to public understanding of that element of the implementation of the government's policy on regulatory simplification. As to any potential harm resulting from disclosure, the Commissioner argues that providing an explanation that put the disputed information into context could negate any risk of misunderstanding.

The CO argue that there was a real risk of the withheld information being considered to be more significant than it really was and being misinterpreted by journalists and the public as a measure of the governments focus on regulatory simplification and the priority it attributed to it. The risk was said to undermine any argument in favour of disclosure and to bolster the case for maintaining the exemption.

We accept the Commissioners' argument that put in the proper context, that is to say, with the other information and an appropriate explanation, in the public domain, the disputed information would add to the public information of the decision making process of the RRC and negate any risk which caused the CO concern.

Closing submissions by the CO:

The closing submissions on behalf of the CO reflected the written submissions in the skeleton argument of 2 March 2015 at paragraph 16] above and essentially and are;

A) Public Interest in disclosure;

a) There is no public benefit interest in the release of this number. How, if at all this bare number released will not contribute to the Public Interest. The number tells you nothing of any interest. It would only do so if some

inference or bearing it would have could be established and it doesn't. Nor dotes it tell you about the efficiency and effectiveness of work. An unanswered question by the Commissioner, - there is nothing at all. Mr Eadie argued that it was revealing in cross-examination that he could contextualise it by telling the public that the bare number is irrelevant.

b) The Public ~Interest benefit is served by information which explains policy – is it a success or failure? In that regard the CO maintains that there is ample information (see paragraphs 11 – 13 of Ms McNamara's statement). Paragraph 15 of her statement they argue set out the correct gauge. None of this they argue, is touched by disclosure of the bare number– nor does it tell you, they argue, how successful the committee is or has been. A single meeting or a hundred meetings? And worse it is not merely Public Interest neutral. They argue, it carries risk. It determines the bare number and could be used against government. Press could say it met too few times or as in Cobra they met too many times. This case, they argue demonstrates that. Why, they ask do the BBC want the bare number as the Transparency and accountability will not be enhanced – it will be harmed, they argue.

B) The Public Interest in maintaining the exemption;

a) Giving proper and significant weight to the evidence of Ms MacNamara given her experience and position: Courts afford significant weight to government officials. There is a particular set of expertise and it puts them in a better position – particularly so in a "predicative situation where:
"*What happens if –" ?*

b)"Institutional competence" is recognised by the court that a witness is particularly well placed to assess consequences they argue giving an example:- "Would the Iranian government react in a certain way? What weight would a court give to the evidence of a Foreign Office witness?

c) They argue that there is recognition by the courts that such a witness is particularly well placed to assess consequences. The precise degree of weight given to such recognition, they concede, should depend on how well placed is the person concerned to make the Judgment., and would depend on expertise. Is the Commissioner saying FOIA is different?
d) Following the oral hearing of this remitted appeal, the parties agreed that it would assist this Tribunal to provide written submissions on the implications for this case of the recent judgment of the Upper Tribunal in *Department of Health v IC and Lewis* [2015] UKUT 0159 (AAC) ("Lewis"). The Department, whose appeal was dismissed, has sought permission to appeal to the Court of Appeal and that is yet to be determined.
e) Harm results they argue to the Public Interest by Disclosure:
f) How are Ministers likely to react – this is a predictive matter.
g) An expert in that field must assess it. You would go to someone who had worked for Ministers for a number of years. See paragraphs 4 – 9 of Ms McNamara's witness statement. It chimes with that of Dr Baldwin.

h) Ministers, they argue, live in a real political world and are likely to assess the reality of the situation. In fact bare numbers would have to be released in a wide number of Cabinet sub committee meetings. How would Ministers manage that new reality? It would then have to occur, they ague, in pretty much most or at least in most cabinet sub committees. How likely to effect their behaviour See paragraphs 20 – 23 of her witness statement
i) She (Ms MacNamara) says it would be likely to affect their behaviour. She says Ministers would be concerned to ensure the proper picture would be presented. They will be concerned about the way figures will be presented. The outcome would be, they ague, Harm – not in the reporting by the press. The harm is in the brave new world would have to react to that. This they argue would cause a reaction by introducing a "pollutant: the word they say being used advisedly. Their time, (Politicians) is precious. It would introduce a pollutant to efficiency and effectiveness – and to what value, they ask. The Co argue in reply also decision making should be driven by efficiency and effectiveness that is why we say it is described as a pollutant. They also agree about eh nature and importance of RRC as described on behalf of the Commissioner and agree any of this is not is dispute, the relevant question they asks "What insight is provided by the bare figure, i.e. the number.
j) Damage argument – as to what would be a pollutant about how often these committees should meet. Ms MacNamara says Ministers will differ in their reaction. Some may be more likely to react in this way. Even some ministers having their behaviour affected is, they argue, a result of this "pollutant". It was a proper step for her to take when she did a survey check by discussing it with Minister's. It is clear, they argue, the effect of the Pollutant on Ministers from the evidence of Ms MacNamara.
k) They argue the Simon Hughes article is of no value whatsoever: He is not and never has been a Cabinet Minister. It is, they argue from a self-serving source, the BBC.
l) In conclusion they argue, here serious concerns about a possible detrimental impact at top-level government. There is, they argue no basis for rejecting her predictive assessment. Cross-examination had no effect on her evidence that should be given weighty effect. On the other side of the scale a possibility to misrepresent how government works.

The CO's closing submissions on Lewis

a) The CO argue the Upper Tribunal ("UT") held (correctly) that there was little to such evidence between the rival parties submissions on the general approach (see Lewis at [63(ii)] therefore regard must be had to Ms MacNamara's expertise in the subject matter and give due weight to it.
b) There were, they argue, no flaws in her evidence.
c) Lewis determined (see paragraph 33) that the public interest balance was a two way street, and that the public interest disclosure must be assessed on a 'contents' basis.
d) Lewis held (see paragraph 38, that there was no presumption, in FOIA appeals, in favour of disclosure, i.e. it must be possible to identify a public interest

in the disclosure of *"the particular information in dispute"*; in this case was the number of meetings.
e) the CO argues that Lewis held (correctly) (see paragraph 37) that a proper analysis of the public interest balance "*will often be informed by the reasons for the request" and accordingly when considering the public interest in disclosure motive is often relevant.* The CO also argue that this finding supports their submissions that the Tribunal should ask itself why Ms Beckford, a BBC journalist, was asking how often the RRC met. She must, they argue, have thought the number of meetings might be newsworthy. In other words, she was intending to place significance on that number that it did not deserve. This, they argue, supports the CO's submissions that:
a) disclosure of the disputed information would be likely to mislead rather than inform the public; and
b) disclosure itself, and the reaction of the media to disclosure, is likely to have an effect on Ministers' behaviour.

Closing Submissions by the Commissioner:

We now set out the closing submissions made on behalf of the Commissioner;

a) The Commissioner argues section 35 (1)(a) & (b) are engaged and the balance starts as equal on both sides.
b) The Commissioner argues that the CO say that the disclosure of the figure will introduce into Ministers a sufficient concern change their behaviour such that they will change their behaviour in an undesirable way. This pollutant effect results in a weighty risk to Ministerial behaviour. Ms MacNamara outlines the risks – possibly in some cases depending on a number of if's. The Commissioner argues it is only a hypothetical risk and is purely speculative.
c) The Commissioner agrees the Tribunal should give sufficient weight to her evidence and it should be commensurate with her experience and position.
d) The Commissioner urges caution and asks us to consider the result and if it would be an undesirable one – not in the public interest e.g. would a Minister say -"*Should I scrap another meeting".*
e) Commissioner points out, the requestor did not ask for any details about those meetings, e.g. what was discussed or what the outcome was. Nor did she ask for anything from which such details could be inferred (thereby arguably intruding upon the confidentiality of such government business). The requestor simply asked for the global figure for a two-year period. There is a degree of fact specificity that this journalist has raised.
f) there is no "inherent weight" in maintaining either of those exemptions (i.e. there is no in-built presumption that the engagement of those exemptions connote any harmful effects on disclosure; the pans of the balancing scales start empty) and that (ii) if the balancing scales are evenly balanced, disclosure follows:
g) In relation to the Cobra case that was raised, the Commissioner says it identifies a case where the figure goes out, but there was no evidence that this affected behaviour of Ministers.

h) At the oral hearing of this remitted appeal, the Commissioner submitted in outline as follows: The public interest in the disclosure of the withheld figure may not be extremely strong, but it has substance. In contrast, the harmful effects of disclosure which the CO fears, lacks substance. The reasoning behind the cabinet office's case, as a matter of evidence and submissions, is unpersuasive. There is at best a very remote possibility that some of the effects envisaged by the CO might materialise, but even then not much harm would follow. Therefore, there is nothing of any substance in the public interest case for maintaining the exemptions.

i) Ms MacNamara says some Ministers will react others won't. She agreed they are all different and they are all individuals. The Commissioner argues this is not the weighty pollutant as described. It is, he argues, a relatively innocuous piece of information.

j) In their skeleton, they remind us the Commissioner argues, that the Coalition government came into power in Mat 2010. It published a document entitled "*The Coalition: our programme for government".* IN the forward, the Prime Minister and Deputy Prime Minister said that their government "will extend transparency to every area of public life. Similarly, there has been the assumption that central government can only change people's behaviour through rules and regulations". The present appeal, he argues, brought about by the Cabinet Office involves both the commitments mentioned in those consecutive sentences: transparency and reviewing the need for government regulation. From this the Commissioner invites us to observe and/or conclude that:

   (i) The RRC's work is an important part of the Coalition Government's programme – sitting alongside "transparency" in the forward to the Coalition programme. The aim is for a fundamentally different approach to regulation as compared with the previous government, so as to reduce the burden of red tape, which was said to have been strangling enterprise.

   (ii) Those aims are not pursued by the RRC alone. The RRC is, however, intended to play a very important part of the process. It is tasked with strategic oversight of the delivery of the Government's regulatory framework. In the words of the Cabinet Office's witness Geoffrey Baldwin, the RRC is the "gatekeeper and highest point for deliberation of regulatory reform before new regulations and the repeal of existing regulations are put before parliament (paragraph 13 of his statement at page 62 of the OB).

   (iii) To that end, the RRC is a "tough new Cabinet Committee" with 'unprecedented power'.

   (iv) The public has been told who is on the RRC and when it first met.

   (v) Then public has been told what the RRC does: it scrutinises, challenges and approves all new regulatory proposals and seeks to remove or reduce existing regulation where appropriate. It has also been told what principles the RRC applies in carrying out its work.

   (vi) The Public has been given specific examples of regulations, which have been assessed by the RRC.

   (vii) The Public has expressly been invited to engage with and play a role in shaping the RRC's work. The 'Red Tape Challenge' website suggests that the public will be informed about the RRC's decisions.

k) The Commissioner accepts that there is not an extremely compelling interest in disclosure but it does give some meaning or partial insight into the workings of this very important committee. As the Tribunal indicated when questioning Ms MacNamara, at least the public will know it meets. A fact that provides insight into government workings. A partial picture none the less contributes to the understanding of the workings of government and of this important piece of public committee working amongst its means of decision-making.

Closing submissions by the Commissioner on Lewis:

l) Lewis is binding on this Tribunal.
m) Lewis was also concerned with the section 35(1) FOIA exemptions. The withheld information comprised entries from the ministerial diary of the then Secretary of State for health, Andrew Lansley MP.
n) The arguments for withholding that information very closely mirror those advanced in the present case.
o) The Department said there was very little public interest in disclosure, as the diary entries did not provide insight into how Mr Lansley prioritised or carried out his work (much of which, for example, was done on papers and thus would not appear as a diary appointment).
p) The Commissioner argues in this case, effectively the same is being said: the number of RRC meetings is not an indicator of the Government's commitment to or level of work on reducing regulation.
q) The Department, in Lewis, the Commissioner argues, as against that, disclosure would risk a change in Ministerial behaviour: to a meaningful extent, meetings would no longer be scheduled for substantively good reasons, but for "presentational" reasons. Ministers would be looking over their shoulders towards critical judgments by the public or the media, and seek to ensure that their diary appointments played well in terms of what they took the public expectations to be. That, it was said, would intrude upon their freedom and hinder effective policy-making.
r) The Commissioner draws a parallel here arguing that again, the same is being said in the present case: disclosure would introduce the "pollutant of publicity" (a description given by Mr Eadie QC on behalf of the CO herein). The CO argue that a substantial risk of a change in Ministerial behaviour would ensure, in that Ministers would, to a meaningful extent, schedule committee meetings which were substantively unnecessary but deemed to be prudent in presentational terms. The Commissioner urges this Tribunal to consider the UTs deliberations on this point and in that light assess the case being advanced by eh CO in this case on similar lines.

How the Public interest balance should be approached:

s) The Commissioner argues that the UT gave binding guidance on how the balancing exercise under section 2(2)(b) should be approached and highlights the following points.

t) First, they argue, the analysis cannot be based on what *type* of information is in dispute, e.g. information about meetings of a Cabinet committee. The analysis they say must be based on the particular contents of the withheld information, assessed by reference to the facts of each case. See paragraphs of 20 and 23 of the Judgment of the UT chamber President, Mr Justice Charles where he says;

"In my view a class approach is wrong. It does not accord with the underlying purpose of FOIA, it flies in the face of the background I have described, and does not fit with the equivalent balancing exercises in respect of the public interest (e.g. when a duty of confidence is owed) - - -" and *" - - - So what is required is an assessment and comparison of actual harm and benefit by reference to the contents of the requested information that falls within a qualified exemption."*

u) Thus, in the present case, according to the Commissioner, the CO cannot simply rely on the fact that the withheld figure is about meetings of a Cabinet committee. That would be to take a class approach. Rather, it must show that *on the particular facts of this case,* its general concerns as to the need for confidentiality about Cabinet Committee meetings arise. The risk of harm (as well as the benefit or potential benefit from disclosure) must be assessed by reference to the particular content of the withheld information. (See paragraph 30).

> *"So a contents based assertion of the public interest against disclosure has to show that the actual information is an example of the type of information within the class description of an exemption (e.g. formulation of a policy or Ministerial communications or the operation of Ministerial private office), and why the manner in which disclosure of its contents will cause or give rise to a risk of actual harm to the public interest."*

v) This is a point on which the Commissioner invites this Tribunal to consider the closed disputed information i.e. the number in question on the basis that may be relevant to the outcomes which Ms MacNamara fears and whether those fears are well founded. The Tribunal have now considered the actual number in the disputed information.

w) The Commissioner argues the risk advanced by Ms MacNamara cannot simply be given public interest weight if the facts and the content of the disputed information do not bear those risks out. They argue that the actual number and the circumstances need to be assessed on a case-by-case basis.

x) The Commissioner argues further that the CO is running the same case before this Tribunal that the Department ran in Lewis. In effect, the Tribunal (in both cases) is asked to defer to the evidence of senior civil servants. See paragraph 57 in Lewis, where the UT commented as follows as to how the Department's case on this issue (which is, the Commissioner argues identical to the CO case before this Tribunal) might be characterised;

" - - - In my view, the FTT should be forgiven for thinking that the Department was doing this and that generally, or in this case, the degree

or deference the Department was arguing for was a high one. I say this because some of the argument before me indicated that Mr Hopkins was right to say that it appeared that in reality the Department was arguing that the deference to be given to its witnesses meant that the evidence and opinion of senior civil servants on the public interest balance should be accepted unless it was irrational, has no evidential basis or is contradicted by evidence of commensurate weight."

y) The Commissioner refers to the rejection of that argument by the UT in Lewis in clear terms: See paragraphs 66-67 - (emphasis added on behalf of the Commissioner):

"66. The structure of FOIA recognises and reflects the concepts of democratic accountability and institutional competence in that it contains absolute exemptions, qualified exemptions and the executive override in section 53. The creation of qualified exemptions gives both the Information Commissioner and the FTT statutory roles as decision makers on the public interest assessment dictated by section 2(2)(b) (see ss. 50, 57 and 58 of FOIA). To my mind, this is a powerful indicator, whose strength is increased when the underlying purposes of FOIA are taken into account, that parliament has institutional competence – constitutional responsibility for) carrying out a critical examination of the evidence and argument on both sides of the public interest balance in determining whether a qualified exemption applies.

67. In my view, this points firmly in favour of the conclusion (which I reach) that a high degree of deference to either side is very unlikely to be appropriate when the Information Commissioner or the FTT are assessing the public interest balance under section 2(2)(b) of FOIA and that they should carry out a thorough and critical analysis of the competing reasoning and analysis on which they are based."

z) The Commissioner argues that in so far as the CO submissions rehears the same submissions in Lewis run on behalf of the Department, they must be rejected. In other words, argues the Commissioner, that the UT was saying that the arguments being run in Lewis (effectively the same as those being run here) were well within the Tribunal's competence, notwithstanding any rival evidence to the contrary.

aa) The Commissioner points out that the UT was at a general level critical of the "candour" and "chilling effect" arguments routinely advanced in favour of withholding central government information under FOIA. See paragraph 27, where the UT explained why those arguments tended to be unpersuasive in the context of PII certificates. Applying that to the FOIA context, the UT said as follows at paragraph 28:

"The same weakness exists in respect of a qualified FOIA exemption because any properly informed person will know that information held by a public authority is at risk of disclosure in the public interest."

bb) This, the Commissioner properly recognises is not to say that candour or chilling effect arguments are automatically invalid. e.g. where witness evidence explains in a "properly reasoned, balanced and objective way" why. Notwithstanding the weaknesses in the argument, the concern applies to the contents and circumstances of the case: see paragraph 29 of Lewis. *"The same weakness exists in respect of a qualified FOIA exemption because any properly informed person will know that information held by a public authority is at risk of disclosure in the public interest."*

cc) The Commissioner recognises that the present appeal is not concerned with chilling effect arguments. The UT's point above is, he says, however made for two reasons. One is that it suggests that properly informed Ministers and officials will have a reasonable understanding of the application of FOIA and will therefore not proceed on mistaken or out-dated blanket expectations of no-disclosure. The other is that where there are clear weaknesses in a case being relied upon, they must be properly confronted and dealt with in witness evidence.

The public interest balance:

19] As stated above this Tribunal is of the view that the onus is on the Appellant to persuade us that the Commissioner erred or was simply wrong in his reasoning that the pubic interest lies in disclosure in this case. The appellant argues that the public interest balance lies in favour of maintaining the exemption. Having considered all the evidence in the particular circumstances of this case. We, unanimously, are not so persuaded.

20] We accept that the requestor did not ask for any details, sensitive or otherwise about the meeting subject of the request. There was no inquiry or question relating to what was discussed or what the outcome was. Nor was the request for anything that such details could be inferred such that might arguably intrude upon the confidentiality or sensitivity of government business. The request was simply for the global figure of the number of meetings for a two-year period.

21] The CO says that the figure is too sensitive to be released, This is for the reasons given by its witnesses, Dr. Baldwin (for the initial FTT hearing and referred to above) and Ms MacNamara who gave evidence before this Tribunal.

22] The exemptions under Section 35(1)(a) & (b) FOIA are engaged and we accept that there is no "inherent weight" in maintaining either of these exemptions. In other words there is no built in presumption that the engagement of these exemptions connote any harmful effects of disclosure, that is to say, the pans of the balancing scales start empty and further if the balancing scales are evenly balanced, disclosure follows. This appears to be common ground and acknowledged by relevant case law discussed in the detailed analysis in the UT hearing of the appeal of the first hearing of this appeal and in particular in the particular circumstances of the limited request for the number of meetings of the

RRC over a two year period since its inception, given the background of the formation and purpose of the RRC by the government.

23] At the oral hearing of this remitted appeal, the Commissioner submitted the public interest in disclosure of the disputed information, that is the number of meetings of the RRC since its inception, may not be strong, but it has substance. In contrast the purported harmful effects of disclosure which eh CO fears lack substance. The Commissioner argues that the reasoning behind those fears is flawed, and the CO's case, as a matter of evidence and submissions, is unpersuasive. There is he argues, at best a very remote possibility that some of the effects envisaged by the CO might materialise, but even then not much harm would follow. Therefore, he argues, there is nothing of any substance in the public interest case for maintaining the exemptions. Having considered the evidence and the particular circumstances of this case we accept these submissions on behalf of the Commissioner and the CO has not persuaded us that the Commissioner has erred or was wrong in the reasoning in his DN.

24] The appellant relied in this hearing principally on the evidence of a senior civil servant, Ms MacNamara, to establish harm in disclosure of the requested information. We have considered all the evidence and in particular the evidence of Ms MacNamara and for the reasons given below find that the evidence fails to persuade us of significant harm from disclosure of the disputed information has been established.

25] We note and accept that Ms MacNamara is a high-ranking senior civil servant employed as the Director of the Economic and Domestic Affairs in the Cabinet secretariat (EDS). At the material time she worked on behalf of the Prime Minister, the Deputy Prime Minister and other senior Ministers across Whitehall to ensure objectives are delivered and to broker agreement to Government policy. She had been in this role since December 2013 and she reported to the Cabinet Secretary, Sir Jeremy Heywood. She, like the previous witness in this case, Dr. Baldwin, undoubtedly had extensive experience of working with Ministers and we accept she too would have significant insight into their concerns about publicity generally and media reflections on the performance of their functions in public office.

26] However we question the depth of her specific political understanding of the full nature, purpose and import of the RRC and of her assertions, in the specific background and particular circumstances pertaining to this case, when she asserts that disclosure of the disputed information would cause harm of the nature or to the extent she describes. We do not consider her an "expert" witness in this regard, and we view her evidence limited in that it is generally predictive rather than fact specific. She fails to offer any information about what any Ministers (or those speaking for them) have actually said. She purports to tell this Tribunal how she believes Ministers will think, but did not provide any information on what Ministers have said on the specific issues pertaining herein. Still less does Dr. Baldwin's evidence begin to assist in this respect.

27] We were entitled to expect to hear some definitive evidence from her, on the nature of the concerns of Ministers she had spoken to, and referred to in her

witness statement, at the oral hearing. Yet she provided no tangible evidence on the suggestion that she had checked her views pertaining to the issues herein, with a number of, or any ministers. In fact under cross examination she declined to say anything about the nature or extent of any discussion with ministers, or what ministers had said to her. On questioning she refused to say whom she had spoken with, what she said to them, what was said in response and even declined to say how many ministers she had spoken to. She refused to give further evidence on these matters, even, when invited to do so by counsel for the Commissioner, by way of a session on a closed basis. Hardly evidence of good grounding research, and worse, her approach would be rejected in any academic research methodology that we would recognise. Even if we were to consider this evidence to be significant and of relevance (which we find it is not) this approach we find irresponsible in that the CO expect us to include it in support of their proposition that harm will flow from disclosure. The witness failed, despite prompting from the Tribunal members, to quantify the scope and range of her evidence – she was evasive and disingenuous on the issues she purported to have considered, and was expected to, give evidence about. She failed to give any persuasive evidence of harm that would be caused by the release of the specific disputed information in the context of the issues in this case. In so far as she indicates that specifically 0 or 100 meetings might draw adverse inference, in tin so far as they attract any comment about extremes, we have the benefit of knowing the disputed information and, without disclosing it, we are satisfied that the actual figure would not attract this type of adverse comment. So on the particular facts in this case we find there is no risk of this kind of adverse comment arising from disclosure.

28] Ms MacNamara introduced the COBRA meetings release of information. She noted the difference between this committee and other Cabinet committees. That said, when asked if the release of the number of meetings had had an effect, she claimed not to know the answer. As a senior member of the CO (even if not present at the time of the incident) she offered no evidence. We would have expected her to know some of the background and some of the effect caused. We ask ourselves, why was she offering this evidence if she does not know the relevance of it. Senior civil servants do meet regularly and discus such events. We remain incredulous that Ms MacNamara can offer the exhibit in evidence. The COBRA committee is a very powerful one and not one whose activity would "slip under the radar". Ms MacNamara put this before the Tribunal referring to the case study, in the form of an "Evening Standard article suggesting that, under Prime Minister Gordon Brown, the Cabinet's COBRA Committee had met unusually frequently. That coverage – which is precisely the sort of coverage she seems to have envisaged in her witness evidence - was not said to have resulted in any change in ministerial behaviour whatsoever. The flaw in the evidence and reasoning is thus that speculation about the fallout from hypothetical future instances is said to be more reliable than an actual past case study.

29] Ms McNamara declined to engage – either in her statement or in oral evidence - with the fact that (as evidenced in the BBC article in the bundle), one government minister, Simon Hughes MP, said that his instinctive view was that the disclosure of the number of times a Cabinet Committee has met would not be

harmful. It was expressly acknowledged by the Commissioner at the hearing that this was expressed merely as an instinctive view, and that its context was an interview by a BBC journalist who could be said to have had a vested interest on this point. Nonetheless despite those caveats, evidence which refuses to engage with such an expression of a ministers view – coupled with a refusal to provide information on the views of other ministers – is, we find, suspect and is flawed

30] In cross-examination, Ms MacNamara would not even concede that Simon Hughes' instinctive view was at odds with the view she expressed in her evidence. She had not been invited to criticise the Minister, but merely to acknowledge the divergence in views – she refused to do so.

31] When taken to the more direct evidence on the RRC committee and the query about the number of meetings of ministers involved there, we find it incredible, that she cannot demonstrate or refer to the nature and/or extent of any particular harm that might possibly flow from disclosure of the number of meetings of the RRC over the two year period in question. In fact she suggests it is not disclosure but the actual number that is of concern but fails to explain the distinction. She suggested, "*There are lots of consequences that could follow", but* failed to expand or explain. She stated, "*My judgment is that Ministerial behaviour would change"* but fails to explain or identify how. She asserted "*It would lead to Ministers being adversely affected – if you put this figure in the public domain.." a*nd yet again failed to support this assertion with any tangible evidence. In fact her evidence was, in our view fundamentally flawed and of no value whatsoever to us in its quest to persuade us that the Commissioner erred or was wrong in finding there was little if any public interest in maintaining the exemptions claimed on the specific facts in this case.

32] Mr Eadie suggests that nobody was better placed to judge the effect on ministers behaviour than Ms MacNamara and that she had clearly stated, even the release of the bare number of meetings would be enough to distract and vary ministers. Ms MacNamara has stated ministers take the issue of Transparency and Accountability very seriously and we can see this is true. However Ms MacNamara had noted the mixed methodology of concluding government business – meetings being only one. We find it hard to accept or believe that hard bitten, street wise, fighting politicos would scurry about trying to fill a mental quota of meetings simply because this release had taken place. Nor do we accept, or believe ministers would avoid a meeting to determine policy outcomes simply because it might be published in the manner and circumstances being considered here. This flaw in the witness evidence, to appreciate that if Ministers were to behave in the ways asserted by the CO witnesses, then there would be strong public interest in shedding light on their doing so, we find is fundamental. The analogies with the reasoning in Lewis are striking and persuasive.

33] We bear in mind the Commissioners' observations on the governments ability to release information or at least to contextualise it, particularly with the wealth of information about the RRC already in the public domain. We do accept that ministers take their duties seriously and would follow whatever path they deem necessary to conclude the policy development and we accept they have concerns about media coverage generally, but we believe the publication of the

number of meetings would go hang if ministers felt the best outcome was to utilise a meeting. Further we are of the view that between Ministries and Political issues across government there is no suggestion or evidence of a “norm” for the number of meetings that should be held and no evidence about commonality that determines how many meetings should or might be expected to be held. There is no evidential comparison – no control to measure against. Ms MacNamara describes how individual ministers vary in their views, part of the joy, she said of her work. More generally Ministries and their objectives are different, their tasks and intensity varies, the public understands this and so do the press and there is no evidence that more evil themes would be drawn by the media or anyone else than would exist in any case by the disclosure of a figure, such as in the present case. Further we find no evidence to support the theory or any practice of a “pollutant” effect likely to arise on ministers in the particular circumstances of disclosure of the disputed information in this case, or no where near the extent suggested by the CO. We are also reminded about the Commissioners detailed submissions on the purpose and nature of the RRC and the exceptional engagement sought with the public and in the public interest of being informed of the work of the RRC generally.

34] We accept the CO submissions on the issue that the information may be of little value in terms of weight in support of disclosure – it is on one view just a dead figure. There is however a counter argument to this approach. The RRC maybe a species that merits deeper consideration – it was a new animal in Whitehall; it was very much trumpeted by the 2010 incoming government, We accept there was public interest in information which, along with other available information, was related to the subject matter under consideration.

35] The CO line as a game changer, and the pollutant argument wins over speculation and minimal harm perhaps? On balance however, and on considering all the evidence, we believe the release of the disputed information will vary ministerial action not one iota. The ministry has blown up in the press the new and intensive role of the Regulatory Reform process; at the time of the request and since it acted decisively in the “Bonfire of the Quangos”, it maintained its 1 in 2 out policy (which itself may spawn more meetings) it has been very high profile and active

36] For all these reasons and notwithstanding the experience and position of the witnesses, we find he CO evidence is materially flawed and it’s reasoning unpersuasive. In so far as the CO contends, and to the extent that such a risk exists at all, there is a public interest in transparency, which the Commissioner effectively submits would shine a light on such a behavioural change, which would carry significant weight in favour of disclosure.

37] There is therefore, we find, little or no public interest of any substance or proven significance in maintaining the exemptions engaged, and while we accept that the public interest in disclosure is limited, in our view it carries significantly more weight and disclosure must therefore follow.

38] We find the Lewis judgment in the UT to be most helpful particularly because of the close proximity of the factual issues and considerations pertaining in both

cases and the very helpful guidance on procedure in analogous circumstances and the weight to be given to evidence from experienced senior civil servants. Accordingly, having considered all of the mattes referred to herein, we dismiss the appeal for all the reasons and in the circumstances set out above.

39] We wish to thank all Counsel for their extensive and helpful oral and written submissions herein. The decision in this case has been unusually delayed and I wish to apologise for any inconvenience caused. The initial and substantial delay was as a result of the Tribunal and the parties awaiting the Upper Tribunal decision in Lewis on similar issues and the delay over the past few months has been due to circumstances beyond my control.

Brian Kennedy QC

12 November 2015.