Appeal number: EA/2016/ 0168

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

THE DEPARTMENT FOR EDUCATION **Appellant**

- and -

THE INFORMATION COMMISSIONER

Respondents

CHRISTOPHER WHITMEY

TRIBUNAL: JUDGE ALISON MCKENNA
Mr ROGER CREEDON
Mr MIKE JONES

Sitting in public at Fleetbank House London on 8 May 2017.

Ewan West, counsel, appeared for the Appellant.

Christopher Knight, counsel, appeared for the Information Commissioner.

Mr Whitmey was neither present nor represented, but sent written submissions.

DECISION

1. The appeal is dismissed. The Appellant is to comply with the Information Commissioner's Decision Notice by disclosing the information requested, subject to redactions of personal data to be agreed with the Information Commissioner.

REASONS

Background to Appeal

2. Mr Whitmey made an information request to the Department for Education ("the Department") on 14 August 2015 in the following terms:

> *Please would you supply me with a copy of:*
>
> > *(a) A letter from Lord Nash to Nick Clegg, Deputy Prime Minister and Vince Cable, the Secretary of State for Business, Innovation and Skills dated 30 May 2014 relating to the public consultation Proposed New Independent School Standards Launch date 23 June 2014;*
> >
> > *(b) A timetable paper produced for Lord Nash; and*
> >
> > *(c) A submission to Lord Nash seeking his approval of the consultation package and consent to seek approval from the Home Affairs Committee (HAC) and the Reducing Regulation Committee (RRC).*

3. Mr Whitmey explained in his e mail that he was making this information request in respect of information referred to in an earlier Decision Notice[1] issued by the Information Commissioner and that, as a year had now passed, the arguments relied upon by the Department in the earlier case to maintain an exemption from disclosure had less weight so that the public interest should now favour disclosure.

4. The Department initially refused the information request in reliance upon "s. 36 FOIA". Later, this was clarified to refer specifically to sections 36 (2) (b) (i) and (ii) and 36 (2) (c) of the Freedom of Information Act 2000 ("FOIA"). During the Information Commissioner's investigation, the Department stated that it also relied upon 35 (1) (b) FOIA in respect of part (a) of the request. It disclosed some information which was contained in annexes to the document at part (a) of the request.

5. The Information Commissioner issued Decision Notice FS50608958 on 15 June 2016, in which she found that s. 35 (1) (b) FOIA, s. 36 (2) (b) (i) and (ii) FOIA were engaged, but that s. 36 (2) (c) FOIA was not engaged. She concluded that the public interest favoured disclosure of the withheld material. The Information Commissioner therefore directed the Department to disclose the withheld information (subject to redactions of certain personal data). The Department appealed to the Tribunal.

---

[1] FS50566201

6. By the time of the hearing, the entire contents of the documents falling within (a) and (b) of the request were withheld but only part of item (c) was withheld. Following the Tribunal hearing, the Department confirmed that it no longer asserted an exemption in relation to the first and second sentences of the withheld paragraph in item (c) of the request. We are grateful for the clarification and have narrowed the scope of the issues we must decide accordingly.

7. We would like to thank Mr West and Mr Knight for their helpful written and oral submissions. Mr Whitmey informed us that he would be unable to attend the hearing but that he wished us to proceed in his absence by taking into account his written submissions, for which we were grateful.

Appeal to the Tribunal

8. The Department's Notice of Appeal dated 13 July 2016 relied on open grounds of appeal with a closed annexe. The open grounds may be summarised as follows: (i) the Information Commissioner's application of the public interest test in relation to part (a) was erroneous because the principle of collective responsibility was important. Also, that many of those copied into the letter are still in Government, and the public interest in disclosure is weak; (ii) the Commissioner had erred in concluding that the qualified person had not given an opinion about parts (b) and (c) of the request under s. 36 (2) (c) FOIA; and (iii) that the Commissioner's application of the public interest test in relation to parts (b) and (c) of the request was erroneous because the public interest in ensuring that Ministers and officials have a safe space in which to discuss and develop policy in relation to a sensitive subject favoured maintaining the exemption.

9. The Information Commissioner's Response dated 24 August 2016 maintained the analysis as set out in the Decision Notice and resisted the appeal. In responding to the Department's grounds of appeal, the Commissioner submitted that (i) the Decision Notice had acknowledged the public interest in the maintenance of the convention of collective responsibility but that the Department's case had tended to elevate this principle to the level of an absolute exemption, which had not been Parliament's approach in formulating the exemption relied upon; (ii) this ground arises only if ground (iii) is unsuccessful, but is in any event misconceived because the evidence did not demonstrate that the qualified person (the Minister) had turned his mind specifically to s. 36 (2) (c) FOIA; and (iii) there was no evidence to support the Department's case that civil servants would be impeded from giving frank advice to Ministers in the future, especially where (as here) the information request concerns a policy long since formulated and implemented.

10. Mr Whitmey was joined as a Respondent to the Department's appeal and filed a Response which relied on the following arguments: (i) that the appeal should be dismissed and the Decision Notice upheld; (ii) that the Tribunal should give little or no weight to the Department's reliance on s. 35 FOIA given its late appearance as a claimed exemption; (iii) the public interest favours disclosure of the information in order to show the reason why the consultation period was short because the governors and staff of schools and academies had a legitimate expectation that the Department

would follow the approach of discounting school holidays when calculating consultation periods[2].

11. The Department replied to Mr Whitmey's Response (undated, page 47 open bundle) as follows: (i) it was not open to the Tribunal to refuse to consider the Department's reliance on s. 35 FOIA as it had been properly raised in the Notice of Appeal; (ii) the statutory instrument referred to by Mr Whitmey has no relevance to the consultation period, as it concerns how schools should respond to FOIA requests only.

12. The hearing of this appeal was mainly in public, although the Department's witnesses gave some of their evidence in closed session so that they could comment specifically on the withheld information. They were cross-examined by Mr Knight on behalf of the Information Commissioner in both open and closed session, and answered questions from the Tribunal.

The Law

13. The duty of a public authority to disclose requested information is set out in s.1 (1) of FOIA. The exemptions to this duty are referred to in section 2 (2) as follows:

> *"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."*

14. The categories of exemption relied upon under FOIA in this case are: s. 35 (1) (b), s. 36 (2) (b) (i) and (ii) and s. 36 (2) (c). These exemptions are so-called qualified exemptions giving rise to the public interest balancing exercise required by s. 2 (2) (b).

15. The relevant parts of s.36 FOIA for the purposes of this Decision are as follows:

> *(2) Information to which this exemption apples 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*

[2] See The Freedom of Information (Time for Compliance with Requests) Regulations 2010.

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

16. S.35 (1) (b) FOIA provides as follows:

"(1) Information held by a government department…is exempt information if it relates to –

(a)….

(b) Ministerial communications,".

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

> *"If on an appeal under section 57 the Tribunal considers -*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
>
> *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*
>
> *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."*

18. We note that the burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Evidence

19. The Department called witness evidence from Mr. Hardip Begol (Director of the Independent Education, Safeguarding in Schools and Counter-Extremism Group within the Department for Education) and Ms. Shona Dunn (Director General with responsibility for the Economic and Domestic Affairs Secretariat within the Cabinet Office). Both witnesses had made open and closed witness statements.

20. In his open evidence, Mr Begol gave the Tribunal some helpful background to Mr Whitmey's request. There had been a consultation in 2014 concerning changes to the Independent Schools Standards framework. The consultation had run from 23 June to 18 August 2014, therefore some of the consultation period was during the school holidays. Mr Whitmey had made an information request for information relating to the decision to run the consultation period at that time. In an earlier Decision Notice, the Information Commissioner had upheld the Department's reliance

on s. 35 (1) (b) and s. 36 (2) (b) (i) and (ii) FOIA and agreed with the Department that the public interest in maintaining these exemptions outweighed the public interest in disclosing the information requested. Mr Whitmey had made a second request for the withheld information in 2015.

21. Mr Begol's evidence was that the Department had sought a qualified person's opinion for the purposes of s. 36 FOIA on 9 September 2015. The qualified person was the Parliamentary Under-Secretary of State for Childcare and Education. He had provided his opinion the same day.

22. Mr Begol noted that the Tribunal's open bundle contained a submission from a junior civil servant in the DfE, expressing the view that the balance of public interest supported the disclosure of item (a) of the information request. That submission had reportedly been accepted by the Senior Civil Servant who had received it (page 209 Open Bundle). Mr Begol explained that these views had been expressed before advice had been sought from the Cabinet Office as to the harm to collective responsibility that would likely be caused by disclosure of item (a). He stated that this was the view of a single official which was sent to a senior official and, on consideration, it had been rejected.

23. Mr Begol's evidence in relation to the public interest balance was that there must be a safe space for Ministers to be briefed effectively and candidly, which includes offering advice on the balance of options or on possible "trade-offs" between different policy priorities. His evidence was that, if civil servants could not clearly identify the risks inherent in any single path, then Ministers would be taking decisions without the fullest advice on the likely or possible outcomes. His evidence was that disclosure of the timetabling information in part (b) of the request would risk a significant chilling effect because it would be likely to damage officials' confidence that they could give candid advice without seeking to reflect presentational factors and that disclosure would be likely to damage Ministers' willingness to request frank written advice on sensitive or controversial matters. He did not consider that the passage of time since the consultation decision with which the request was concerned had the effect of reducing the harmful effects of disclosure. His evidence was also that there is sufficient information about this matter already in the public domain to satisfy the public interest.

24. In answering some additional questions in chief, Mr Begol confirmed that the date schools were informed of the policy changes was 22 September 2014, but the actual date of implementation was 29 September 2014.

25. In cross examination, Mr Begol accepted that the proposed changes to the Independent School Standards had been controversial. They had concerned the promotion of "British values" in the wake of the so-called "Trojan Horse" problem in Birmingham. He acknowledged that the changes had been made "pretty speedily" following a consultation period of six weeks. The consultation process had been criticised by a Parliamentary committee, and the Minister had accepted that "not enough care" had been given to it. Mr Begol accepted that the Minister's comments had heightened public debate. However, the Government's response to the

consultation had explained its intention to implement the new standards at the start of the forthcoming academic year in view of its concern that a small number of schools were not promoting "British values".

26. Mr Knight put to Mr Begol that his evidence was surprising in suggesting that a civil servant would not give frank advice to a Minister for fear of disclosure. He asked whether it was not a civil servant's obligation to do so? Mr Begol clarified that he was not suggesting that a civil servant would withhold information from a Minister but rather that the drafting of advice would be different because of the need to place advice into context for a public audience. Mr Knight asked whether it would be right to say the advice would not be less frank but rather more nuanced? Mr Begol replied that it would be more guarded and that the more radical options would not make their way into written advice. Mr Begol said he could not think of any examples of where this had occurred. He said that if the information withheld from Mr Whitmey were disclosed, he would modify his approach in future by discussing presentational issues with colleagues before sending his advice.

27. Mr Begol stated that the Cabinet Office is the centre of expertise and is the protector of the principle of collective responsibility, so the Department was guided by its view. He relied on Ms Dunn's evidence in relation to item (a).

28. It is appropriate for us to give a "gist" of the evidence given in closed session. In his closed evidence, Mr Begol was asked with direct reference to the withheld material in part (c) of the request how it would have differed if it was anticipated that it would be disclosed. He said it would be written in a way that could not be misconstrued, there would have to be an explanation of the surrounding circumstances so it would be "less frank and direct". On reflection, he said that he had no continuing concerns about disclosing the first and second sentences of the withheld paragraph, only the remainder of the paragraph. In relation to the third sentence, he said that he would not have omitted it but would have given more detail if he had thought it was to be disclosed.

29. Also in closed session, Mr Begol was asked in relation to item (b) of the request how it would have been written differently if disclosure was anticipated. He repeated that it would be less "free and frank" because it would have needed to include presentational factors. He did not think any of the options would have been omitted but they would have been expressed differently.

30. In her open witness evidence, Ms Dunn addressed the convention of Cabinet collective responsibility and the application of s. 35 (1) (b) FOIA to part (a) of the requested information. She explained that the Ministerial Code protected the privacy of opinions expressed in Cabinet and Ministerial Committees. In this case, the requested item (a) clearly constituted Ministerial correspondence. It was a letter from one Minister to others, copied to the chairs of relevant committees. She understood that the issue for the Tribunal was one of balancing the public interest, and her evidence was that even if (as the Decision Notice had concluded) the information contained in the requested letter was "fairly routine", then its disclosure still had great potential to harm the collective process by causing Ministers to question whether it

was possible to protect the majority of such correspondence. She explained that many of the recipients of the letter were still in Government and those who are not (Liberal Democrat Ministers from the Coalition Government) are still politically active, so disclosure would have a chilling effect on Ministers' willingness to have necessarily candid recorded discussions about policy development. Ms Dunn accepted that there was a public interest in disclosure of Lord Nash's letter but asserted that this was outweighed by the public interest in protecting the collective decision making process.

31. In cross examination, Ms Dunn explained that s. 35 (1) (b) FOIA refers to Ministerial communications, which is a sub-set of information which engages the convention of Ministerial collective responsibility. Her evidence was that strong weight attaches to that convention and it was important to think about what factors might diminish that weight. She accepted that the effluxion of time was one of them.

32. Mr Knight asked whether it was correct to say that as the rationale for the convention was the ability for Ministers to disagree in private but take collective responsibility in public, the weight attached to the convention would be lessened in circumstances where the requested information did not reveal Ministerial disagreement. Ms Dunn replied that she did not agree with such an approach because it would indicate by omission that where information was withheld it was due to a Ministerial disagreement on the issue in question.

33. Ms Dunn accepted that there had been disclosures of Ministerial communications under FOIA in the past and of course the sky had not fallen in. Mr Knight asked her view as to the sensitivity of item (a) in the request. She replied that its content was not at the high end of sensitivity but that you had to balance that against the benefit of the public in seeing it. She said it was "sensitive enough" for the Cabinet Office to be concerned about disclosure. She accepted that item (a) itself did not indicate Ministerial disagreement but that, taken with other documents, there could be speculation about the nature of the debate that had taken place. She was concerned that release of this document could unnecessarily erode confidence in the convention, asking rhetorically "which straw breaks the camel's back?" and whether the public interest in this information was sufficient to warrant that risk.

34. In re-examination, Ms Dunn explained that the purpose of the "write-round" process used here is to take the place of a discussion, so the author may try to second guess any objections and deal with them up front. This could give the impression there was a disagreement when there was not.

35. Once again, we give a "gist" of Ms Dunn's closed evidence as follows. In her closed evidence, Ms Dunn was taken to the withheld item (a) and asked to elaborate on her concerns about its disclosure. She said there was a public interest in the question of whether the Government's decision making was in any way flawed but this information was really just about administration and the taking of an unconventional approach in the context of needing to proceed with urgency.

Submissions

36. Mr West informed the Tribunal that there had been no challenge to the lawfulness of the consultation period with which the information request was concerned. He regarded this as important information in the light of the comment at paragraph 23 of the Decision Notice that "*the public interest in the administration of a policy will increase where…the normal process for consultation is not followed as this could point to weaknesses in the means by which a policy decision was reached*". Mr West noted that Mr Whitmey had not made a case to that effect.

37. There was common ground between the parties as to the recognition of "safe space" by the authorities and that the limits of the safe space had to be decided on a case by case basis. It was also agreed that the authorities recognised that the timing of a request was a relevant factor in this regard.

The Appellant's Case

38. In respect of s. 35 (1) (b) FOIA, Mr West reminded the Tribunal that the scope of the exception was wide as it concerned information that "relates to" Ministerial communications.

39. He asked the Tribunal to attach considerable weight to Ms Dunn's evidence, recognising that she is a very senior civil servant. He recognised that collective responsibility was not an absolute bar to disclosure but submitted that weight should be attached to it as a mechanism which conditions the way in which the cabinet works.

40. Mr West referred the Tribunal to Mr Begol's evidence about safe space and asked the Tribunal to give weight to his views as a senior official.

41. In relation to the factors relevant to the public interest balancing exercise, Mr West submitted that the public interest in disclosure was not the same as Mr Whitmey's concerns and made three points. Firstly, the Department had already accepted that the consultation period had not been ideal, but that it had proceeded in circumstances of urgency. In these circumstances, the public interest was not enhanced by disclosure of the requested information. Secondly, the information requested did not add to the sum of public knowledge about that issue. He referred to Mr Whitmey's attachment of the 10th Report of the House of Lords Secondary Legislation Scrutiny Committee to his amended skeleton argument, and submitted that this document pre-dated the Minister's appearance before the Parliamentary Committee where an explanation for the consultation period had been given, so it did not add materially to the information already available. Thirdly, as to the relevance of timing, the Department did not accept that the information requested was "old news" by the time of the second request. He asked the Tribunal to note that paragraph 49 of the Decision Notice concluded that changed circumstances (including the passage of

time and the completion of the policy-making process) had significantly weakened the Department's chilling effect arguments, but that Mr Begol's evidence was that there would nevertheless be an impact on the behaviour of civil servants going forward.

42. Mr West replied to Mr Knight's open submissions by emphasising that he was not asking the Tribunal to defer to the opinions of the Department's witnesses but rather to acknowledge that they were best placed to form a judgement on the issues they described.

The Information Commissioner's Case

43. In relation to the ground of appeal about s. 36 (2) (c) FOIA, Mr Knight agreed that it was a moot point, but suggested it would be helpful for the Tribunal to comment on it. The Information Commissioner's view was that the qualified person's opinion could not be a "rubber stamp" and that the opinion could not be reasonably arrived at if the submission to that person did not contain the relevant material. He submitted that that was the case here.

44. In commenting on the witness evidence, Mr Knight reminded the Tribunal of the need for a contents-based approach, as set out by Mr Justice Charles sitting the Upper Tribunal in *Department of Health v Information Commissioner and Another* [2015] UKUT 159 (AAC) *("Lewis")* at paragraphs 23 and 29 - 30. He submitted that the witness evidence relied on by the Department had not met that standard because there was no evidence that there would be a material change of approach by officials or Ministers. The Department's case was rather that the business of Government would be affected by disclosure but, Mr Knight submitted, they ought to be operating in a way that took account of FOIA by now.

45. Turning to s. 35 (1) (b), Mr Knight agreed that the convention of collective responsibility is an important one, but submitted that taking a contents-based approach it was difficult to see what harm could arise from disclosure of the specific information requested in this case. He asked the Tribunal to take the view that it was not at the upper end of the sensitivity scale and to consider that the convention did not create an absolute bar to disclosure. He noted that the Department had not relied on s. 36 (2) (a) (i) FOIA, which would have required a qualified person's opinion to be obtained. In this case, he relied on the fact that the particular policy issue had been closed and submitted that the withheld information did not undermine the policy in any way so the weight to be attached to the convention was lessened in these circumstances.

46. Ms Dunn's evidence as to the harm arising from disclosure of the information requested relied, in Mr Knight's submission, on a vague mosaic effect which had been raised for the first time in oral evidence. He suggested that the Department's own assessment of the risk of harm, later overruled by the Cabinet Office, had been correct.

47. In respect of s. 36 (2) (b) (i) and (ii), the Information Commissioner accepted that these exceptions were engaged so the issue for the Tribunal was one of public

interest. He submitted that Mr Begol's evidence on this point had been "strained". He had not suggested that civil servants would withhold information from a Minister for fear of disclosure (which would be a breach of their duties) but that their drafting of advice would have to be altered to include greater explanation, context, additional caveats and nuance. In Mr Knight's submission, this would improve the advice given and not undermine its candour and frankness, as Mr Begol had claimed.

48. Mr Knight described the public interest in disclosure of the requested information as follows. There is a general interest in this area of policy because there was controversy about the concept of "British values" and the tangential connection to the Trojan Horse case. There was also an interest in the process by which the policy was introduced, including the fact that the consultation period had included the school holidays. The fact of the consultation had been announced on 9 June but the consultation had not actually commenced until 23 June and people were entitled to ask why this was the case. This point had been raised in the consultation responses and there had been specific criticism of the process by a Parliamentary Committee. The information already in the public domain did not give the level of detail contained in the withheld information.

49. Mr Knight made some submissions in closed session about the closed witness evidence, to which Mr West replied also in closed session. We do not find it necessary to rehearse the closed arguments as they did not raise new issues but rather applied the arguments we have already described to the detail of the withheld material.

Mr Whitmey's Case

50. Mr Whitmey's skeleton argument and addendum thereto urged the Tribunal to dismiss the Department's appeal on the basis that (i) little or no weight should be given to the claimed s. 35 exemption as it represented an abuse of process; (ii) the Department had breached the Information Commissioner's guidance on the identity or motives of the applicant; (iii) there is an overriding public interest in knowing the detailed reasons why the Department had adopted a consultation period which was short and included the school holidays in breach of the relevant consultation principles.

51. In relation to point (ii), Mr Whitmey very fairly accepted that this was not a ground on which the Tribunal could reject the appeal, but suggested that it was indicative of the Department's lack of objectivity.

Conclusion

52. Firstly, we accept the Department's submission that the Tribunal is required to consider its reliance on s. 35 FOIA, notwithstanding that the exemption was claimed tardily. It is not open to us to give less weight to an exemption which legitimately falls to be considered. We set out our conclusions on this exemption below.

53. Secondly, we accept the Department's submission that The Freedom of Information (Time for Compliance with Requests) Regulations 2010 referred to by

Mr Whitmey have no effect in relation to the consultation period to be adopted by the Department. We find that the Regulations are strictly limited in scope to the calculation of the period for schools to reply to FOIA requests and are incapable of creating a legitimate expectation that the same approach to the calculation of time would be used for the consultation on the Independent School Standards.

54. These initial conclusions narrow the scope of Mr Whitmey's case to the correct application of the public interest balancing exercise. We consider this further below.

55. Whilst recognising that it became a moot point and that we did not hear full argument on it, we tend to agree with the Information Commissioner's Decision Notice at paragraph 39 that the qualified person's opinion obtained for the purposes of s. 36 (2) (c) FOIA did not clearly address the necessary criteria of the prejudice that may "otherwise" occur through the release of the requested information. We were asked to indicate our view and we have done so, but we stress that our comment on the point is in no way determinative of this appeal and sets no precedent for other cases.

56. In relation to item (a), we acknowledge that it falls squarely within the ambit of the exception, being a communication between Ministers. The exception at s. 35 (1) (b) FOIA is therefore engaged, and we must consider the balance of public interest under s. 2 (2) FOIA. In doing so, we are guided by the decisions of the Upper Tribunal and the higher courts and we note the contents-based approach set out in the *Lewis* Decision referred to at paragraph 44 above. At paragraph 23 of that Decision, Mr Justice Charles describes the correct approach as follows:

> *"…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…."*

57. Taking that approach, we were not persuaded by the Department's case in respect of part (a) of the request. Ms Dunn's evidence was strong on the importance of the convention of collective responsibility but, as we found, weak on the harm said to arise from disclosure of the particular letter with which we are concerned. We found that her "straw that broke the camel's back" approach demonstrated a class-based, rather than a contents-based approach to the information in respect of which the exemption was claimed and that the harm she identified as arising from disclosure of the letter from Lord Nash was predicated upon the hypothetical construction of a mosaic of information which might lead the public to form (correct or incorrect) conclusions about the nature of Ministerial discussions.

58. We were not persuaded that there was a strong case of harm arising from the disclosure of the particular information at part (a), but we accept that there is a harm attributable to disclosure in breach of the convention of collective responsibility. We weigh that harm against the public interest in disclosure of the particular information sought. In this regard, we accept and adopt the public interest argument made by Mr Knight and described at paragraph 48 above.

59. Having weighed the harm of disclosure as identified by Ms Dunn against the public interest in transparency about Governmental action which was controversial in both substance and process, we conclude that the balance of public interest favours disclosure in respect of item (a).

60. In relation to items (b) and (c), we accept that the exemptions under s. 36 (2) (b) (i) and (ii) are engaged by the information requested and that we must apply the public interest balancing exercise under s. 2 (2) FOIA.

61. In respect of item (c) of the request, the sole issue for us to decide is whether the remaining parts of paragraph 3 should be disclosed. In respect of item (b), we have considered the entirety of the document.

62. We considered carefully the evidence of Mr Begol but have concluded that it did not meet the test set out by Mr Justice Charles in the *Lewis* Decision, referred to at paragraph 56 above, in describing "*actual harm*". Mr Begol described a number of respects in which he might change the form and substance of written advice if he thought it may be disclosed under FOIA, but this appeared to us to be based on a class-based rather than a contents-based approach to the information requested. Even so, we struggled to identify evidence of harm in his description of the likely change of approach. He specifically did not say that any particular advice or option would be withheld from a Minister but rather that additional factors would be included in his written advice. This evidence did not establish that a harmful cultural change would result from disclosure.

63. Mr Begol's evidence did not in our view establish harm arising from disclosure of the specific contents of items (b) and (c). Nevertheless, we accept that there is a public interest in preserving safe space for the provision of advice and the exchange of views and that the potential harm of infringing this safe space should be weighed in the balance. The weight to be attached to safe space was considered in the Decision Notice to have been lessened by the implementation of the policy concerned and the passage of time. Mr Begol's evidence challenged this conclusion but only in respect of likely cultural change rather than in relation to the contents of the withheld information. We agree with the Decision Notice in this regard.

64. We conclude that there is a strong public interest in the withheld information for the reasons outlined by Mr Knight and referred to at paragraph 48 above. We also take into account Mr Whitmey's arguments as to the public interest in the information he requested. We recognise that there is some information in the public domain about these issues, but we consider that there is a strong and legitimate public interest in transparency in this area of policy, which was controversial both in substance and in process, and that the disclosure of the particular information requested would add to the sum of that knowledge.

65. Weighing all these factors, we conclude that the public interest favours disclosure of item (b) and the remaining part of item (c).

66. We find that the Decision Notice in this case was correct and should stand. The appeal is hereby dismissed.

ALISON MCKENNA **DATE OF DECISION: 8 June 2017**

PRINCIPAL JUDGE **DATE PROMULGATED: 8 June 2017**