First-tier Tribunal
General Regulatory Chamber
Information Rights

Appeal Reference: EA/2017/0211

Heard at Field House, London
On 5 & 6 April 2018

Before

JUDGE HAZEL OLIVER
MR NIGEL WATSON
MRS SUZANNE COSGRAVE

Between

DEPARTMENT FOR COMMUNITIES & LOCAL GOVERNMENT

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

CHRIS STOKEL-WALKER

Second Respondent

Appearances:

Mr Tom Cross, counsel, for the Appellant
Mr Rupert Paines, counsel, for the Information Commissioner
Mr Stokel-Walker did not attend

DECISION

The appeal is dismissed except as follows:

Paragraph 80 of the Information Commissioner's Decision Notice is to be amended to withhold further information under section 40(2), as set out in paragraphs 26 and 27 of the Tribunal's reasons.

SUBSTITUTED DECISION NOTICE

The Information Commissioner's Decision Notice stands, except as follows.

Paragraph 80 is amended by:

a. Adding reference to lines 157, 276, 372, 444, 459, 572, 575, 666; and

b. Correcting "621" to read "261" and correcting the second entry of "275" to read "276".

REASONS

Background to Appeal

1. This appeal concerns information sought under the Freedom of Information Act 2000 ("FOIA") relating to the Ministerial diary of James Wharton, formerly the Minister for the Northern Powerhouse.

2. On 15 February 2016, Mr Stokel-Walker (the Second Respondent) made a request to the Department for Communities and Local Government ("DCLG") for various information relating to the activities of Mr Wharton. DCLC has now been renamed the Ministry of Housing, Communities and Local Government, but for ease of reference we refer to DCLG throughout this decision.

3. The first request was for: "*The official diary of James Wharton, Minister for the Northern Powerhouse, from 1 January 2016 to 14 February 2016 inclusive*", which is the subject of this appeal. Mr Stokel-Walker made two other requests relating to visits, speeches or trips made by Mr Wharton, but these are not the subject of this appeal.

4. DCLG acknowledged the request on 14 March, referred to the possible application of several exemptions, and said they would respond by 12 April 2016. DCLG wrote again on 12 April to advise it was necessary to extend its response time by a further 20 working days in order to consider the public interest in relation to various exemptions and section 36 of FOIA. On 13 April Mr Stokel-Walker asked to extend the terms of his request to 17 April 2016, and DCLG agreed to this. On 10 May DCLG wrote to Mr Stokel-Walker again to say they were still considering his request, they were extending the date for issuing the response to consider the application of qualified exemptions, and they would try to respond by 8 June 2016. Mr Stokel-Walker replied on the same day, complaining about DCLG's failure to respond. On 16 May 2016, Mr Stokel-Walker contacted the Information Commissioner ("the Commissioner") in order to complain about DCLG's failure to provide a substantive response for more than four months.

5. DCLG sent a substantive response on 18 May 2016 which refused the requests for information, relying on sections 22, 40(2), 35(1)(a), 35(1)(b), 35(1)(d), and 36(2)(c) FOIA. Mr Stokel-Walker requested a review on the same day. DCLG sent its review decision on 16 June 2016, which maintained that the information should not be disclosed.

6. As part of the investigation into Mr Stokel-Walker's complaint of 16 May 2016, the Commissioner wrote to DCLG on a number of occasions asking questions and seeking further information. The parties explored the possibility of an informal resolution, but this was not possible.

7. The Commissioner issued Decision Notice FS50629605 on 22 August 2017. In relation to the request for diary entries, DCLG's final position relied on sections 35(1)(a), (b) and (d) of FOIA (information held by a government department relating to the formulation or development of government policy, Ministerial communications, and/or the operation of any Ministerial private office), together with section 40(2) in relation to entries containing personal data.

8. The Commissioner decided that the diary entries did not engage section 35(1)(a) or 35(1)(b) of FOIA. She decided that the diary extracts did engage section 35(1)(d), but the

public interest favoured disclosure of much of the withheld information. The Commissioner also decided to allow DCLG to withhold under section 40(2), by way of redaction, information which satisfies the definition of personal data under the Data Protection Act 1998.

9. The Commissioner required DCLG to take the following steps in respect of the request for diary entries: "*...the DCLG is required to disclose the contents of Mr Wharton's diary for the period 1 January 2016 to 15 April 2016, with the exception of those entries which constitute personal data or is purely party political and which are identified at paragraph 80 of this notice*".

The Appeal

10. DCLG appealed against the Commissioner's decision on 19 September 2017. The appeal is limited to the Commissioner's findings in relation to section 35 of FOIA and its application to the request for diary entries.

11. In relation to section 35(1)(d) of FOIA, DCLG says that the Commissioner was right to find that the diary entries engaged this subsection as they relate to the operation of a Ministerial private office. However, the Commissioner attached no or no sufficient weight to the various public interest reasons relied on for maintaining the exemption when striking the balance, and failed to appreciate the limited nature of such public interest as there was in releasing the information.

12. In relation to section 35(1)(a), DCLG says that certain of the diary entries in question do "relate to" the formulation or development of government policy sufficiently to engage the exemption. The Commissioner has misapplied a test of "necessary degree of significance", has taken too narrow an approach to the scope of the exemption, and has mischaracterised the information. The public interest should therefore be applied, and the interest in preserving a safe space for formulation or development of government policy outweighs any public interest in disclosure.

13. In relation to section 35(1)(b), DCLG relies on the same arguments as for 35(1)(a) – certain of the entries do "relate to" Ministerial communications and the public interest weighs in favour of non-disclosure.

14. The Commissioner's response opposes the appeal, relying on the reasons given in Decision Notice and the appeal response. The Commissioner maintains that sections 35(1)(a) and (b) are not engaged as there is an insufficient connection between the information and government policy or Ministerial communications. The term "relates to" is not without limits, an information-specific assessment is required, and DCLG has only given vague grounds and has not discharged the burden of explaining and demonstrating how these exemptions are engaged. In any event, the public interest in maintaining both these exemptions and section 35(1)(d) remains weak and the interest in disclosure is significantly weightier. The Commissioner does not accept the strength of the public interest arguments put forward by DCLG in relation to maintaining the 35(1)(d) exemption, and submits that there is significant and meaningful public interest in transparency. The Commissioner also refers to the previous decision in ***Department of Health v Information Commissioner & Lewis*** (cited below).

15. Mr Stokel-Walker opposes the appeal and relies on the same grounds as the Commissioner. He complains that the DCLG has "systematically and deliberately stymied the

release of information in a timely and useful manner", and this is an attempt to make the information less newsworthy. He says that the information was of particular public interest at the point it was requested, but still remains important today due to continued promotion of the Northern Powerhouse initiative, and to prevent the government from treating FOIA as a joke.

16. It was agreed at the start of the hearing that the issues to be determined in the appeal are as follows:

a. Is section 35(1)(a) engaged by any of the disputed information (formulation and development of government policy)?

b. Is section 35(1)(b) engaged by any of the disputed information (Ministerial communications)?

c. If so, does the public interest weigh in favour of disclosure?

d. It is agreed that section 35(1)(d) is engaged by the disputed information (the operation of a Ministerial private office). Does the public interest weigh in favour of disclosure?

Applicable law

17. The relevant provisions of FOIA are as follows.

1(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(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 and to the extent that –*
....
(c) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

35(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
(c) ...
(d) *the operation of any Ministerial private office.*

18. The issue of disclosure of Ministerial diaries has been considered once before in this Tribunal, in a case that was appealed to the Court of Appeal – ***Department of Health v Information Commissioner & Lewis*** [2017] EWCA Civ 374. The original First-Tier Tribunal decision in this case was given in 2014, and upheld the Commissioner's decision that the majority of the withheld information should be disclosed on the public interest balance. The legal approach taken by the First-Tier Tribunal was upheld on appeal to the Upper Tribunal and the Court of Appeal.

19. We are mindful that we are not bound by the First-Tier Tribunal's decision on the facts in ***Lewis***, and are making our own assessment of the evidence and submissions presented to us in this case.

Evidence and submissions

20. We had an open witness statement from Mr David Smith, the Head of the Knowledge and Information Management Unit in the Ministry for Housing Communities and Local Government (previously DCLG).

21. We also had a closed statement from Mr Smith, which provided some additional information at paragraph 38 which had been redacted from the open statement. The closed statement annexed a printout of a spreadsheet exported from an Outlook calendar, showing all of the diary entries (with redaction of those containing personal data), and highlighting those entries which DCLG is seeking to withhold. We were provided with an updated version of this spreadsheet at the start of the hearing. The line numbers in this spreadsheet correspond with the line numbers in the electronic copy of the disputed material as originally provided to the Commissioner, as referred to in paragraph 80 of her Decision Notice. The spreadsheet shows that a number of entries have been provided to Mr Stokel-Walker on a voluntary basis, which was done without accepting that they were covered by FOIA.

22. We also had an agreed bundle of open documents and a short bundle of closed material, which we read in advance of the hearing.

23. We heard oral evidence from Mr Smith in both open and closed session. He was asked questions by Mr Paines and by the Tribunal.

24. We also had written and oral submissions from DCLG and the Commissioner, and a skeleton argument from the Commissioner. We have taken all of these into account in making our decision.

Information withheld under section 40(2)

25. As noted above, paragraph 80 of the Commissioner's Decision Notice sets out the numbered entries in the disputed information that could be withheld as they contain personal data or are party political (including the Minister's travel arrangements).

26. The list contains two obvious errors which were noted during the hearing – the reference to "621" in the list should be "261" (bottom of page 15 in the open bundle), and "276" should be substituted for the second entry of "275" (top of page 16 in the open bundle).

27. DCLG and the Commissioner had also conducted some closed correspondence by letter dated 28 March 2018, in which the DCLG sets out some additional entries which are of an identical nature to those that had already been withheld. The Commissioner agrees that these can also be withheld under section 40(2). As Mr Stokel-Walker had not seen this correspondence and was not at the hearing, the Tribunal directed that he should be provided with a redacted copy of this letter (removing the explanations of the type/content of the entries) and given 14 days to provide any comments before the Tribunal finalised its decision. Mr Stokel-Walker did not raise any objections to these additional items being withheld.

Mr Smith's evidence

28. Mr Smith's written statement explained the workings of the Private Office and how it is responsible for governing the Minister's diary. He does not work in the Private Office himself and had obtained much of the information in his statement from discussions with the Private Office. The Ministerial Diary Secretary (a junior post) is responsible for diary management. This Secretary liaises with various others in the Office and the Minister in relation to what goes in the diary. Diary entries are generated from a number of sources. The diary is highly reactive and is not necessarily accurate as there are often changes of plan – it is a record of what the Minister was diarised to do, not of what he actually did. It also does not reflect the Minister's priorities, and some entries are abbreviated so that it is difficult to understand what is at issue.

29. Mr Smith explained this further in oral evidence. He said that, having spoken to the Private Office, approximately 20% of the Minister's diary for the period in question was inaccurate. This could be changes to the times of the meeting, for example because a previous meeting or engagement had overrun, or because the meeting did not last for the same amount of time as it had been booked for in the diary. It could also be that a meeting had been cancelled and had not been removed from the diary. Although a number of diary entries show meetings as having been cancelled, in other cases this may have happened late and the diary would not necessarily have been changed.

30. The diary also does not reflect other activities of the Minister in his remaining time – e.g. activities as an MP, or work he did at home dealing with flooding during this period, or travel time that is omitted for security reasons.

31. Mr Smith's written statement spends some time explaining the effect on the operation of the Minister's Private Office and diary if it were known that Ministerial diaries would have to be released on request – time, expense and distraction in considering how diary entries should be presented given their potential to mislead; a "paralysis by analysis" inhibiting effectiveness because of anxieties about public scrutiny; increased expenditure in re-grading the diary secretary post and employing additional back-up staff; diary entries being kept as uninformative as possible; and an overall change in culture as to how the diary is handled which would slow down the operation of government. These explanations were largely directed at the future effect on diary management if Ministerial diaries became disclosable.

32. However, this position changed in Mr Smith's oral evidence. He accepted that there was the potential for Ministerial diaries to be covered by FOIA since it came into force. He also accepted that there was awareness of the First-Tier Tribunal decision in ***Lewis*** since 2014, which showed that Ministerial diaries may need to be disclosed under FOIA. Mr Smith did not give evidence that there had been any changes in behaviour in relation to Ministerial diary management since the ***Lewis*** decision. Although he was asked whether the effects referred to in his written statement had actually taken place, he gave no evidence which showed this. Instead, he focussed on the need to make the diary understandable and contextualise the diary entries at the time of disclosure to the public.

33. Mr Smith explained that the diary entries on their own may give an inaccurate picture of the Minister's activities and may not be easily understandable to the public. If the diary was to be disclosed, it would be necessary to correct any inaccurate entries and provide detailed context. Without this, the diary would be of limited public interest because of its inaccuracy

and lack of clarity. This exercise would take considerable time and resources, which is not merited given the limited public interest in disclosure.

34. Mr Smith's evidence was that the public would not understand the limitations of what a diary can tell the reader, and would take it to represent what the Minister actually did and what his priorities were – even if the government gave a public explanation of those limitations. If the information were to be released with an explanatory introduction, the public may still search electronically for sections of this information and not see the context. Journalists could also use the information to produce flawed statistics, although in oral evidence Mr Smith accepted that a political journalist would be able to understand that a Ministerial diary was a tool for managing time rather than a complete record of actual Ministerial activities.

35. In relation to transparency, Mr Smith says that not only would the withheld entries not give an accurate reflection of what the Minister actually did, but there are other mechanisms by which Ministerial activities can be scrutinised. He referred in particular to the transparency data that is collated and published showing meetings by Ministers with external third parties.

36. In relation to section 35(1)(a), Mr Smith's open evidence was that this is engaged as the Minister's involvement in a meeting or discussion about policy tells the reader something about that policy. The public interest is against disclosure because the entries are liable to mislead and not give an accurate impression of how policy is formulated or developed, including the length of time spent on the issue. Release would harm the development of policy because it would lead the Minister to consider changing decisions about who to meet with or how long for.

37. In relation to section 35(1)(b), Mr Smith's open evidence referred to the problem of comparison of different Ministerial diaries, which could be contrasted to find out the stance of different parties from their different diary entries – e.g. the time spent on pre-meeting briefings and who was involved.

38. We also heard evidence from Mr Smith in closed session. The gist of the closed session, as drafted by the Commissioner and agreed by DCLG and the Tribunal, is as follows:

a. Mr Paines asked the witness to explain why certain entries had been released to the requester. The witness explained in relation to certain cases that they were considered to be 'ephemera' and had been released to the requester without conditions attached to the release. He also referred to certain entries containing publically available information.

b. Mr Paines went through a selection of items in the diary, asking questions about how the exemptions relied upon by the Appellant applied in relation to those entries, and for any specific public interest factors in favour of maintaining the exemption(s).

c. The witness referred on occasions to the Minister needing to have 'safe space' to discuss matters e.g. future policies, referring to the Appellant's reliance on section 35(1)(a).

d. The witness also referred to 'Ministerial communications'. Mr Paines put to the witness that the entries in question did not reveal the content of the communication.

e. The witness said the diary was a list of what was scheduled to take place. Where meetings were cancelled, for instance, there was no record (at least in the diary) of why the cancellation had occurred. The witness said that in his view when considering disclosure it is necessary to look at what is helpful to the public.

f. The panel members then had questions about the disputed information as it had been produced in the closed bundle. Mr Cross, for the Appellant, said he would check but it appeared that there were occasional printing issues; the substantive content was not different.

g. Mrs Cosgrave asked about the transparency information to which reference had been made. The witness set out that it records, government-wide, what meetings took place (as opposed to those planned and then cancelled) and what hospitality and gifts were received.

Section 35(1)(a)

39. The first issue is whether section 35(1)(a) is engaged by any of the disputed information. The information must "relate to" the "formulation or development" of government policy. Mr Cross submits that this wording is wide enough to cover a number of the diary entries. Mr Paines submits that none of the information is covered because the entries do not contain any information about the content of any policies

40. The most recent authority on the breadth of "relates to" is the Upper Tribunal decision in ***Cabinet Office v Information Commissioner and Morland*** [2018] UKUT 67 (AAC). This confirms that "relates to" carries a broad meaning, and means there must be "some connection" with the information, or the information "touches or stands in relation to" the object of the statutory provision (paragraph 18). The correct question is whether the requested information relates to "the process of policy formulation or development" (paragraph 28).

41. The Commissioner's Decision Notice refers to the information as lacking a "*necessary degree of significance to provide a sufficient enough link between the information itself and how a particular policy, whether specified in the entry or not, is formulated or developed*." We accept Mr Cross' submission that this is not the correct legal test in light of ***Morland***. The issue is whether there is some connection between the formulation or development of government policy and the information, or the information must touch or stand in relation to the object of the exemption. The connection must be with the process of policy formulation or development, not simply the existence of government policy.

42. Mr Cross submits that it is not necessary for the diary entries to set out a particular government policy, determine the stage of that policy, reveal the content of that policy, or reveal the content of policy discussions. Having viewed the disputed information (and as referred to in Mr Cross' open submissions), some of the diary entries show the fact of a meeting, sometimes who was due to attend that meeting, and the length of that meeting. In some cases the entry also identifies the broad area of government policy which is involved. This is what was planned and scheduled in the diary, not necessarily what actually happened. Mr Cross submits that this plainly creates "some connection" between the information and the formulation or development of government policy. The significance of that information is relevant to the public interest test, not the engagement of the exemption.

43. Mr Paines submits that "relates to" does not have an unlimited ambit, and it is not sufficient to simply relate to policy. The purpose of the exemption is to preserve a "safe space" for policy formulation, which does not arise where the information is in essence the fact that meetings were scheduled to take place. The information tells us nothing about actual policy formulation or development.

44. We agree that "relates to" is to be interpreted broadly, but it is important to consider the rest of the statutory wording as interpreted in ***Morland***. The necessary connection is with the "process" of policy "formulation or development". In a very broad way, the fact of a meeting to discuss an area of government policy could be seen as having "some connection" with, or touching or standing in relation to, the "process" of the formulation or development of government policy – i.e. the process involved having a meeting. But, we find that this connection is too tenuous. The information in question does not reveal anything about the actual content of any policy that was being formulated or developed, or anything else tangible about policy. We have taken into account the underlying purpose of this exemption in assessing the purpose of the wording, which is to preserve a safe space for policy development free from public scrutiny. We do not see that the mere fact of a planned meeting to discuss unspecified government policy would endanger this safe space, in the absence of any information at all about the content of the policy or the discussions which were intended to take place. We therefore find that the information does not engage section 35(1)(a).

45. We were referred to limited authority on the meaning of "relates to" in this context, so in case we are wrong in this assessment and the exemption is engaged we have gone on to consider the public interest test in relation to this exemption as set out below.

Section 35(1)(b)

46. The next issue is whether section 35(1)(b) is engaged by any of the disputed information. The information must "relate to" Ministerial communications, and "relate to" has the same meaning as discussed above.

47. Mr Cross submits that the information reveals scheduled meetings, with timings, at which it was intended that Ministers would communicate with each other. This is sufficient for the broad statutory test. Mr Paines submits that the information must relate to the content of communications, based on the underlying purpose of preserving a safe space for Ministerial decision-making.

48. The disputed information that we have seen reveals nothing about the actual content of communications between Ministers. At most, it shows scheduled meetings and (in some cases) the broad topic of the meeting. The purpose behind this exemption is to preserve a safe space for Ministerial discussions, and also in some cases to preserve collective responsibility. Disclosure of the mere fact of planned meetings between Ministers does not endanger either safe space or collective responsibility. This exemption requires the information to contain something about the content of communications. Otherwise, any information which shows that Ministers were in a situation where they may have been communicating with each other (or were scheduled to do so) would be covered. This clearly cannot be the purpose of the exemption. Although there only needs to be "some connection" with Ministerial communications, this must mean a connection with the content of communications rather than

the fact that some unspecified communication may have taken place. We therefore find that section 35(1)(b) is not engaged.

49. Although we found this point more straightforward than section 35(1)(a), for completeness we have gone on to consider the public interest test in relation to this exemption as set out below.

Public interest balance

50. We are considering the public interest balance in relation to 35(1)(d), which is accepted as applying to the disputed information. As noted above, although we have found that 35(1)(a) and (b) are not engaged, for completeness we are also considering the public interest balance in relation to these exemptions.

51. Our task is to balance the public interests in disclosure of the disputed information against the public interests in maintaining the exemptions. If the interests are evenly balanced, the public interest in maintaining the exemption will not have outweighed the public interest in disclosure, and so disclosure should be ordered (***Lewis*** (CA) paragraph 46).

52. We are considering an official Ministerial diary. In this case, this is not a diary written by the Minister himself as a record of events or a reflective exercise. It is a diary which is administered by the Minister's Private Office as a professional tool. It shows scheduled appointments (including some cancellations) and other planning of the Minister's time in relation to his activities as a Minister (as well as some information about others which has been withheld under section 40).

53. We also note that we are considering Mr Stokel-Walker's request for the "official diary" of the Minister for a specific time period. This is what he asked for. He did not make a request for information as to how the Minister actually spent his time.

54. We start with considering the public interest in disclosing the disputed information:

a. As noted by Lord Walker in ***BBC v Sugar (No 2)*** [2012] UKSC 4, FOIA was enacted "*to promote an important public interest in access to information about public bodies*" (paragraph 76). Subject to appropriate safeguards, there is a "*strong*" public interest in the press and general public having the right to require public authorities to provide information about their activities. This adds to parliamentary scrutiny, providing a "*further and more direct route to a measure of public accountability*". This general public interest clearly applies here, as the diary will provide additional information about the Minister's planned activities.

b. Mr Paines also referred us to the decision of the Upper Tribunal in ***Evans v Information Commissioner*** [2015] UKUT 313 (AAC), in relation to the importance of accountability and transparency. The promotion of "*good governance*" through accountability and transparency is "*strongly in the public interest*" (paragraph 131). The strength of these general interests under FOIA should be acknowledged because other methods of achieving accountability and transparency have had only limited success, and "*when disputed information concerns important aspects of the working of government, the interests in accountability and transparency will not merely be of*

general importance, but of particular strength" (paragraph 133). The disputed information here does concern important aspects of the working of government, by showing how a government Minister in a particular post plans and uses his time.

c. Looking at the requested information in this case, there is a more specific public interest in knowing how Ministers use their time. Ministers are responsible for particular areas of government policy and are publicly accountable for their actions. Mr Smith referred to the transparency information that is published showing all meetings by Ministers with external third parties, which is done to ensure Ministers are held up to public scrutiny in this area. This shows the importance of transparency in how Ministers deal with external third parties. The diary entries show not only planned meetings with external third parties, but also some planned telephone calls and cancelled meetings which are not shown in the published transparency information. Disclosure of this additional information would enhance transparency in relation to the Minister's dealings with external third parties.

d. The general public interest in transparency and accountability is stronger when applied to the specific post in question here, Minister for the Northern Powerhouse. At the time of the request this was a new, high-profile and potentially controversial Ministerial post. There is a legitimate public interest in understanding what activities the Minister was engaged in and how he planned to use his time, which would enhance public understanding of the Ministerial role and the Northern Powerhouse more generally.

e. Mr Cross submits that the diary does not give an accurate picture of the Minister's activities, and the Commissioner was wrong to suggest in her Decision Notice that it did. Therefore, the diary cannot meaningfully show how the Minister used his time or operated, and it cannot assist the public interest in what the Minister did. Not only is the diary 20% inaccurate in relation to what the Minister did, there is no way of knowing whether an individual entry is accurate or not. Mr Smith also made the point that the information is inaccurate and lacks clarity, and this means that it is of limited public interest.

f. We agree that the diary does not show what the Minister actually did. However, as submitted by Mr Paines (and accepted by Mr Smith in his evidence), it is 100% accurate as to what the Minister planned to do. It is also 80% accurate as to what the Minister actually did. Of the remaining 20% of inaccurate entries, as confirmed by Mr Smith a number of these inaccuracies would relate to timings of engagements rather than the engagement not having happened at all. We agree that it is not possible to know for sure from the disputed information whether a particular diary entry happened as planned. But, this does not mean there is little or no public interest in the information. The diary enables the public to see exactly what the Minister planned to do with much of his time, in his role as Minister. The diary also enables the public to gain an overall picture of the Minister's activities, even if some 20% of the entries are inaccurate in some respect. It shows the overall time spent on different types of activities, even if it does not indicate the relative importance of the issues involved. This may not enhance transparency and accountability as much as a full, confirmed record of what the Minister actually did. But there is still a significant level of public interest in this information.

g. Mr Cross also submits that the anodyne nature of the disputed information limits the public interest in disclosure. The diary contains no detail on the content of meetings or other engagements, and so provides very little information about the activities in question. It does not show how the Minister made decisions or anything about his private interests. The information would only be of significant interest to a limited section of the public with an interest in the Northern Powerhouse. We accept that the diary does provide only limited information. This means that any public interest in understanding actual formulation of Ministerial policies, or the weight given to specific policy issues, is served in a very limited way by the information. However, as already noted, there is a significant public interest in knowing how the Minister planned to spend his time, and in gaining an overall picture of how he did spend his time. We also do not accept that the Northern Powerhouse is of interest to only a limited section of the public, particularly at the time of this request when the Ministerial post was a new one.

55. Turning to the public interests in upholding the exemptions, Mr Cross puts this as, "*the interest in avoiding (in summary) the clear distraction of the Private Office and the Minister, resulting from the need to make the diary public-friendly; in circumstances where the information at issue in this particular case (whatever the position in others) reveals nothing in particular which it is in the public interest to know*." As already discussed above, we do not agree with the submission that the information at issue reveals nothing in particular which it is in the public interest to know. In relation to the public interests in upholding the exemptions:

a. Mr Smith's evidence was that it was necessary to contextualise the information in detail before it was disclosed, and this would take a substantial amount of work. This is because the diary is both inaccurate and lacks clarity. In essence, as submitted by Mr Cross, he was saying that it was necessary to make the diary "public-friendly". Although Mr Smith's written statement suggested this work would need to be done because of the potential for disclosure of diaries, his oral evidence referred only to this work being done after a FOIA request had been received.

b. We accept that a full contextualisation of the diary entries which involved checking, correcting and clarifying every entry would involve significant work which may be a distraction for the Private Office (although we are less clear as to how this would be a distraction for the Minister). But, we are not persuaded that this would be necessary. As accepted by Mr Smith in evidence, FOIA only requires a public authority to release the information that it holds at the time of the request. There is no requirement to contextualise or clarify the information at all - and, indeed, the information itself should not be altered. Mr Stokel-Walker asked for the diary itself, not for a corrected and clarified version of the events planned in that diary.

c. Mr Paines also submits that any contextualisation could be done with a short and general explanatory statement, and points to the fact that Mr Smith was able to explain the limits of the diary in his witness statement. We agree that any clarification that DCLG feels it needs to do to make the release of the information "public-friendly" can be done relatively simply. For example, DCLG could explain that this is a professional diary used as a tool for managing the Minister's time, it shows what was planned, but not all of the entries will be accurate because there will have been some late changes. This would be only a minor additional burden when responding to a FOIA request, and

would not present a clear distraction to the Private Office and/or Minister such as to affect the public interest in any significant way.

d. As a related point, Mr Smith expressed concern that the diary entries would be misunderstood by the public, and this would be against the public interest. He did not accept that the public would understand the limitations of a professional diary – although he did accept that a professional journalist would do so. Again, this concern could be addressed if necessary by a relatively simple explanatory statement. Mr Smith thought that the public might come across sections of the information on the internet without seeing any explanatory statement, but this is something that could happen with any release of information under FOIA. Once the information is in the public domain, extracts may be used in a way that is misleading. Mr Smith also expressed concern that journalists would use the information to produce flawed statistics. This can largely be prevented by an explanatory statement, and the fact that a professional journalist is likely to understand the limits of a professional diary. In addition, the danger of misperception does not mean it is in the public interest in this case to withhold the information. As stated by the Upper Tribunal in ***Evans*** (paragraph 188), in relation to the dangers of misperception on the part of the public, "*the essence of our democracy is that criticism within the law is the right of all, no matter how wrongheaded those on high may consider the criticism to be*".

e. The interests considered above apply to section 35(1)(d). Turning to section 35(1)(a), if this had been engaged we would have found that there are no significant additional public interests in upholding this exemption. The purpose behind this exemption is to provide a safe space for the formulation and development of government policy. As discussed above, the diary entries do not reveal anything about the content of government policy, and so any public interest in upholding the exemption is minimal.

f. Similarly, if section 35(1)(b) were to be engaged, we would have found that there are no significant additional public interests in upholding this exemption. The purposes behind this exemption are preserving a safe space for Ministerial communications, and in some cases preserving collective responsibility. As discussed above, the diary entries do not reveal anything about the content of Ministerial communications. Mr Smith referred in evidence to the problem of comparison of different Ministerial diaries, which could be contrasted to find out the stance of different parties from the time spent on meetings. Even if this could be done (which would depend on the level of detail in each individual diary), no actual content of Ministerial communications is involved. Again, any public interest in upholding the exemption is minimal.

g. As a final point, Mr Smith's written statement suggests there would be a "culture change" in how Ministerial diaries were dealt with if such diaries were to be disclosed under FOIA. It appears that he was no longer making this point in his oral evidence. In any event, as put to Mr Smith, the 2014 decision of the First-Tier Tribunal in ***Lewis*** made it clear that Ministerial diaries might need to be disclosed under FOIA. We had no evidence that any of these consequences had actually occurred, or indeed that there had been any change since ***Lewis*** in how Ministerial diaries are used or administered. Mr Cross drew our attention to the finding in ***Lewis*** that the resource impact on private office was a "significant factor" in assessing the impact of disclosure. However, this was a finding about future effects of the very first decision that Ministerial

diaries may be disclosed. We note that the evidence in this case is very different from that in ***Lewis***. The First-Tier Tribunal in ***Lewis*** was speculating about the possible effects if diaries were to be disclosed. In this case we have evidence as to what has (or hasn't) happened to damage the public interest as a consequence of the ***Lewis*** decision.

56. In conclusion, we find that the public interest in maintaining the exemptions relied on does not outweigh the public interest in disclosure. As submitted by Mr Paines, the disputed information is not "earth-shattering". The information only provides limited details. Nevertheless, there is a substantial public interest in disclosure of the information, based on transparency and accountability in the context of the (then) new Ministerial post in relation to the Northern Powerhouse. This substantial public interest is not outweighed by the limited public interest in avoiding a modest burden to the Minister's Private Office of providing some explanatory context to the diary (if they wish to do so). This remains the case after any additional minimal public interest in "safe space" for government policy or Ministerial communications is taken into account.

Conclusions

57. Paragraph 80 of the Commissioner's Decision Notice will need to be amended to include the additional redactions agreed between the parties under section 40(2), as set out in the letter from DCLG of 28 March 2018, and the corrections set out at paragraph 26 above.

58. Otherwise, we uphold the decision of the Commissioner and dismiss the appeal.

59. The parties should note that this decision covers the information that had already been disclosed on a voluntary basis, as this was done without accepting that FOIA applied to this information. We also note that the information provided by DCLG to Mr Stokel-Walker should be a full version of that provided to the Commissioner (including the spreadsheet line numbers and the full text in each field presented), and should be the content of the official diary as at the time of Mr Stokel-Walker's requests without amendment or addition.

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date: 15 April 2018