Case Reference: EA-2022-0143
EA-2022-0144
Neutral Citation number: [2023] UKFTT 427 (GRC)

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: CVP

Heard on: 9 February 2023
Tribunal deliberations on: 2 March 2023
Decision given on: 21 March 2023

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER PAUL TAYLOR
TRIBUNAL MEMBER JO MURHPY

Between

DEPARTMENT FOR LEVELLING UP, HOUSING AND COMMUNITIES

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:
For the Appellant: Jack Anderson (Counsel)
For the Respondent: Oliver Jackson (Counsel)

Decision: The appeals are allowed in part. The Appellant was entitled to rely on section 42 of the Freedom of Information Act 2000 to withhold part of the requested information. The Appellant was not entitled to rely on section 35 or section 36 to withhold the remainder of the requested information.

Substituted Decision Notices – IC-104925-0143 and IC-94008-P7W3

Organisation: Department for Levelling Up, Housing and Communities

Complainants: Mr. Patrick Cowling (IC-104925-0143) and Mr George Grylls (IC-94008-P7W3)

For the reasons set out below:

(i) The public authority was entitled to rely on section 42 of the Freedom of Information Act 2000 to withhold the following parts of the requested information: the last part of paragraph 11 and paragraphs 21 -24.

(ii) The public authority was not entitled to rely on section 35 or section 36 to withhold the remainder of the requested information.

(iii) The public authority is required to disclose the remainder of the requested information to the requestors within 35 days of the date this decision is promulgated.

(iv) Any failure to abide by the terms of the tribunal's substituted decision notice may amount to contempt which may, on application, be certified to the Upper Tribunal.

REASONS

Introduction

1. This decision contains a closed annex. If there is no appeal, it is likely that it will not be necessary for the annex to remain closed. The tribunal will seek and take account of the parties' views before publishing the annex. The annex will remain closed in any event until the latter of the following dates:
   1.1. The expiry of the time limit for appealing to the Upper Tribunal.
   1.2. The refusal of any application for permission to appeal by the First-Tier Tribunal or the Upper Tribunal.
   1.3. The conclusion of any appeal to the Upper Tribunal.

2. These are two joined appeals. The appeals relate to requests for disclosure of the Accounting Officer's full assessment (the Assessment) of the process adopted by the Department for Levelling Up and Communities (the Department) for selecting which towns could bid for the Towns Fund, a £3.6 billion fund to assist struggling towns in England.

3. EA/2022/0143 is an appeal against the Commissioner's decision notice IC-104925-R4H6. EA/2022/0144 is an appeal against the Commissioner's decision notice IC-94008-P7W3.

4. Both decision notices were dated 11 May 2021 and held that neither section 36(2) nor section 42(1) were engaged and that the Department was required to disclose the information.

5. Section 42 is no longer in issue. The parties are agreed that the section 42(1) exemption is engaged in relation to the legal advice contained in the Assessment and that the public interest favours maintaining the exemption in respect of this part of the requested information.

Factual background

6. Large parts of this background are taken from the parties' pleadings and written submissions, for which the tribunal is grateful.

7. The Departmental Accounting Officer ("AO") is personally responsible and accountable to Parliament for their department's use of public money. The AO is normally also the Permanent Secretary and therefore also owes a duty in that capacity to serve the Departmental Minister.

8. The production of an AO Assessment is part of the process of assurance that the standards set out in in Managing Public Money (MPM) are met. There is published guidance in relation to AO assessments (in this appeal, published in September 2017 – "the 2017 AO Guidance").

9. At the date of the requests, the Department was known as the Ministry of Housing, Communities and Local Government. In July 2019 the Government announced the Towns Fund. The Department designed a process to support Ministers to select which towns should receive funding, providing a prioritised and ranked list of the 541 different options. The list ranked the towns as high- medium- and low- priority. The list gave the Ministers scope to use their own judgment on which towns to select.

10. Ministers selected all 40 high-priority towns and 61 from the pool of 501 low- and medium-priority towns.

11. On 6 September 2019, 101 towns in England were invited to develop proposals to bid for up to £25 million (or more in exceptional cases) of funding to implement a Town Deal in accordance with the Towns Fund prospectus.

12. On 21 July 2020 the National Audit Office (NAO) published a report by the Comptroller and Auditor General entitled "Review of the Town Deals selection process" (the NAO Report). The Department provided the full Assessment to the NAO for the purposes of its investigation. The NAO Report sets out the process by which towns were selected, the results of the selection process, and the rationale.

13. The Parliamentary Public Accounts Committee (PAC) published its report "Selecting towns for the Towns Fund" on 11 November 2020 (the PAC Report).

14. On 14 January 2021 the Department published a summary of the Assessment online (the Summary).

15. Further guidance relating to the Towns Fund was issued in June 2021. In July 2021, the Department published a full list of the funding allocated, amounting to about £2.3 billion.

16. There was also a competitive fund of £830 million, the future high streets fund. It was announced in November 2021 that £300 million set aside for a proposed third competitive strand of funding would now be delivered through the Levelling Up Fund.

Request

17. This appeal concerns two requests made on 11 November 2020 and 18 November 2020.

18. On 11 November 2020 Patrick Cowling *(*the First Requestor), a journalist at the *BBC,* made the following request (the First Request):

> "In the [PAC Report] it says the following: 'The Department's Permanent Secretary confirmed that he was satisfied the selection process met the requirements of HM Treasury's Managing public money, but he would not commit to sharing his Accounting Officer assessment with the committee. He has since written to the Committee with a summary of his assessment provided in confidence, and on which we therefore will not comment. It remains unpublished.'
>
> I would therefore like to request the release of the two documents mentioned in the extract above, namely:
> 1. the Accounting Officer's assessment
> 2. The Permanent Secretary's summary of his assessment"

19. On 18 November 2020 George Grylls (the Second Requestor), a journalist at *The Times*, made the following request (the Second Request):

> "This is a freedom of information request for a full copy of the accounting officer's assessment of the Towns Fund"

20. The Department responded to both requests on 14 January 2021. It provided a link to the Summary, as requested in part 2 of the First Request. It confirmed that it held the Assessment but refused to disclose it, relying on section 35(2) FOIA (formulation of government policy). On 16 April 2021 the Department upheld the decision on internal review, relying in addition on sections 36(2) (prejudice to the effective conduct of public affairs) and, in respect of some information, section 42(1) (legal professional privilege).

21. During the Commissioner's investigation the Department stated that it no longer relied on section 35(1)(a).

Decision notice

22. In two decision notices dated 11 May 2021 the Commissioner held that neither section 36(2) nor section 42(1) were engaged and required the Department to disclose the information. The decision notices are substantially identical.

23. In relation to section 36(2) the Commissioner found that the materials provided to the Minister (for the purposes of the opinion of the qualified person) were inadequate and did not document the reasons why disclosure would be likely to have the claimed prejudicial or inhibitory effects. The same was true of the "Record of qualified person's opinion" signed by the Minister. The Commissioner concluded that the opinion was not reasonable.

24. The Commissioner concluded that section 42 did not apply because the Department had not established who the legal advisor was and who the client was, nor that a legal advisor had communicated the information in their professional capacity.

Grounds of appeal – both appeals

25. The Grounds of Appeal are that the decision notices were wrong because:
    25.1. The information is exempt under section 35 FOIA
    25.2. The information is exempt under section 36 FOIA
    25.3. The legal advice is exempt under section 42 FOIA

The Commissioner's response – both appeals

Section 35

26. The Commissioner is unsure of the policy to whose formulation or development the Assessment is said to relate. On the assumption that it is the selection of towns for funding through the £3.6 billion Towns Fund, the Commissioner's position is that the Assessment does not relate to the formulation or development of that policy.

27. In the Commissioner's view the Assessment was an administrative document concerned with the implementation of the Towns Fund policy rather than its formulation or development. It did not influence the design of the Towns Fund policy or the process by which towns were selected for funding. It merely recorded and explained these steps. It was not concerned with reviewing or improving the existing policy. The towns had already been selected by Ministers.

Section 36

28. The Commissioner submits that the record of the qualified person's (QP's) opinion dated 26 April 2021 does not include any reasons from the Minister. The submission to the Minister simply asserted that the necessary prejudice/inhibition would be likely to occur rather than explaining how. The Commissioner maintains that the opinion was not substantively reasonable where the QP lacked any evidence on which to base that opinion and provided no reasons for that opinion.

Section 42

29. [This is no longer in issue]

The public interest test

30. The Commissioner's position is that the public interest favours disclosure. There is a general public interest in transparency. There is a legitimate interest in the process by which the £3.6 billion Towns Fund was allocated. There was a plausible suspicion of wrongdoing over the process by which that money was allocated, indicated by the PAC Report. These factors outweigh the public interest factors in favour of withholding the information.

Reply by the Department

Legal framework

31. The Department submits that there is no requirement that the policy-making process still be live in order for the exemption to bite: **Cabinet Office v Information Commissioner** [2018] UKUT at paragraph 29.

32. It submits that the question is whether the QP's opinion is substantively, not procedurally, reasonable. The opinion is not conclusive but must be accorded a measure of respect.

33. The Department submits that in considering a possible 'chilling effect', that effect need not be proved by evidence in any particular case (**Department of Health and Social Care v Information Commissioner** [2020] UKUT 299 at paragraphs 28 – 30) but the tribunal is entitled to scrutinise claims that there would be such an effect in context (**Davies v Information Commissioner** [2019] 1WLR 6641 at paragraphs 25 – 30).

The role of accounting officer assessments

34. The Department submits that the departmental Accounting Officer ("AO") is personally responsible and accountable to Parliament for their department's use of public money (see Chapter 3 of Managing Public Money ("MPM")). The AO is normally also the Permanent Secretary and therefore also owes a duty in that capacity to serve the Departmental Minister. The production of an AO assessment is part of the process of assurance that the standards in MPM are met.

35. The Department sets out the relevant extracts from the 2017 AO Guidance and notes that the Guidance recognises that the AO assessment itself may affect the formulation or development of the policy.

36. The Department submits that the 2017 AO Guidance was clear that it would not normally be appropriate for the full assessment to be published. That reflects a settled understanding of the importance of ensuring a safe space for the AO in relation to the production of an AO assessment, having regard to the personal nature of the opinion and the role of the AO assessment in ensuring that the standards in MPM are met.

37. The AO guidance was revised in December 2021 ("the 2021 AO Guidance"). Paragraph 1.11 notes the expectation that a summary of the AO assessment will be prepared and published.

Section 35

38. The Department submits that if the AO concludes that the standards are not met, that may require that the relevant policy (in this case the method and selection of towns for the Towns Fund) is modified. The Department submits that this is not implementation but part of ensuring that policy is formulated and developed in accordance with MPM. The Assessment is developed alongside policy discussions, rather than being written only after the policy was settled. It plainly related to the

formulation and development of government policy even if it did not conclude that the policy needed to be changed.

Section 36

39. The Department submits that the QP's opinion that disclosure would lead to prejudice was a reasonable one to hold. The Commissioner focusses on putative flaws in the process and/or record of reasoning rather than on its substantive reasonableness. The QP's opinion is consistent with the opinions of others and with the AO Guidance.

40. The Department submits that the opinion was plainly objectively and substantively reasonable. The preservation of a safe space is particularly important because :

    40.1. The Assessment is the personal responsibility of the AO.
    40.2. The AO is normally also the Permanent Secretary and owes a duty to the Minister. Publication may jeopardise the ability of the AO to be frank because of the potential impact on relations with the Minister or other Ministers in the future.
    40.3. The 'middle-space', falling short of the circumstances in which it is necessary or appropriate to seek a Ministerial Direction, would be jeopardised.
    40.4. There is a risk that AO assessments come to be drafted more as justifications for the AO's conclusions than documents aimed at providing frank advice as to areas of challenge.

Section 42

41. [No longer in issue]

The public interest

42. The Department submits that the interest in transparency is outweighed because:
    42.1. The risk of a chilling effect is particularly significant for the reasons set out above.
    42.2. The public interest in disclosure is diminished by publication of the Summary.
    42.3. Accountability and information have been provided by the NAO Report and the PAC Report. The NAO were provided with the full Assessment.

Evidence and gist of closed session

43. We read an open and a closed bundle and a number of additional documents including an additional QP's opinion (and submissions to the QP) dated 23 January 2023. With the agreement of the Department, the submissions to the QPs and both opinions are now to be treated as open material.

44. The bundles include an open and a closed witness statement from David Thomas, senior civil servant, dated 14 October 2022. We heard oral evidence from David Thomas. Mr Thomas was an impressive witness and appropriately indicated where matters were outside his knowledge. He made concessions where appropriate. We attach significant weight to his experience and expertise and have highlighted the

reasons for any departure from his evidence within our discussions and conclusions below.

45. After the hearing we were provided with an amended marked-up copy of the Assessment which forms part of the closed material.

46. The closed bundle consists of:

46.1. A closed witness statement of Mr. Thomas plus exhibits.
46.2. Various items of correspondence between the Commissioner and the Department.
46.3. The Assessment.

47. It is necessary to withhold the above information because it refers to the content of the withheld information, and to do otherwise would defeat the purpose of the proceedings.

48. The following is a gist of the closed session, prepared by the parties and approved by the tribunal:

> "Counsel for the Appellant asked Mr Thomas to clarify which paragraphs of the Assessment were no longer being contested. Mr Thomas explained that information in only four paragraphs was still being contested by the Department, and the Department's broad reasons for contesting that information. He stated that, in respect of that contested information, the Department was of the view that the relevant section 35(1)(a) and/or section 36(2) exemptions were engaged, and that the balance of the public interest was not in favour of disclosure. Some of the information was no longer being contested.
>
> Judge Buckley, Mr Taylor and Ms Murphy asked questions about: whether the policy was still live at the time that the Department answered the Requestors' requests in January 2021; why the Appellant didn't inform the Requestors that some of the information in the Assessment was already in the public domain through the NAO Report; why the Appellant had recently changed its mind in deciding that some of the information which was previously being contested was no longer being contested; whether some of the information which was still being contested was already in the public domain in effect; and whether the Commissioner had agreed that a particular sentence in the Assessment was covered by legal advice privilege and should not be disclosed. On this last point, Counsel for the Commissioner explained that the Commissioner agreed that that particular sentence was covered by the legal advice privilege exemption, and should not be disclosed."

The law

49. The relevant parts of sections 1 and 2 FOIA provide:

> "General right of access to information held by public authorities.

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.

Effect of the exemptions in Part II.
.....
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 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."

50. **APPGER v Information Commissioner and Foreign and Commonwealth Office** [2016] AACR 5 gives guidance on how the balancing exercise required by section 2(2)(b) of FOIA should be carried out:

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

Section 35(a) FOIA

51. Section 35(a) FOIA provides as follows:

> "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"

52. Section 35 is a class-based exemption: prejudice does not need to be established for it to be engaged. It is not an absolute exemption. The tribunal must consider if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

53. Case law has established in the FOIA context that "relates to" carries a broad meaning (see **APPGER** at paragraphs 13-25). In **UCAS v Information Commissioner and Lord Lucas** [2015] AACR 25 at paragraph 46 the Upper Tribunal approved the approach of the FTT in the APPGER case where it said that "relates to" means that there must be "some connection" with the information or that the information "touches or stands in relation to" the object of the statutory provision.

54. The question of whether the policy-making process is still 'live' is an issue that goes to the assessment of the public interest balancing test, and not to whether the section 35(1)(a) exemption is engaged in the first place (**Morland v Cabinet Office** [2018] UKUT 67 (AAC).

55. The intersection between the timing of the FOIA request and its relevance to the public interest balancing test is helpfully analysed by the First-tier Tribunal in **Department for Education and Skills v Information Commissioner and the Evening Standard** (EA/2006/0006) ("DFES") at paragraph 75(iv)-(v) (a decision approved in **Office of Government Commerce v Information Commissioner** [2008] EWHC 774 (Admin); [2010] QB 98 ("OGC") at paragraphs 79 and 100-101):

> "(iv) The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy. We note that many of the most emphatic pronouncements on the need for confidentiality to which we were referred, are predicated on the risk of premature publicity. In this case it was a highly relevant factor in June 2003 but of little, if any, weight in January 2005.
>
> (v) When the formulation or development of a particular policy is complete for the purposes of (iv) is a question of fact. However, section 35(2) and to a lesser extent 35(4), clearly assume that a policy is formulated, announced and, in many cases, superseded in due course. We think that a parliamentary statement announcing the policy, of which there are examples in this case, will normally mark the end of the process of formulation. There may be some interval before development. We do not imply by that that any public interest in maintaining the exemption disappears the moment that a minister rises to his or her feet in the House. We repeat – each case must be decided in the light of all the circumstances. As is plain however, we do not regard a "seamless web" approach to policy as a helpful guide to the question whether discussions on formulation are over."

56. The public interest can wax and wane and the need for a safe space changes over time in relation to development of policy.

57. If disclosure is likely to intrude upon the safe space then there will, in general terms, be significant public interest in maintaining the exemption, but this has to be assessed on a case by case basis.

58. In considering the factors that militate against disclosure the primary focus should be on the particular interest which the exemption is designed to protect, in this case the efficient, effective and high-quality formulation and development of government policy.

59. In relation to 'chilling effect' arguments, the tribunal is assisted by the following paragraphs from the Upper Tribunal decision in **Davies v IC and The Cabinet Office** [2019] UKUT 185 (AAC):

> "25.There is a substantial body of case law which establishes that assertions of a "chilling effect" on provision of advice, exchange of views or effective conduct of public affairs are to be treated with some caution. In *Department for Education and Skills v Information Commissioner and Evening Standard* EA/2006/0006, the First-tier Tribunal commented at [75(vii)] as follows:
>
> > "In judging the likely consequences of disclosure on officials' future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants since the Northcote-Trevelyan reforms. These are highly-educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions. The most senior officials are frequently identified before select committees, putting forward their department's position, whether or not it is their own."
>
> 26.Although not binding on us, this is an observation of obvious common sense with which we agree. A three judge panel of the Upper Tribunal expressed a similar view in *DEFRA v Information Commissioner and Badger Trust* [2014] UKUT 526 (AC) at [75], when concluding that it was not satisfied that disclosure would inhibit important discussions at a senior level:
>
> > "75. We are not persuaded that persons of the calibre required to add value to decision making of the type involved in this case by having robust discussions would be inhibited by the prospect of disclosure when the public interest balance came down in favour of it...
> > 76. ...They and other organisations engage with, or must be assumed to have engaged with, public authorities in the full knowledge that Parliament has passed the FOIA and the Secretary of State has made the EIR. Participants in such boards cannot expect to be able to bend the rules."
>
> 27. In *Department of Health v Information Commissioner and Lewis* [2015] UKUT 0159 (AAC), [2017] AACR 30 Charles J discussed the correct approach where a government department asserts that disclosure of information would have a "chilling" effect or be detrimental to the "safe space" within which policy formulation takes place, as to which he said:
>
> > "27. ...The lack of a right guaranteeing non-disclosure of information ...means that that information is at risk of disclosure in the overall public interest ... As soon as this qualification is factored into the candour argument (or the relevant parts of the safe space or chilling effect arguments), it is immediately apparent that it highlights a weakness in it. This is because the argument cannot be founded on an expectation that the relevant communications will not be so disclosed. It follows that ... a

> person taking part in the discussions will appreciate that the greater the public interest in the disclosure of confidential, candid and frank exchanges, the more likely it is that they will be disclosed...
> 28. ...any properly informed person will know that information held by a public authority is at risk of disclosure in the public interest.
> 29. ... In my view, evidence or reasoning in support of the safe space or chilling effect argument in respect of a FOIA request that does not address in a properly reasoned, balanced and objective way:
> i) this weakness, ... is flawed."

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

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

30.Charles J said at [69] that the First-tier Tribunal's decision should include matters such as identification of the relevant facts, and consideration of "the adequacy of the evidence base for the arguments founding expressions of opinion". He took into account (see [68]) that the assessment must have regard to the expertise of the relevant witnesses or authors of reports, much as the qualified person's opinion is to be afforded a measure of respect given their seniority and the fact that they will be well placed to make the judgment under section 36(2) – as to which see *Malnick* at [29]. In our judgment Charles J's approach in *Lewis* applies equally to an assessment of the reasonableness of the qualified person's opinion as long as it is recognised that a) the qualified person is particularly well placed to make the assessment in question, and b) under section 36 the tribunal's task is to decide whether that person's opinion is substantively reasonable rather than to decide for itself whether the asserted prejudice is likely to occur. Mr Lockley agreed that the considerations identified by Charles J were relevant. We acknowledge that the application of this guidance will depend on the particular factual context and the particular factual context of the *Lewis* case, but that does not detract from the value of the approach identified there."

Section 36

60. Section 36 provides in material part that:

"36 Prejudice to effective conduct of public affairs

(1) This section applies to—

(a) information which is held by a government department … and is not exempt information by virtue of section 35, and
…
(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act…

(b) would, or would be likely to, inhibit—
(i) the free and frank provision of advice, or
(ii) the free and frank exchange of views for the purposes of deliberation, or

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

61. It is for the tribunal to assess whether the qualified person's (QP's) opinion that any of the listed prejudices/inhibitions would or would be likely to occur is reasonable, but that opinion ought to be afforded a measure of respect**: Information Commissioner v Malnick** [2018] UKUT 72 (AAC), [2018] AACR 29 at paragraphs 28-29 and 47.

62. It is not an absolute exemption.

Open oral submissions, open skeleton arguments and supplementary submissions

Parliamentary privilege

63. It was largely agreed between the parties as to what was in scope of the principle of parliamentary privilege and the approach to be taken by the tribunal, namely that in so far as what is relied on are statements of fact and in particular statements of agreed fact, there is no objection to relying on that material. It was agreed, in essence, that the tribunal could treat the NAO report as covered by parliamentary privilege without the need to make a ruling on that issue.

The timing of the assessment of public interest

64. The Commissioner submitted that the date on which the tribunal is required to conduct the public interest balance depends on whether the public authority responds to the request within the statutory timeframe set out in sections 10 and 17 FOIA. If the response is in time, it is considered at the date of that response. Where the response is late, it is considered at the latest date by which the public authority should have responded. In this case, the responses were late and the dates are therefore 9 December 2020 for the first request and 16 December 2020 for the second request. The disclosure of the Summary cannot therefore be taken into account.

65. In support of this submission Mr. Jackson highlighted the reasoning of the Upper Tribunal at paragraphs 65-67 of **Montague v Information Commissioner** [2022] UKUT 104 (AAC), which relies on the actions that the public authority is required to take by Part I FOIA.

66. Mr. Anderson submitted that the requirement with which the Upper Tribunal was concerned was the requirement to respond to the request. Once the public authority has done so, it has done what FOIA requires. That is true even if the response was later than it was required to be. There is nothing in **Montague** to support the position that the relevant time is when a request ought to have been made even if, in fact, there was no response by that time.

General points

67. It was common ground that the question was whether or not the particular information in dispute should be disclosed, not whether AO assessments in general should be disclosed. Mr. Anderson submitted that, nonetheless, there are particular structural features of AO assessments and the role of AOs that are relevant. Mr. Jackson accepted that wider points can be relevant, but reminded the tribunal that our decision does not set a precedent therefore wider concerns about future AO assessments being disclosed are not relevant.

68. Mr. Jackson made the following overarching points:

68.1. The thread running through the appeal is whether the public and the struggling towns which were not invited to bid for the £3.6 billion Towns Fund should be made more aware of the process by which 101 towns but not others were selected to be able to bid for that taxpayers' money. The contested information could either refute or support the reasonable suspicion of wrongdoing. These are strong public interest factors in favour of disclosure.

68.2. The focus is on the contested information in the specific Assessment. That information has to relate to the formulation or development of policy and be covered by the reasonable opinion. Wider points concerning the structure within which AOs operate can provide context and explanation but the evidence of Mr. Thomas includes matters that are not relevant. They are concerns about future AO assessments being disclosed. This case does not set a precedent one way or another about disclosure of AO assessments.

69. Mr. Jackson submitted that there is nothing unusual about the personal responsibility of the AO. This is not in itself a factor that attracts any public interest or legal consequence one way or another. The AO is the permanent secretary and therefore would be least susceptible to chilling effect concerns.

Section 35(1)(a)

Engagement

70. Mr. Anderson submitted that the timing of the request does not give the answer to whether the information relates to the formulation or development of government policy. Whether or not the policy formulation or development was live at the date of

the request is irrelevant to the engagement of the exemption. 'Relates to' has a broad meaning – it has to have some connection with the information.

71. Mr. Anderson submitted that the information did not simply relate to the implementation or administration of policy. The Assessment is an integral part of the policy formulation and development process. It is not a retrospective audit of a decision that has been taken, it is one of the 'keys', along with treasury approval, to getting to a final decision.

72. Mr. Jackson submitted that although 'relates to' has a broad meaning, it "should not be read with uncritical liberalism as extending to the furthest stretch of its indeterminacy, but instead must be read in a more limited sense so as to provide an intelligible boundary, suitable to the statutory context" (**Department of Health v ICO** [2017] 1 WLR, quoting with implied approval from the FTT decision).

73. Mr. Jackson submitted that previous iterations and drafts of the Assessment may well relate to the formulation and development of policy. The Assessment does not. He argued that the policy is not the entire process of the Towns fund over 5 years, the policy in question is the ministerial selection process of which the results were announced on 6 September 2019. This is relevant to whether the Assessment relates to the policy in question.

Public interest balance

74. The Department does not dispute that there is a general public interest in disclosure and that there are features of this case which might stand in favour of disclosure, including the amount of money at stake, a degree of media attention and political comment. Mr. Anderson submitted that even to make a finding of a reasonable suspicion of wrongdoing would be to go beyond what can properly be found on the evidence, in particular given the limitations of the extent to which the tribunal can rely on the various reports to which parliamentary privilege attaches. It is fair to note that there were members of the public who were concerned that there may have been wrongdoing, or who raised those concerns in correspondence.

75. Mr Anderson submitted that a number of factors diminished the public interest in disclosure:

    75.1. Other accountability mechanisms exist in this context, in particular through the NAO and the PAC.
    75.2. Other information was in the public domain at the relevant date.
    75.3. The published Summary was detailed and included reference to the fact that there was, in certain respects in relation to the allocation of funding, divergence between the options put forward by civil servants and the decision of the ministers.

76. In relation to the factors in favour of withholding the information the arguments related to the potential chilling effect and the importance of maintaining a safe space.

77. Mr. Anderson submitted that the tribunal must avoid two extreme positions:

77.1. That publication of any official information would have a chilling effect, notwithstanding the high standards of professionalism to be expected from the civil service, and

77.2. Approaching the question of prejudice and risk in a way that is self-defeating. One of the arguments to which the tribunal can have regard is the argument that officials know that FOIA exists and are already aware of the possibility of disclosure which is said to go to some extent to diminishing the weight of a safe space argument. That goes too far. It is open to the tribunal to have regard to the fact that the possibility of disclosure might exist but Parliament created this exemption with the intention of ensuring that a safe space was nonetheless preserved.

78. It was submitted on behalf of the Department that the tribunal must avoid either extreme and focus on the particular information as well as the structural features of the AO in that role. The tribunal must not put out of its mind the risks that arise from compelled disclosure of such assessments in relation to how future assessments might be prepared. That is always the risk that arguments on chilling effect and safe space go to.

79. Mr. Anderson submitted that the tribunal has heard clear and candid evidence from Mr. Thomas, a senior civil servant, that if those drafting the submissions in the Assessment had to have more in mind the risk of disclosure to a wider audience, that may have an effect in terms of couching how their submissions were made. Any person communicating will tailor the way they communicate to who they believe their audience will be. This will be different if the anticipated audience is effectively contained to those at a high level within the policy making process compared to the wider world. An important feature of the AO process is that it gives the opportunity for the AO to say 'pause' or to highlight the issues that need particular care and attention.

80. He highlighted other features of the role that point to why ensuring a safe space is particularly important in this context:

80.1. It is an important gateway in the policy formulation process – one of the 'keys' to a final decision - not a matter of routine administration.

80.2. The AO is personally responsible to Parliament which underscores the importance of the Assessment and the importance of getting frank advice. There is a risk of that being tempered if the advice had to be drafted with a mind to a wider audience.

80.3. The AO will generally be the permanent secretary – the official at the very highest level, and an individual for whom the relationship with the Minister is the most important. There is a risk to that relationship if officials are seen publicly to be criticising or departing from policy that they are bound as civil servants to support and implement.

80.4. It is important to preserve and protect the intermediate space before officials take the step of seeking a published Ministerial direction. If individuals are more conservative in how they couch their language in an AO assessment

that diminishes the value of the free and frank exchange of views and information in the intermediate space and is inimical to good policy making.

81. Mr. Anderson submitted that the Assessment is a good example of a case where those features are salient, not least because it involved a lot of money on an issue that was potentially controversial and therefore where it was important to be as frank as possible at that stage in the process.

82. Whilst Mr. Anderson accepted that it was right that disclosure does not set a legal precedent for disclosure of future AO assessments, the tribunal has to consider if there may be indirect and wider consequences as a matter of fact when considering the potential chilling effect of a decision (**DHSC** paragraph 26).

83. The Department does not rely on the wider policy connections to establish that the section 35 exemption is engaged, it is more relevant to liveness in relation to the public interest balance.

84. It was submitted that relying on the Guidance as a factor in favour of the respondent's case is peculiar when the thrust of that guidance plainly emphasises that generally AO assessments won't be published in full.

85. Mr. Anderson argued that the conscientiousness of civil servants cuts both ways. The tribunal has heard evidence from a conscientious senior civil servant who has taken time out from his work to explain why particular effects may arise from disclosing certain types of information and his evidence should be given significant weight. Mr. Thomas was a candid and helpful witness, who could speak both to the general structure and in relation to the specific information in issue.

86. Mr. Anderson submitted that there is nothing as a matter of law that says that a tribunal should reject arguments on a chilling effect. It is a matter of fact to be determined in the circumstances of every case.

87. The tribunal asked Mr. Anderson about the effect on arguments based on the potential chilling effect of the tribunal's decision of the fact that the NAO decides what parts of the Assessment would be put into the public domain, without any veto for the AO.

88. Mr. Anderson submitted that, as Mr Thomas said in his evidence, there is a degree of dialogue between the NAO and the AO in relation to the final form of the report which may include considerations of confidentiality amongst other things so there is scope within that for the AO to have a role in deciding what will go in the final report. Further, publication as part of the same accountability structure is quite different from the prospect of material going out into the wider world before the wider public when it is not subject to that filter of the NAO considering what is relevant and what should not be published in its report, and which was necessary to be published in its report for the purposes of the functions it is performing.

89. Mr. Jackson submitted that the public interest lies in favour of disclosure, taking account of the following:

89.1. If either exemption is engaged it is only weakly engaged.

89.2. The importance of the subject matter. There is significant public and political interest in the equality of opportunity across the UK. The fact that Ministers went against officials' recommendations as to the geographical spread of eligible towns is directly relevant to the levelling up agenda.
89.3. The tribunal is asked to make a finding that there was a reasonable suspicion of wrongdoing based on the facts in the NAO report and from the text of the request for an internal review. There is a strong public interest in either supporting or refuting this.
89.4. Disclosure would give a full picture of what was in the Assessment. It is not so much what the disputed information does say, as what people might think it says if withheld.
89.5. The scale of public money involved.
89.6. The public interest in the towns not invited to bid finding out the full extent of the process.
89.7. There has been significant media interest and there is a public interest in the press being able to report on government processes and action.
89.8. There is no reasonable expectation of non-disclosure. Both the 2017 and 2012 guidance contemplate that the AO assessment may be published.
89.9. The inherent public interest in transparency of government action.

90. In relation to the counter arguments, Mr. Jackson submitted:
90.1. There are alternative mechanisms of accountability in the NAO and the PAC, but the disputed information is not in those reports.
90.2. It was suggested by Mr. Thomas that it is for the AO to decide whether or not to disclose and the tribunal should take account of that. It cannot be a factor that the public authority does not want to disclose the requested information, because this would apply in every case before the tribunal.

91. Mr. Jackson noted that the chilling effect argument was made in different ways. It would lead to officials couching their language differently. It would undermine the middle space that an AO Assessment occupies before a ministerial direction is sought. It gives an opportunity for policymakers to raise a red flag over something that might be problematic. These are all arguments that if disclosure was ordered, people might behave differently in the future.

92. Mr. Jackson submitted that this was considered to be a poor argument because of the conscientiousness and competence of the high quality civil servants we are lucky to have. The idea that they would not provide free and frank advice in the future is rightly deprecated. Mr. Thomas was concerned, but he need not be, about the effect on the permanent secretary. It was suggested that the permanent secretary has a relationship with the Minister that needs to be protected, but there is no need to treat permanent secretaries as if they are fragile.

93. The tribunal asked Mr. Jackson about the effect on arguments based on the potential chilling effect of the tribunal's decision of the fact that the NAO decides what parts of the Assessment would be put into the public domain, without any veto for the AO.

94. Mr. Jackson submitted that this does go to show that the chilling effect argument is overstated. Mr Thomas was clear that while there is a negotiation between the AO and the NAO the final decision lies with the Comptroller general of the NAO and if

they are of the view that the information should be published then that is the decision that is made. That seems to have been the case for some time and hasn't caused any great concerns.

95. The Commissioner accepts that the Government is entitled to a safe space, but on the facts of this case, even if the information did still relate to the formulation and development of policy, the need for a safe space was rapidly diminishing at the date of the Assessment given how soon after the policy was announced. By the time of the response to the request in January 2021 any public interest in maintaining the exemption was significantly diminished.

Section 36

Engagement

96. Mr. Anderson submitted that in accordance with **Malnick** the test is one of substantive reasonableness:

> "If a defect in the process by which the opinion was reached would mean that the opinion was not reasonable, the result would be that information would have to be disclosed even though the opinion appears to be correct in substance and where the consequences of disclosure would be very serious prejudice within section 36(2) and where there was no sufficient countervailing public interest in disclosure. Such an outcome militates against the purpose of FOIA which is concerned with matters of substance not process. We agree with Ms Stout that Parliament cannot have intended that a procedural failing could of itself prevent the public authority from successfully protecting the public interests encompassed by section 36." (paragraph 52)

97. He submitted that paragraphs 54 and 55 of **Malnick** highlight the unintended consequences of the alternative approach: first, that it would mean that the decision-making process requirements were more demanding at the initial gateway stage than they were at the substantive stage of considering the public interest test; second, if a procedural error prevents a public authority from relying on section 36, then (absent any other exemption applying) the disputed information must be disclosed, whatever the potential prejudice.

98. Mr. Anderson argued that this must apply to this appeal, where it is effectively said that the submission underlying the opinion was too thin in its reasons or conflated the public interest test with the prejudice test. In any event, the second QP opinion provides a fuller submission with a wider range of factors.

99. Mr. Jackson submitted that in accordance with **Davies v ICO** [2019] 1 WLR for an opinion under section 36 to be substantively reasonable it must appropriately identify, prove, explain and examine the harm and it must address in a properly reasoned and balanced objective way the weaknesses in the chilling effect argument. The first opinion clearly falls short. The second opinion falls short where the reasons are exactly of the generic and general kind that was deprecated in **Davies**.

100. In relation to **Davies** and the approach to the reasonableness of the QP opinion, it was submitted by Mr. Anderson on behalf of the Department that the issue in that case concerned the reasons the first tribunal had given for its conclusion that the QP's opinion was a reasonable opinion to hold and effectively the Upper Tribunal concluded that such reasons hadn't been given. This appeal is very different in that there are plainly sufficient reasons for concluding that prejudice of the necessary sort would arise, which demonstrates that the opinion was substantively reasonable. The alternative would be to make the gateway to section 36 significantly elevated and burdensome. Mr. Anderson submitted that it is plain the opinions were substantively reasonable.

The public interest

101. It was agreed that the public interest cannot be aggregated, but that the factors under each section were the same in this appeal.

The role of the tribunal

102. The tribunal's remit is governed by section 58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Discussion and conclusions

103. The issues we have to determine are:
    - 103.1. Does the withheld information relate to the formulation or development of government policy?
    - 103.2. Does the public interest in maintaining the exemption outweigh the public interest in disclosure?
    - 103.3. If the information does not relate to the formulation or development of government policy:
        - 103.3.1. In the reasonable opinion of a qualified person, would disclosure of the information or would disclosure of the information be likely to inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation, or otherwise to prejudice the effective conduct of public affairs?
        - 103.3.2. Does the public interest in maintaining the exemption outweigh the public interest in disclosure?

104. The parties were in agreement that certain paragraphs of the Assessment were exempt under section 42, and, having reviewed the withheld information, the tribunal was content to proceed on that basis.

Parliamentary privilege

105. The tribunal adopts the agreed position from the parties. In effect, we may rely on the undisputed facts contained in the NAO and PAC reports (and any other material covered by parliamentary privilege) but not on the opinions contained therein.

The time for assessment of the public interest balance

106. In essence the conclusion in **Montague** was based on the function of the Commissioner under section 50(1) FOIA which was to decide whether a request for information had been dealt with in accordance with the requirements of Part 1 of FOIA. As there was no requirement in Part 1 FOIA for the public authority to review its decision refusing the request, the relevant date cannot be the date of any such review. Once a decision has been made and communicated, this brings an end to that which the public authority is required by law to do by Part 1 FOIA.

107. We do not agree that anything in the reasoning in **Montague** supports an argument that the relevant date is the date at which the public authority should have responded. There a number of references in the decision to an 'in-time' review decision. The Upper Tribunal could have used, but did not use, these words in relation to the initial refusal decision.

108. In contrast, **Montague** states repeatedly that the relevant date is the date of the initial refusal decision. We consider that we are bound by the Upper Tribunal decision to assess the public interest at the date of the initial refusal, not at the date by which the Department should have refused. Whether or not this should be the position is not a matter for this tribunal.

109. The relevant date for the purposes of this appeal is therefore 14 January 2021.

Does the withheld information relate to the formulation or development of government policy?

110. We find that all the withheld information relates to the formulation or development of government policy. The tribunal notes that on the latest version of the document entitled "Marked up copy of AO advice" the coloured highlighting indicates that part of paragraph 3 is withheld only under section 36 and not under section 35. This was not the position in the earlier version of that document in the closed bundle, where it was stated to be withheld under both sections.

111. We understood Mr. Anderson's submissions to be that the entire Assessment related to the formulation of government policy, and he confirmed this in response to a question from the Judge. Our conclusions in this part of the decision relate to all the withheld information, including that in paragraph 3.

112. The relevant policy is the ministerial selection process of those towns to be invited to bid for funding. We accept that the Assessment took place right at the end of the process of development and formulation of the relevant policy. We accept that the Assessment is largely an update on AO issues relating to the planned announcement on the selection of 100 towns, such selection having already been made. The recommendation in the Assessment is to "note the Accounting Officer risks and

associated legal advice". No subsequent policy development or formulation took place. This is subject to a qualification that we deal with in our closed reasons.

113. We accept Mr. Thomas' evidence that the Assessment relates to the formulation and development of that policy because its content is the outcome of an iterative process involving discussions that took place during the process of development and formulation of policy. Further although it takes place at the end of the policy development and formulation, it looks back on and evaluates that process. The question of whether the policy making process was still live goes to the public interest test not to whether the section is engaged.

114. For those reasons we accept that the exemption is engaged in relation to all the withheld information.

Does the public interest in maintaining the exemption in section 35 outweigh the public interest in disclosure?

Public interest in maintaining the exemption

115. The purpose of section 35 is to protect the effective, efficient and high-quality formulation and development of government policy and to protect good government. It reflects and protects some longstanding constitutional conventions of government. It reserves a safe space to consider policy options in private – civil servants and subject experts need to be able to engage in free and frank discussion of all the policy options internally, to be able to expose their merits and demerits and possible implications. It is in the public interest that officials and ministers have "time and space…to hammer out policy exploring safe and radical options alike, without the threat of lurid headlines depicting what has merely been broached as agreed policy" (**DfES** para 75(iv), approved in **OGC**).

116. Under section 35 there is no space where confidentiality can be assured because it is not an absolute exemption.

117. The need for a safe space is much greater when development of that policy is nearer the live end of the spectrum at the relevant date.

118. In considering the weight of the safe space in this appeal, we have taken particular account of the following.

119. The AO assessment is an important gateway in the policy formulation process – it is one of the keys to a final decision. It is important that the AO assessment properly identifies any issues and appropriately challenges the policy under consideration. The AO is personally responsible to Parliament which underscores the importance of the AO assessment and the importance of getting frank advice. The safe space of the AO assessment is important as an intermediate 'safe space' before officials take the step of seeking a published Ministerial direction. The AO, as permanent secretary, has to give advice in a way that manages to be full and frank and avoids undermining the policies that they are required to serve and implement. If individuals are more conservative in how they couch their language in an AO assessment that diminishes

the value of the free and frank exchange of views and information in the intermediate space and is inimical to good policy making. We accept that all those matters would carry very significant weight, particularly if the policy in question were live at the relevant date.

120. We have considered the liveness of the policy at the relevant date. It was necessary to put some of our reasoning on this issue in the closed annex, because otherwise the withheld information would have been disclosed. Our open findings on the liveness of the policy are as follows.

121. First, the *specific* policy to which the Assessment related was no longer live at the relevant date. The Assessment related specifically to the planned announcement on the selection of towns to work with and develop town deals and AO issues relating to that announcement. It considered the methodology developed by officials for selecting eligible towns, initially to allocate some of the capacity funding to help places to develop new economic visions for their areas and to apply for substantive funding.

122. Even at the stage that the Assessment was written on 5 September 2019, the towns had already been selected. Whilst the policy formulation and development process was not technically over, because treasury approval had not yet been given, it was substantively over. Therefore even at the date the Assessment was drafted, put inelegantly, the process was some way from the livest end of the spectrum.

123. The final list of towns was announced on 6 September 2019, 4 months prior to the relevant date. At the relevant date we find that policy discussion and development *in relation to the selection of the initial list of towns* was not in any sense live.

124. We accept that the 'liveness' of a policy is not black and white. Further we accept that the public interest in maintaining a safe space waxes and wanes and does not evaporate the moment a policy is announced. We take into account the fact that in January 2021 related work was ongoing in relation to the next stages of the towns fund process and we find that this is likely to have involved matters that are more properly described as policy than implementation. However we heard no evidence on any specific harm or impact that disclosure of this specific information might have had on any ongoing related policy work.

125. In relation to the specific content of the withheld information we have made further findings but it was necessary to put this reasoning in the closed annex, otherwise the withheld information would have been disclosed.

126. In the circumstances, we find that the need for a safe space had reduced to some extent by 14 January 2021. Although some broadly related policy work was likely to have been continuing, the specific issues with which the Assessment was concerned were not. Further, for the reasons set out in the closed annex we do not think that the specific information contained in the Assessment was likely to lead to harm if published at the relevant date.

127. Despite those findings, given the particular features of AO assessments identified above, we still place significant weight on preserving the safe space in the public interest balance.

128. The Department also relied on the effect that disclosure of the requested information would have on the conduct or the candour of civil servants in the future when drafting Accounting Officer assessments. We have had regard to the experience and expertise of Mr. Thomas, and of the measured and considered way in which he gave evidence and answered questions.

129. We accept that he has formed the view that, were Accounting Officer assessments to be published, contributors would self-censor to avoid creating material for the public domain that attacks or undermines the government's position. His view is that self-censorship would be an inevitable consequence of expecting that AO assessments could be published against the wishes of the AO and Ministers.

130. We accept that this view is honestly held and is formed in the light of his experience and expertise, to which we give due respect. However, having considered Mr. Thomas' evidence carefully we are not persuaded that our decision risks having those consequences for the following reasons.

131. In relation to the Assessment specifically, Mr Thomas' opinion was as follows (paragraph 49 of the open witness statement):

> "49. If it were the case that colleagues knew the Assessment would be published, this would have undermined the efficacy of the process of which the document is the artifact. It would have inhibited the frank exchange of views which went into the preparation of the document. Insofar as knowledge of its publication would have inhibited the candour with which officials presented the Towns Fund in the preparation of the draft AO assessment, this would have prejudiced the effective conduct of Government affairs."

132. Mr. Thomas also highlighted the particular risks arising from the tension between the AO's duty to the minister as a Permanent Secretary and to Parliament as AO (paragraph 50 of the open witness statement):

> "50. If the AO had been aware that her assessment would be published, this would have increased the tension between her duty to the minister as Permanent Secretary and to Parliament as AO. This tension was highlighted by the 2016 PAC Report at paragraph 18: "*Tensions can arise if an AO believes that a Minister's favoured policy is not feasible or value for money, or if the spending involved would be unlawful or improper. The National Audit Office concluded that in such cases, AOs are often reluctant to raise concerns about the use of taxpayers' money given there is effectively a conflict with their duty to serve Ministers*." It is in the public interest that this tension is not exacerbated by the threat of publication; if there is a potential problem with the Minister's policy, there needs to be a safe space for this to be addressed."

133. In open oral evidence he added the following:

> "It is important to retain the trust of the minister you are working with – this is the fundamental point about serving equally well governments of different political persuasions … it is important that the minister feels that they can trust their officials and that officials are not undermining them in some way…So there is a natural caution in wanting to do anything that would be seen to undermine that, which is not the same as saying that in the room or in advice officials wouldn't say, "This is not a good idea". Officials do say such things, but that is different from saying them in the expectation that they would readily be made public. I appreciate there are circumstances in which they would be made public and other legal procedures that would make such documents public, but this may be my poor understanding of how the system is supposed to operate in respect to Freedom of Information, but my understanding is that is why the Act provides for an essentially a safe space for these internal debates to be had."

134. Mr. Thomas outlined a further risk that 'routine publication' of full AO advice risks blurring the importance of a ministerial direction at paragraph 51.

135. When it was put to Mr. Thomas in cross-examination that it was not right to say that civil servants would 'self-censor' because of the risk of freedom of information disclosure, because that would go against their role and responsibilities, he replied in open:

> "I think the distinction I would draw…when we write accounting officer assessments at least in my department we normally try to put them, or to think about them in a sort of 'red teaming' kind of way… in other words, can one put the point where it is attacking - not necessarily in a full throttle way but they … can be phrased in a way which is designed to make you pause and think. One could make the same points without phrasing in them in that way - not sure the phrasing is necessarily illustrative of a lack of accountability or any of these other things - but I think the way in which our current practice is these days which is to try and put the points bluntly, that approach, I think, would not be taken if the material was primarily drafted or expected to be released."

136. He also stated in open, when it was put to him that civil servants would be aware of the risk of disclosure from their knowledge of FOIA and because it was contemplated in the Guidance:

> "This is very much my layman's perspective, and I have become more familiar with the law in recent days, but the layman's perspective has tended to be that the Freedom of Information Act provides for a safe space that provides that advice to ministers and so on, could potentially be disclosed but there are safeguards around that, which I guess is part of the issue today. From a layman's perspective I think when one is writing a submission to a minister or accounting officer advice, one works on the assumption that this is within the space of formulating and deciding on what the government policy would be, which is different from 'does the government have information about x or y?'"

137. Mr. Thomas gave the following additional open evidence at paragraphs 61 and 62 of his open witness statement:

> "Officials were aware that elements of the policy could be considered contentious and explored these concerns frankly in the AO assessment in a manner reflecting the assumption that, as advised in the AO assessment guidance at the time, the document would not be disclosed to the public. This frank discussion is evidenced in the closed witness statement.
> …
> where there is a perceived risk that the AO assessment might be published, it would have the potential to prejudice the effective conduct of public affairs by (i) exacerbating the inherent tension for the Permanent Secretary between complying with their duty to the minister and complying with their duty as AO to Parliament; (ii) reducing the likelihood of officials giving a frank assessment; and (iii) blurring the significance of a ministerial direction."

138. The Judge asked Mr. Thomas why the tribunal reaching a particular conclusion as to where the public interest lay in a particular case, taking into account the specifics of that case including, for example, the sensitivity or otherwise of the material, the liveness of the policy etc. would be likely to alter the way that AO assessments were written in the future, given that the FOIA framework is already known about by the people who are writing the assessments.

139. Mr. Thomas replied, in open:

> "It's an excellent question, so as I tried to outline earlier I think I pointed out that colleagues had tended to think of accounting officer assessments in the same vein as ministerial submissions in that they are very much bound up with the question of 'Are we doing the right thing?' 'Is this the right policy?' 'What direction should we be going in?' and so in my perhaps misguided layman's approach I think that's how it was considered up to now. So yes I am aware that those are potentially disclosable, I think again my layman's misunderstanding is not that… There tends to be a bit more protection afforded to those than there is to say, other papers that the government might hold. Again I might be entirely wrong in which case you could correct me. I think I would also add, as I said in answer to one of Mr Jackson's questions, I'm not aware that the accounting officer assessment has been published in full against the wishes of the accounting officer. Again that might be incorrect I've not done an exhaustive survey."

140. We have the utmost respect for Mr. Thomas' experience and expertise, and he gave evidence in a measured and considered way. However, we do not think that his evidence answered the question why a decision by this tribunal, on these particular facts, to the effect that the public interest favoured disclosure, would lead to a change in behaviour.

141. If Accounting Officers are properly informed, and, at that level of seniority, we assume that they will be, they will appreciate that the greater the public interest in the disclosure of confidential, candid and frank information, the more likely it is that it will be disclosed.

142. Mr. Thomas is right in his assumption that 'there tends to be a bit more protection' afforded to documents such as ministerial submissions and AO assessments than other papers the government might hold. The nature of the AO assessment is what gives rise to the engagement of section 35, and the nature of the document will also feed into the public interest test. The need for a safe space in relation to such documents will carry greater weight in the public interest balance and forms part of our conclusions above. A decision by the tribunal that the public interest favoured disclosure in a particular case would not alter that. There always was and remains a 'threat' or a 'risk' of publication against the wishes of the AO under FOIA. A decision to disclose in an individual appeal would not increase that risk.

143. Any future effects said to flow from the fact that "colleagues knew the Assessment would be published" or the AO being "aware that her assessment would be published" do not flow from our decision. A decision to disclose in this appeal does not mean that other AO assessments "would be published", or indeed that other AO assessments are more likely to be published.

144. Effects that flow from an "expectation that [AO assessments] would readily be made public" or "the routine publication of full AO advice" do not flow from the outcome of an appeal where the tribunal has carefully balanced the public interests, taken account of the importance of a safe space, but has ultimately concluded that the public interest favours disclosure. It is not the case that AO assessments will either now or in the future "readily be made public" or be subject to "routine publication".

145. Mr. Thomas is no doubt right that AO assessments would be drafted differently "if the material was primarily drafted or expected to be released". Our ruling does not have the effect that AOs should expect their assessments to be released under FOIA. The material does not need to be drafted to be released. It is a matter of fact that in some circumstances the public interest might favour disclosure of AO assessments, because section 35 is not an absolute exemption, but that has always been the case and is not altered by our decision.

146. Mr. Thomas was specifically asked why our decision on where the public interest lay would have a chilling effect, when awareness of the existence of the risk of disclosure under the public interest balancing test did not. His answer is set out in full above. In essence, his response was that it was understood that documents that contained full and frank discussions and were bound up with fundamental policy decisions tended to have more protection than more anodyne government documents. Whilst that assumption is correct, the answer does not, in our view, address the weakness in the chilling effect argument identified by Charles J. Nowhere in Mr. Thomas' evidence is this weakness addressed in a properly reasoned way.

147. Further, there is already a known risk of publication against the AO Officers wishes in the NAO report. Mr. Thomas was asked if he was surprised that the NAO report contained verbatim extracts from the Assessment, including in particular the official's record of the minister's selection rationale contained in appendix B of the Assessment, which was initially withheld in response to the request under section 36(2)(b)(i) and section 35(1)(a), and is included wholesale (with minor differences in wording) as Figures 6 and 8 in the NAO report.

148. His response in open was:

> "Not at all… there is a legal requirement to make available to the National Audit Office everything it wants to see, pretty much… we give access to everything they want and they are at liberty to make what use of it they want. We will have a discussion about checking the facts are correct, there is a process involving a draft coming to me and then for the accounting officer to say that we are happy that it is factually accurate. Sometimes as part of that process we might say, 'This bit is commercially confidential' or we don't agree with the way it is phrased."

149. When asked who would have the final say as to what extracts would be included in the NAO report, if the Accounting Officer was not happy with what had been included, he replied in open:

> "The Comptroller and Auditor General. He is an officer of Parliament and they are his reports. It may happen at Accounting Officer clearance stage that some comments come to me, and I may make comments and have a discussion with the NAO team. I hope at that stage everyone is happy, if not there is occasionally a discussion between the Accounting Officer and the Comptroller and Auditor General… The point of the process of agreement is largely to make sure that when the Public Accounts Committee meets there is agreement over facts. That's the general point of it but part of that is also the NAO will listen if we say 'look this is not appropriately phrased' or something like that. We don't say that terribly often, they have a way of writing the report. It is their say at the end of the day. If they wanted to say something we disagreed with, which they frequently do, then they are entirely at liberty to say so."

150. Whilst we accept Mr. Thomas' evidence that there will usually be a discussion between the AO and the NAO, it is clear that the AO is aware that it is the Comptroller and Auditor General who has the ultimate say about what is published, which could include, as it did in this case, large verbatim extracts from the report which, at least in the Department's initial view in this case, should be withheld under sections 35(1)(a) or 36(2)(b)(i).

151. Mr. Thomas was then asked by the Judge whether the fact that it might go in the NAO report might have any impact on the way that people draft the AO assessment. His reply in open was in accordance with what might be expected from courageous, robust and independent senior civil servants, i.e. that they would make sure that they flagged any concerns which they thought the NAO might be interested in:

> "Yes it does actually and I think I should have said this earlier, so my approach to this has been that we want to put down some of the reasons we think it is not a good idea when writing accounting officer assessments or the things that they are going to be particularly interested in so that so that you can kind of see all these were some of the things that were weighed up. I wouldn't say that that's a requirement for everything but certainly usually we write them in the expectation that is very likely the national audit office will want to see them."

152. In our view, the fact there appears to be no generalised chilling effect arising from the risk that verbatim extracts from the AO assessment could be published in the NAO report, even against the wishes of the Department, supports our view that no generalised chilling effect is likely to arise from our decision in this appeal.

153. In conclusion, taking all the above into account, we respectfully disagree with Mr. Thomas' opinion that our decision would be likely to have a generalised chilling effect on Accounting Officers. In our view if there is any generalised chilling effect it comes from the passing of FOIA and we rely on the courage and independence of senior civil servants to be robust in the face of the extant risk of publicity to which our decision adds nothing. We do not accept, as a matter of fact, that there will be indirect and wider consequences as a result of any decision by this tribunal to disclose the withheld information.

154. Although we were not specifically asked to take account of the qualified persons' opinions under section 35, we find that they are relevant to the public interest balancing exercise under section 35, because the QPs have reached an opinion that disclosure would inhibit the free and frank exchange of advice and the free and frank exchange of views for the purposes of deliberation, which falls within the ambit of the interests protected by section 35.

155. Whilst we take account of the expertise and experience of both the QP's, we are not persuaded that there is anything in the opinions that addresses the issues we have identified above in relation to assertions of a generalised chilling effect. There is little of substance in the first QP opinion that adds to Mr. Thomas' considered and detailed evidence that we have discussed above.

156. In relation to the second QP opinion we note that the prejudice is said to flow "if the full advice were to be put in the public domain as standard". As explained above, there is nothing in our decision that could lead any properly informed person to conclude that the full advice of the AO will be put into the public domain "as standard". It remains the position that every FOIA request for an AO assessment must be subject to a careful balancing of the public interest, and that there is likely to be significant weight in maintaining the safe space as we have concluded above.

157. Mr. Anderson submitted that we must avoid the 'extreme position' of approaching prejudice and risk in a way that is 'self-defeating' by accepting the argument that the fact that officials know that FOIA exists and are already aware of the possibility of disclosure diminishes the weight of a safe space argument. Parliament created the section 35 exemption with the intention of ensuring that a safe space was preserved.

158. We do not accept that we have adopted an extreme position, nor that it, in effect, this approach defeats the purpose of section 35.

159. First, it may be that evidence in a particular case effectively addresses the weakness identified by Charles J. In those circumstances a generalised chilling effect argument about wider consequences on future discussions is likely to succeed. Whether or not a tribunal accepts arguments of a generalised chilling effect is a matter of fact to be determined in the circumstances of every case.

160. Second, as the ICO guidance on section 35 acknowledges at paragraph 206 arguments about a chilling effect on ongoing policy discussions are likely to carry significant weight and arguments about the effect on closely related live policies may also carry weight.

161. Third, whilst we do not accept that there is a risk of a generalised future chilling effect in this case, that does not mean that the need for a safe space is not weighed in the public interest balance. It is in the public interest that civil servants and officials involved in policy making should have a safe-space in which to do so, albeit that the need for a safe space may be diminished or superseded by the finalisation and publication of a policy. (**Department of Health and Social Care v Information Commissioner** [2020] UKUT 299 (AAC)). In this case we have concluded above that there remained a strong public interest in maintaining that safe space at the relevant date.

162. Overall our conclusions are that there is a strong public interest in maintaining the exemption in this case.

The public interest in disclosure

163. In summary, we have concluded there is an extremely strong public interest in disclosure of information relating to the selection of the towns announced on 5 September 2019, but for the reasons set out below we have concluded that this public interest is reduced on the facts to some extent by a number of factors, and that there remained a very strong public interest in disclosure of the withheld information at the relevant date.

164. Looking first at the factors which have led us to conclude that there is an extremely strong public interest in disclosure, we have taken account of the following.

165. First, there is, overall, a large amount of public money at stake. There is a large amount of public money potentially available to individual towns to spend for the benefit of particular, not insignificant, sections of the public. Towns not placed on the list are excluded from bidding for a portion of that money, and their inhabitants excluded from benefitting from it. There is therefore very significant public interest in increasing public understanding and accountability in relation to how, overall, that money is spent and in relation to how the selection decision was reached.

166. Second, whilst we do not find that there was a reasonable suspicion of wrongdoing, we take account of the following matters, which are set out in the internal review request of George Grylls, a journalist at the Times:

> "A data analysis conducted by the London School of Economics concluded: "…there is robust evidence that ministers chose towns so as to benefit the Conservatives in marginal Westminster seats."
>
> The two ministers who were responsible for choosing the towns were Jake Berry and Robert Jenrick. Darwen, a town in Mr Berry's Lancashire constituency, was chosen by Mr Jenrick. Mr Jenrick's constituency of Newark,

in Nottinghamshire, was chosen by Mr Berry. Civil servants had ranked them respectively the 289th and 270th most deprived towns in Britain."

167. Further we take account of the fact that Ministers chose not to follow officials' suggested regional allocation.

168. These matters, in the tribunal's view, very significantly increase the public interest in transparency and accountability. There is an extremely strong public interest in publishing the full analysis by the Accounting Officer of the departure by the Ministers from officials' recommendations. Disclosure would have the related advantage of avoiding misplaced speculation as to what might have been withheld. There is a strong public interest in informed reporting on this issue in the media.

169. Third, the levelling up agenda is a subject of importance. There is significant public and political interest in equality of opportunity across the UK. The fact that the Ministers went against officials' recommendations as to the geographical spread of eligible towns is directly relevant to the levelling up agenda.

170. The extremely strong public interest in accountability and transparency is reduced to some extent by the accountability mechanisms already in place, including the NAO report and the PAC report, and the fact that the Department had just published a summary of the report. The NAO report and the PAC report are thorough and detailed. The summary lacks much of the detail contained in the full report. In the tribunal's view, for the reasons set out above, much of the public interest lies in the publication of the full picture, and therefore we take the view that the public interest in publication of the full report remains very strong.

Conclusion on the public interest balance

171. Without attempting to crudely summarise or repeat our detailed discussions and reasoning set out above, our conclusions are that although there is a strong public interest in maintaining the exemption, it is outweighed on these particular facts by the very strong public interest in disclosure. For those reasons the Department was not entitled to rely on section 35 to withhold the requested information.

Section 36

172. As we have determined that section 35 is engaged in relation to all the withheld information, section 36 cannot apply. The information is 'exempt information' under section 35, even though we have determined that the public interest favours disclosure. For those reasons we find that the Department was not entitled to withhold the information under section 36.

173. Although we have not considered section 36, given that the parties submissions and the evidence in relation to the public interest balance were materially identical to those under section 35, we would have concluded that the public interest favoured disclosing the information for the reasons set out above.

Observation

174. As we noted above, the NAO report contains extracts from the Assessment, including the officials' record of the minister's selection rationale contained in appendix B of the Assessment, which was initially withheld in response to the request under section 36(2)(b)(i) and section 35(1)(a), and is included wholesale (with minor differences in wording) as Figures 6 and 8 in the NAO report.

175. Mr Thomas was asked by one of the members of the tribunal why the Department did not inform the requestors that some of the information in the Assessment was already in the public domain through the NAO Report. Mr Thomas did not know the answer to this as he was not involved at that stage.

176. Given the substantive extracts from the Assessment contained in the NAO report, the tribunal's view is that the Department could and should have referred the requestors to the NAO report in its initial response.

Signed Sophie Buckley

Judge of the First-tier Tribunal
Date: 20 March 2023

Case Reference: EA-2022-0143
EA-2022-0144
Neutral Citation number: [2023] UKFTT 00427 (GRC)

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: CVP

Heard on: 9 February 2023
Tribunal deliberations on: 2 March 2023
Decision given on: 21 March 2023

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER PAUL TAYLOR
TRIBUNAL MEMBER JO MURHPY

Between

DEPARTMENT FOR LEVELLING UP, HOUSING AND COMMUNITIES

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

CLOSED ANNEX
(Now Open)

Closed oral submissions and skeleton arguments

Closed oral submissions on behalf of the Department

177. The evidence of Mr. Thomas was that some of the options discussed in the Assessment were not proceeded with, in particular in paragraph 15. Mr Anderson submitted that this shows that the Assessment did not simply reflect the end of the process, but was still a live part of the process, which goes into the public interest balancing test. In so far as the Assessment was dealing with matters that were ultimately discarded, the public interest in those matters is reduced and conversely the interest in protecting policy formulation is greater.

178. The substantive content of the information helps to illustrate the points made about the way in which advice is couched, for example the way in which paragraph 3 is formulated. This is not the sort of formulation you would expect if it were intended for a wider audience. It is intended to put those reading the document 'on alert'.

179. The tribunal should carefully consider the extent to which there is any real volume added to the information that has already been made public, by, for example, the greater detail provided in paragraphs 14, 15 and 17.

180. The Department has undertaken a careful balancing exercise and it is accepted that the bulk of the document can be disclosed, which diminishes the public interest in requiring the rest of it to be published.

181. In terms of the liveness of the policy, Mr Anderson submits that there were a number of strands to the Towns fund. Initially it was intended that there were going to be 3 strands. It was on 6 September 2019 that the towns were invited to develop their proposals. It was not until July 2021 that a full list of the funding allocated was published. There was intended to be a third competitive strand of funding but that element of the policy was changed in November 2021.

182. This is relevant because the detailed information in relation to the decision-making around what money should be allocated in the earlier stream and the possibilities of allocation that were rejected is the sort of thing that may have been relevant or might have been relied upon or put forward in relation to the further stages of the funding. That means that there was still a live element at the time of the decisions to refuse the requests.

Closed submissions on behalf of the Commissioner

183. In relation to the 'liveness' in January 2021, Mr Jackson submits that the policy under consideration is not the entire process of the Towns fund over the course of three years. The policy that is the focus of the Assessment is the ministerial selection process that was undertaken in the summer of 2019 and announced on 6 September 2019. It is possible for information to relate to multiple different stages of policy or multiple different policies, but it is necessary to consider the strength of the connection.

184. The Commissioner submits that by January 2021 the liveness of the policy had fallen away. The decision had been made. Even if there were further developments in July and November 2021, this information does not relate to those policies.

185. The Assessment is dated 5 September, the day before the public announcement was made. There may have been earlier drafts or iterations but the request relates to this document. The tribunal can infer that there was no formulation or development in progress at this point.

186. The specific sections of the Assessment that are contested are paragraphs 3, 14, 15 and 17. To the extent that these record discussions and deliberations that had been happening over the previous months but had now reached a settled position, this no longer relates to the formulation or development of policy. Paragraph 15 deals with implementation of policy rather than formulation. These are referred to as 'specific delivery questions'. The policy - ministerial selection of towns eligible for this sum of money - had concluded by this point.

187. In relation to section 36, the first opinion falls far short of the requirements for a reasonable opinion in **Davies**. It relies on entirely generic concerns about the chilling effect and free and frank advice.

188. The second opinion reiterates the same general concerns, and does not meet the requirement to be tailored to the specific information in question.

Closed reply by the Department

189. It is not right to infer that the Assessment did not relate to the formulation or development of policy from the fact that the Assessment was the day before the announcement. It does not become an adopted policy of Government until it is signed off, until then it is still at the stage of formulation and development.

190. Where the Assessment refers to further choice in relation to matters of delivery, this does not mean that it is not part of policy.

191. Paragraphs 12 and 16 of the second opinion do refer to the particular context of the fund. The submission has to be read in the context of the background and the information with which it is concerned which is annexed to the submission. It is plainly sufficient for the purposes of the section 36 gateway.

Closed discussions and conclusions

Liveness

192. In relation to the liveness of the policy to which the Assessment relates, we accept, for the purposes of the engagement of section 35, that the fact that paragraphs 14 and 15 contain aspects which were not taken forward shows that the Assessment did not simply reflect the end of the process, but was still to some extent part of a live process at the date at which it was written. This supports our conclusions in relation to the engagement of section 35.

193. In relation to liveness at the relevant date for the purposes of the public interest balance, the first policy aspect which was not concluded at the date of the announcement on 6 September 2019 is found in paragraph 14 of the AO and relates to a proposed cluster of two towns:

> "The Secretary of State has picked 49 towns (48 town deals with one cluster of two towns). from the highest scoring 320 after the top 40 have been removed and 12 from the lower scoring 'low priority' towns. The cluster is Keighley (in the top 40) and Shipley (in the next 320). Officials had recommended that as a potential cluster and the justification is that they are nearby and that you are combining a mix of more prosperous and less prosperous towns to have a mix of need and opportunity in one deal"

194. In the original announcement on 6 September 2019 Keighley and Shipley were announced as a cluster, but the NAO report records that this was not taken forward. We find that this was therefore no longer a live policy at the relevant date, because it had been abandoned by the time of the earlier NAO report.

195. The second aspect is in paragraph 15:

> "For one town selected (Kidsgrove), Secretary of State wants the letter to district and county to recommend collaboration with nearby towns in the Stoke City conurbation. This would be determining expectations for local town partnerships more tightly than we are in other places. This will present specific delivery questions (like how the local authorities work together) that are policy choices yet to come. This could be challenging but we anticipate could also be true in other places when we launch the prospectus and begin to work with places. We will set out in our Q&A that this is to be set out in more detail in the prospectus and determined through the development of deal proposals."

196. Unfortunately the evidence before the tribunal on when this proposal was abandoned is unclear. The Judge asked Mr Thomas when the decision was made, but he did not know when that proposal was abandoned, and we were unable to find evidence of the date in the bundle. When giving evidence on why it was not in the public interest for paragraphs 15 and 16 to be disclosed, Mr. Thomas referred to the AO guidance on redacting 'policies not taken forward' from the summary.

197. Mr. Anderson's submissions on liveness were fairly broad, and his only reference to this specific point was that 'possibilities of allocation that were rejected may have been put forward or relied on in relation to the further stages of funding'.

198. Doing our best with the limited evidence before us, and assessing the matter on the balance of probabilities, given the references by Mr Thomas and Mr. Anderson to policies that had being 'rejected' or 'not taken forward' we find that the proposal in paragraph 15 had been rejected by the relevant date. Our findings as to the liveness of the process as a whole are set out in our open decision.

Specific harm arising from the content of the withheld information

199. Mr. Thomas highlighted the use of the phrase 'The main area of concern is around propriety' in paragraph 3. He stated that it was written like that to 'flash up in red lights' that this is the issue the AO has to think particularly carefully about. He stated that 'we wouldn't phrase it in that way'. His concern was that this would, if released, immediately become a newspaper headline. He stated that the NAO might choose to say that, and the Department would not question that, because that is the sort of thing that the NAO are entitled to say.

200. Given that one of the four established AO standards or criteria is propriety, and that a section on propriety is included in the summary of the AO report it was already a matter of public knowledge at the relevant time that propriety was one of the matters under consideration.

201. In relation to any generalised chilling effect, we have made our findings on this in open. We do not think that there is any other harm, and there is significant public interest, in the public knowing that this was the AO's main area of concern, even if this were to appear in a newspaper headline. The AO reports sets out in detail the context and considerations in

relation to propriety and why the AO reached the conclusion that the Ministers' approach was appropriate.

202. Mr Anderson submitted that it was not in the public interest to publish policy that had not been taken forward. We accept that this carries some weight in the public interest balance, but there was no evidence or submissions identifying the specific harm that the release of information on these specific proposals could have caused to the ongoing process, and we find that the additional weight is not sufficient to outweigh the very strong public interest in disclosure of the full report for the reasons set out in open.

203. Further we find that there is a public interest in knowing why Keighley and Shipley were originally announced as a cluster, and in understanding the options that were considered in relation to potentially asking towns to work together. These matters give a clearer picture to the public and to the towns concerned of how carefully this was considered by the Secretary of State and will contribute to a fuller understanding of how decisions were reached in relation to the spending of this significant sum of public money.

204. In addition to the particular points considered above, we have carefully considered the specific content of all the withheld sections of the AO Assessment, looked at in the context of the nature of AO assessments, and in the light of all the evidence before us. The passages consist of further detailed explanation of the process adopted and we find that their disclosure will serve the public interests in disclosure identified in open.

205. On the evidence before us, and taking into account the nature of the information and the way in which it is expressed, we find that there is no specific additional harm that is likely to flow from the publication of the contents of these particular passages, other than the matters already identified in open.

Signed Sophie Buckley

Judge of the First-tier Tribunal
Date: 20 March 2023