NCN: [2024] UKFTT 00212 (GRC)
Case Reference: EA/2023/0223

First-tier Tribunal
General Regulatory Chamber
[Information Rights]

Heard: GRC Remote Hearing Rooms on: 16 November 2023, & 23 February 2024.
Decision given on: 07 March 2024.

Tribunal: Judge Brian Kennedy KC, Jo Murphy and Kerry Pepperell.

Between

ROSEMARY SMITH

Appellant

and

THE INFORMATION COMMISSIONER

1st Respondent

HM TREASURY

2nd Respondent

Representation:

For the Appellant: Rosemary Smith as litigant in person and also represented by her proxy Mr. Tinker on 23 February 2024.

For the 1st Respondent: Helen Wrighton in written Response but not in attendance.

For the 2nd Respondent: Toby Fisher of Counsel at the oral hearing on 23 February 2024.

Decision: The Appeal is allowed in part.

Result: The Tribunal issue the following Substituted Decision Notice:

a) The appeal is Allowed in relation to information contained in the further additional material that is the subject of the FOIA request in this appeal and has been disclosed to the Appellant since the Appeal was adjourned on 16 November 2023.

b) The remainder of the withheld information in the Closed Bundle is exempt for the reasons given below.

c) The Tribunal require no further action on behalf of the 2nd Respondent.

REASONS

Introduction:

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("FOIA") against his decision notice of the Commissioner dated 29 March 2023 Ref. IC-161762-Z1X9 ("the DN") which is a matter of public record. The original hearing listed on 7 June 2023 was adjourned as a result of a failure of the public authority to provide adequate disclosure and the appropriate hearing bundles. HM Treasury ("*the* Treasury"), were joined as Second Respondent by way of Case Management Directions.

Factual Background to this Appeal and Decision Notice:

2. On 9 February 2021, the Appellant contacted the Treasury via the *'what do they know'* website asking for the following:
"...Please provide all emails and letters referring to the Loan Charge that were to/from Beth Russell, Director General Tax and Welfare
Relevant dates: Between August 2019 to current date (8/2/2021)..."

3. On 23 February 2021, the Treasury relied on section 14(1) to refuse the request on the basis that compliance would be *"...particularly burdensome ... we would need to review 18 months of correspondence, including several thousand emails, in order to consider whether any information should be withheld under FOI exemptions. . . . "*

4. Correspondence then ensued between the parties as the Appellant attempted to refine her request, first, by limiting the timeframe and, on 17 May 2021, the Appellant further refined her request for *"...all emails and letters referring to the Loan Charge that were to/from (not copied) Beth Russell, Director General Tax and Welfare. Relevant dates: Between 1/1/2020 and 31/3/2020..."* These requests were all refused in reliance on section 14(1) on the basis of the burden occasioned by reviewing the high numbers of emails within scope.

5. On 16 September 2021, the Treasury advised the Appellant that it held *"...515 emails potentially in scope..."* but that it held no emails relevant to the request which asked for the number of emails written by Beth Russell containing the phrase 'loan charge' from 1 January 2020 to 31 March 2020.

6. On 15 October 2021, the Appellant asked:

". . ..1. Please supply the precise count (not an in-scope number that you appear to make up) of all emails sent by Beth Russell containing the term "loan charge" or its abbreviation "LC" between the dates 1/1/2020 and 31/3/2020.

2. Please also supply copies of all emails sent by Beth Russell containing the term "loan charge" or its abbreviation "LC" between the dates 1/1/2020 and 31/3/2020. "

7. On 10 November 2021, the Treasury responded to the Appellant:

". . .our response of 15 October 2021 . . .. incorrectly stated that 'we hold 515 emails sent by Beth Russell'. This should have read 'we hold 515 emails sent or received by Beth Russell', a figure which we had previously released under FOI2021/16436 on 16 September 2021.

This does not change the substance of our response of 15 October, in that the request to release the 515 in-scope emails sent or received by Beth Russell was refused under section 14(1) of the FOI Act,

In regard to the first part of your current request, as detailed in our response to FOI2021/16436 on 16 September 2021, our searches indicate we hold no (zero) items directly authored by Beth Russell, containing the term "loan charge" or the abbreviation "LC", between the dates of 01/01/2020 and 31/03/2020.

As part of the aforementioned response to FOI2021/16436 on 16 September 2021, we also confirmed that we held 515 items sent or received by Beth Russell containing the term "loan charge" or the abbreviation "LC", between the dates of 01/01/2020 and 31/03/2020. To clarify, this means that the 515 items identified as in scope of that request were all received by Beth Russell.

In relation to the second part of your current request, as no (zero) items were identified as in-scope, we are unable to provide a release."

8. On 14 November 2021, the Appellant requested the following information from Treasury:

> *"...You have said that Beth Russell did not write any emails containing the requested terms "LOAN CHARGE" or "LC" between 1/1/2020 and 31/3/2020*

It does seem rather odd that having received 515 emails that Beth Russell did not respond to any of them.

It may be that a member of her office is responding on her behalf to some of these 515 emails. I wonder if you would be kind enough to search the mail boxes of her secretary, personal assistant or anyone else in her office team that have written emails with the terms "LOAN CHARGE" or "LC" for the period 1/1/2020 to 31/3/2020.

You state that Beth Russell didn't write any emails herself. On this basis please provide

a. *A count of the emails Written by Beth Russell's secretary, personal assistant or Beth Russell's office support team containing the terms "LOAN CHARGE" or "LC". Of course please include emails that contain both terms. Please break this count down into a table showing the number written each month and the role of the author (secretary, PA, office).*

b. *Copies of any emails written by Beth Russell's secretary, personal assistant or Beth Russell's office support team containing the terms "LOAN CHARGE" or "LC". Of course, I do not need to know the names of any member of staff not classified as a senior civil servant. - - - - -"*

9. On 10 December 2021, the Treasury confirmed it held no information within scope. On 11 December 2021, the Appellant responded as follows:

"...Question 1

I do wonder whether you are misinterpreting my request to exclude emails that she may have written/sent where she herself or her team did not write the specified words in a response, but that they responded to an email chain containing these words. Please confirm whether or not this is the case. I ask as it seems very unusual for any individual to receive more than 500 emails without responding to any one of them.

Question 2

If the response to question 1 is that there are some email chains of the 515 received by Beth Russell or her office/PA/secretary that she or they responded

to without actually writing either the words "Loan Charge" or its abbreviation "LC" then please provide copies of the email chains to which they responded.

Question 3

If the response to question 1 is that Beth Russell or her office/PA/secretary did not respond to any of the 515 emails then please supply copies of the emails received by Beth Russell or her support office/PA/secretary containing the terms either "Loan Charge" or its abbreviation "LC" during the period between 1/1/2020 and 17/1/2020.

I have deliberately limited this request following your guidance to ensure that it does not either exceed the limitations of section 12 or have such a wide scope that you may want to invoke section 14 - "

10. On 14 February 2022, the Treasury responded to the Appellant. It indicated that it did not hold any information within the scope of questions 1 and 2. However, it did disclose some redacted information falling under question 3. The redactions had been made under sections 40(2) and 35(1)(a).

11. On the same day, the Appellant said that she wanted to *"...understand how emails that 3 years are now old are being withheld using section 35(1)(a) of the FOI Act as it relates to the formulation or development of government policy. These emails are now simply an historical record of such. As you have to consider public interest then I would ask that you provide the qualified opinion that supports such your use of section 35(1)(a). Please also supply all meta data associated with FOI2021 28023...".*

12. On 14 March 2022, the Treasury responded to, what it had understood to be the Appellant's request for an internal review on 14 February 2022, and provided some further arguments in support of section 35(1)(a). On 17 March 2022, the Appellant contacted the Treasury asking it to revisit its position on non-disclosure. On 18 March 2022, the Appellant complained to the Commissioner.

13. On 28 March 2023, and during the Commissioner's investigation, the Treasury disclosed 73 pages of material to the Appellant which had previously been withheld under section 35(1)(a) albeit this disclosure also contained redactions under sections 35(1)(a); 36(2)(b)(ii) and 40(2).

14. On 29 March 2023, the Commissioner issued the decision notice now under appeal in which he found that the Treasury was entitled to rely on sections 35(1)(a) and 36(2)(b)(ii) to withhold the redacted material.

15. On 24 April 2023, the Appellant lodged a Notice of Appeal.

Legal Framework:

16. Section 35(1)(a) of FOIA states that: 'Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to- (a) the formulation or development of government policy'. Section 35 is a class-based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.

17. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.

18. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.

19. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case-by-case basis, focussing on the precise context and timing of the information in question.

Grounds of Appeal:

20. The Appellant challenges the DN on the grounds that: the Treasury holds more information within scope than has previously been identified. The Appellant provides the following two examples.

a) First, the Appellant refers to email 14 on page 65 of the material disclosed to her on 28 March 2023 saying *"...the email provided appears to be incomplete as it is in response to a direct assertion to Beth Russell. It is in itself further evidence that HMT have not released all the emails requested. Namely emails authored by Beth Russell during the period 1/1/2020 to 31/3/2020..."*

b) Second, the Appellant refers to email 17 which starts on page 68 of the same disclosure, and which starts with the words "...*Thanks Beth...".*

21. The Appellant argues that the Commissioner erred in finding that section 35(1)(a) was engaged for the following reasons.

a) First, the Appellant refers to paragraph 21 of the DN where reference is made to HMT's explanation that the information being withheld under s35(1)(a). and;
b) Second, the Appellant argues that *"...the policy was developed and announced in 2016/17 and became active in 2019. ... It is unreasonable to claim that the documents should be withheld years after the policy has become active and is in use.....it could always be argued that policy is being reviewed and or refined, but a discussion that took place more than 3 years ago should not be witheld*...[at] *35 of the DN. The Commissioner appears to accept that the information is historic in using the phrase 'were live at the at the time of the complainant's request'. "*
c) Third, the Appellant also argues that the Commissioner *"...appears to be mixing up section 35 ... and section 36 ... These items talk about 'safe place', 'chilling effect'. These are the type of argument associated with section 36..."*

22. The Appellant argues that the public interest test favours disclosure because of the number of people affected (which the Appellant puts at 61,000 directly affected and 200,000 if their families are included); the 10 suicides which occurred as a direct result of the Loan Charge and the fact that "...more *people are now being drawn into these schemes than when the Loan Charge was enacted."*

23. The Appellant argues that section 36(2)(b)(ii) is not engaged for the following reasons.

a) First, the Appellant argues that the Treasury has relied upon section 36(1)(b)(ii)

which *"...does not exist..."*

b) Second, the Appellant argues that *"...HMT sought the opinion of the qualified person 22/2/2023 after they had already redacted the information. In other words, they again broke the law in applying a public interest test for section 36 retrospectively. Perhaps this is a normal pattern of behaviour that HMT now follow in that it follows on from the retrospective nature of the Loan Charge. I also doubt that the Exchequer Secretary to the Treasury was aware that they were signing as a qualified person in retrospect."*

24. The Appellant argues that the public interest test under section 36(2)(b)(ii) favours disclosure because *"...the purpose of this FOI request was to find out how HMT had formulated such a flawed policy and how it was managing the situation with the backlash from both the victims and Parliamentarians. It does not seem to be in the public interest to suppress such information as it actually references the Parliamentarians involved. "*

25. The Appellant argues that, notwithstanding the Commissioner finding a breach of section 10(1), she ".... *would have expected that the ICO would have censured HMT for such blatant abuse of the FOIA..."* and that such censure is one of the outcomes sought in pursuing this appeal.

Commissioner's Response:

26. The Commissioner resists this appeal. In response to issue one, the Commissioner invites the Treasury to address the point in its Response.

27. The Commissioner maintains that the relevant withheld information does relate to the formulation or development of policy which should be withheld under section 35(1)(a).

28. The Commissioner will say that the relevant time at which to consider the public interest is at the time of the request or for compliance therewith and, from this, it would naturally flow that this is the same deadline by which to consider the engagement of any exemptions. To that end §35 DN confirms it is the Commissioner's position that *"...the*

policy making in relation to the issues covered in the information were live at the time of the complainant's request."

29. The Commissioner will say that arguments about safe space and chilling effect can be relevant to both sections 35 and 36 FOIA as can be seen from his guidance on both exemptions which refer to these concepts.

30. The Commissioner relies on the reasons for finding that the balance of the public interest test favoured non-disclosure as set out at §§ 32 to 37 of the DN.

31. The Commissioner recognises the typographical error in the disclosure made to the Appellant but is of the view that this does not invalidate the Treasury's ability to rely on section 36(2)(b)(ii) and to which it referred in its submissions to the Commissioner.

32. The Commissioner does not understand the Treasury to have sought the Opinion of the Qualified Person retrospectively. The Commissioner relies on §41 onwards of the DN to support his finding that section 36(2)(b)(ii) was properly engaged in this instance.

33. The Commissioner relies on the reasons for finding that the balance of the public interest test favoured non-disclosure as set out at §§ 53 to 57 of the DN.

34. The Commissioner did find a breach of section 10(1) for the Treasury's late provision of relevant information but notes that the Appellant has not specified what form any further censure should take albeit to the extent that the Appellant sought specific condemnatory comment in the DN; the Commissioner will say that this is not an issue for the Tribunal as per the following examples of earlier First-tier Tribunal judgments:
"...9. the Appeal process is not intended to develop into a joint drafting session, but only to provide relief if the Decision Notice is found not to be in accordance with the law..." (Billings v Information Commissioner (EA/2007/0076));

"...16. [an] *appeal is against the outcome of the DN, not the way in which the ICO has reached it nor the way in which he has expressed his reasons..."* (William Stevenson v Information Commissioner (EA/2015/0117)); and

"...30. ...it is also not the Tribunal's role to conduct a procedural review of the Information Commissioner's decision-making process or to correct the drafting of the Decision Notice. For this reason, we agree with the Information Commissioner that the Appellant's grounds 3 and 6 invite us to take an impermissible approach to the appeal and we have no hesitation in dismissing those grounds. . .." (Peter Wilson v Information Commissioner (EA/2021/0149P)

Response of HM Treasury:

35. In response to;

(i) **Ground 1**: the Treasury has conducted further searches, and they respond to say: *"Regrettably a small number of additional documents responding to the search request have been identified. They are now under review for redaction and will be filed and disclosed as soon as possible together with further submissions explaining why they were not previously identified, and how the Tribunal should consider them in the context of this appeal."*

(ii) Ground 2: the engagement of s 35(1)(a) FOIA the Treasury concurs with and repeats §§26 – 33 of the Commissioner's Response on this ground. It is entirely clear that the information withheld under s. 35(1)(a) FOIA relates to the formulation or development of policy that, at the date of the request, was still under active consideration. As recorded by the ICO at paragraphs 21 and 22 of the appealed decision, the withheld information does <u>not</u> relate to the development of the Loan Charge policy but to: policy making about the reform of the tax system; future policy options, such as strategies to tackle promoters of tax avoidance schemes, are discussed and remain in development; discussions about off-payroll working rules reform; options for reform of the tax administration system; options to prevent fraud and legal approaches to tackling this; and a number of named policy approaches still under active development which the Treasury asked the Commissioner not to name but which do not relate to the Loan Charge. The Treasury notes that the date of adoption of the Loan Charge policy is irrelevant to the engagement of s 35(1)(a) FOIA in relation to material relating to the development of <u>different</u> policy.

In *HMT v Information Commissioner* (EA/2007/0001, 7 November 2007) at [54] the Information Tribunal explained that the exemption is designed to protect "… the efficient, effective and high-quality formulation and development of government

policy." It is clearly engaged in this case.

(iii) **Ground 3: the public interest test under s 35(1)(a) FOIA** The Treasury concurs with §§ 34 and 35 of the Commissioner's Response on this ground and refers the Tribunal to the Commissioner's reasoning at §§ 24 – 37 of the appealed decision. The Treasury and the Commissioner, it is argued, correctly considered the content and sensitivity of the information in question and the effect of its release in all the circumstances of the case and concluded that it was necessary to withhold the information in order to protect the policymaking process.

(iv) Ground 4: the engagement of s 36(2)(b)(ii) FOIA The Treasury acknowledges that it may have made a typographical error in identifying, in the documents released to Ms Smith, the legal basis for certain redactions as s. 36(1)(b)(ii) FOIA. Plainly s. 36(1)(b)(ii) does not exist and HMT intended to rely on s. 36(2)(b)(ii). In all correspondence with the ICO, HMT correctly identified the basis for these redactions as s 36(2)(b)(ii). HMT concurs with and repeats paragraph 38 of the Commissioner's Response on this ground. Further, the Treasury did not (as alleged by Ms Smith), – retrospectively seek the opinion of the Qualified Person. On 22 February 2022, the Exchequer Secretary's view was sought on whether certain information highlighted for their review would, or would be likely to, result in the specified harm in s 36(2)(b)(ii) if released. The Exchequer Secretary was informed that their view was being sought as a qualified person for the purposes of the Act. The Treasury concurs with and repeats paragraph 40 of the Commissioner's Response on this ground.

(v) Ground 5: the public interest under s 36(2)(b)(ii) FOIA. The Treasury concurs with and repeats paragraph 42 of the Commissioner's Response on this ground and refers the Tribunal to the ICO's reasoning at paragraphs 53 – 57 of the appealed decision.

(vi) Ground 6: inadequate censure of HMT for its breach of s 10(1) FOIA -

The Treasury concurs with and repeats §44 of the Commissioner's Response on this ground and argues there is no error of law in the ICO's decision.

Further Response of HM Treasury:

36. The Treasury conducted further searches to satisfy itself that all information within scope had been identified. The additional information was found exclusively in the email repository of Suzy Kantor. It is not entirely clear why these emails were not previously identified in searches of Ms Kantor's email repository which took place at earlier stages of the FOIA process, albeit Ms Kantor's email repository was not the primary focus of

searches which concentrated primarily on the email repositories of Beth Russell and her office support (as per the request).

37. The further information, having since been found, and released with submissions, and appropriate redactions applied. The redactions fall into three categories:

a. The majority of the redacted information is withheld under s. 40 FOIA, a withholding ground in relation to which the Appellant has not appealed as regards the previously released information.

b. In email chain 5 (*RE: [FST advice] Tackling the Tax Gap Budget Advice [DG clearance] - comments by COP Thursday 16*), a number of redactions are made on the grounds that while certain emails fall within a chain that is within the scope of the request, the content of those emails is irrelevant / out of scope as wholly unrelated to the loan charge. This is consistent with the approach applied to information previously released in relation to this request, as agreed with the First Respondent.

c. In email chain 10: (*"RE: personal"*) one email and one attachment are withheld in their entirety pending the opinion of a qualified person on whether certain information contained within it should be withheld under s 36(2)(b)(ii) FOIA. HMT is endeavouring to secure this opinion as a matter of priority but the parliamentary recess period means that HMT has not been able to secure time in appropriate Ministers' diaries to provide the opinion by the date of this submission. The withheld email and withheld attachment will be disclosed to the Tribunal and the Parties with appropriate redactions, if any, as soon as the qualified person's opinion is secured. HMT will use best efforts to do so by 5 September 2023, in order to ensure all relevant material is included in the relevant bundles and the Appellant and First Respondent have an opportunity to make any further written representations on it by the 12 September deadline.

Appellant's Skeleton Argument:

38. The Appellant filed a skeleton argument with the Tribunal on the 19th of February 2023 in support of her appeal.

39. The justification for employing section 35 on a policy enacted and in effect since April 2019, pre-dated by public announcement and legislation, is fundamentally flawed. The Loan Charge's substantial public, financial, and emotional toll on 67,000 individuals and

their families, including the tragic escalation to suicides and attempted suicides, underscores the paramount public interest in full transparency and accountability. The Loan Charge was announced in the 2016 Budget and was later legislated in the Finance (No. 2) Act 2017. It came into effect on April 5, 2019. It is difficult to see why section 35 (formulation of government policy) is being applied for a policy that has been implemented in April 2019. It was formulated prior to the budget of 2016.

40. The Treasury's retrospective engagement with the public interest test, and its apparent conflation of relevant criteria, undermines the legitimacy of its response and highlights a disregard for the severity of the policy's consequences. The Treasury have engaged the public interest test, although it does seem retrospectively/retroactively. It appears that these words are conflated by the department. It appears that the public interest test was applied post the initial response to the Appellant.

41. The profound societal impact, evidenced by the escalation in suicides to 10 individuals and numerous affected lives, starkly contrasts with the rationale for applying section 36(2)(b)(ii). The Tribunal is urged by the Appellant to consider whether the protective intent of these exemptions is outweighed by the public's right to understand the decision-making processes that have led to such dire outcomes. It is argued that the Treasury do not appear to understand the level of public interest. The number now affected by the current Loan Charge legislation now stands at 67,000, including family members in the region of 200,000. The number of suicides has grown to 10 and there are now 13 confirmed attempts. HMRC have referred themselves on each of these occasions to the IOPC.

42. The IOPC have asked HMRC to determine if any of their officers have operated incorrectly. HMRC found that it had nothing to answer for. There are also hundreds if not thousands who are now in very uncomfortable positions with many seeking medical care and other life changing events such as separation and divorce brought about by this policy. There are now more people entering these schemes than prior to 2019 (a point raised by Sir Amyas Morse in his review of the Loan Charge). The so called *'naughty step'* where HMRC lists them on their website for 12 months for promoters of these schemes is having no effect. It is difficult to reconcile the use of section 36(2)(b)(ii) with the other side of the argument showing such devasting consequences.

43. On page A13, §57 of the DN the Commissioner finds by a narrow margin in favour of

withholding the information, based on an argument in §54 citing financial hardship affecting a large number of people. However, the Commissioner has ignored the deaths of 10 people.

44. In §43 on the DN it states that the information has been withheld on the basis of section 36(2)(b)(ii). The Commissioner takes the view that this does not invalidate using a different section of the FOIA.

45. The Commissioner in §§ 34 and 55 to 57 of the DN seems to think that the age of the request is significant. It appears that this is mixing up section 35 (formulation of policy) and 36 (frank exchanges). It errs on the side of the Treasury accepting that the deaths and serious injuries of several citizens is more important than providing information to the public about how it has arrived at the decisions that have caused it. In §34 for example the formulation of policy seems to be applied when the policy has been on the statute book for four years (2016) and active for two years (2019). No information was released until 2022.

46. The DN, particularly its interpretation and application of sections 35 and 36, merits rigorous scrutiny. The decision to prioritize bureaucratic procedure over the tangible, devastating effects on citizens represents a misalignment with the core principles of public interest and transparency enshrined in the FOIA. In paragraph 35 of the DN the Commissioner accepts that the policy making in relation to the issues covered in the information were live at the time. A reasonable argument might be that they were historic by January 2020, having been implemented in April 2019.

47. The apparent delay in the qualified person's engagement with the public interest test, as revealed in the audit trail, further questions the procedural integrity and the substantive justification for the exemptions claimed. The audit trail provided in section E of the open bundle shows that the qualified person did not opine on the public interest test until (22/2/2022) after the data had been redacted and sent to Appellant on the 14/2/2022 .

HM Treasury's Skeleton Argument:

48. The Treasury lodged a skeleton argument with the Tribunal on the 19th of February.

49. In response to Ground 1, the Treasury conducted further searches. Counsel on behalf of the Treasury apologised profusely to the Appellant, the parties and the Tribunal confirming that regrettably 15 further email chains, including two unreleased attachments, were identified ('**the further additional material**').

50. The additional material was provided to Ms Smith, and filed with the Tribunal, on 29 August 2023, with redactions made only under section 40 FOIA. One email chain contained one attachment that was withheld in its entirety pending the opinion of a qualified person under section 36(2)(b)(i) and (ii) FOIA.

51. It is clear that on 1 September 2023, Baroness Penn (as a Qualified Person) provided her opinion that release would be likely to cause the harm identified in sections 36(2)(b)(i) and (ii) FOIA **[F2 OB]**. The email and attachment were then released to Ms Smith with appropriate redactions **[D161-163 OB]**.

52. Concerning Ground 2, the Treasury concurs with and repeats §§ 26 – 33 of the Commissioner's Response on this ground **[A26-A28 OB]**. It is clear that the information withheld under s. 35(1)(a) FOIA relates to the formulation or development of policy that, at the date of the request, was still under active consideration. As recorded by the Commissioner at §§ 21 and 22 of the appealed DN **[A5 OB]**, the withheld information does not relate to the development of the LC policy but to: policy making about the reform of the tax system; future policy options, such as strategies to tackle promoters of tax avoidance schemes; discussions about off-payroll working rules reform; options for reform of the tax administration system; options to prevent fraud and legal approaches to tackling this; and a number of named policy approaches still under active development which the Treasury asked the Commissioner not to name but which do not relate to the LC.

53. The Treasury repeats and concurs with §§ 34 and 35 of the Commissioner's Response on ground three **[A28]** and refers the Tribunal to the Commissioner's reasoning at §§24 – 37 of the appealed decision **[A8-A9]**.

54. The Treasury and the Commissioner, it is argued, correctly considered the content and sensitivity of the information in question and the effect of its release in all the circumstances of the case and concluded that it was necessary to withhold the

information in order to protect the policymaking process.

55. In reference to the Treasury's reliance on s 36(2)(b)(i) and (ii) in relation to the document disclosed in September 2023 (email chain 10) **[D161-163 OB]**, Baroness Penn's view was sought on whether certain information highlighted for her review would, or would be likely to, result in the specified harm in s 36(2)(b)(i) and (ii) if released **[Closed bundle, doc 5, pp 180-196]**. Baroness Penn was informed that her view was being sought as a qualified person for the purposes of the Act.

56. With regard to the opinion of the Exchequer Secretary dated 24 February 2023, The Treasury concurs with and repeats paragraph 42 of the Commissioner's Response on this ground **[A29 OB]** and refers the Tribunal to the Commissioner's reasoning at §§ 53 – 57 of the appealed decision **[A12-A13 OB]**.

57. As regards the opinion of Baroness Penn dated 1 September 2023, the opinion of the Baroness, it is argued was reasonable on the grounds set out in the submission dated 31 August 2023 **[Closed Bundle Doc 5, pp 181-187]**. The Treasury acknowledges the strong public interest in ensuring government departments are accountable for their activities and are as transparent as possible, but the Minister reasonably considered – on balance – the public interest not to favour release.

58. The Treasury further concurs with and repeats §44 of the Commissioner's Response on ground 6 **[A30-A31 OB]**. The Treasury argue there is no error of law in the Commissioner's decision.

HM Treasury Additional Submissions:

59. The Treasury filed a post-hearing note to clarify certain matters not already set out in the skeleton argument previously lodged.

First release – 14 February 2022

60. The Treasury identified 3 email chains (including 10 emails) that were relevant to the request. It decided to release one email chain with redactions under s.40(2) FOIA and withhold two email chains under s.35(1)(a): see **[C77]**.

61. The Treasury released the information to the Appellant on 14 February 2022 **[C43 – C51]**.

Second release – 31 January 2023

62. On 31 January 2023, the Treasury released the two email chains that were previously withheld in their entirety under s.35(1)(a) in the First Release. The released email chains were:

a. "Update on "*Future of DR" work*": one email plus attachments **[D17 – D68].**

b. "Loan charge: promoters and Sir Amyas follow-up": nine emails **[D69 – D78].**

63. Redactions were made to these email chains and attachments under ss 40(2) FOIA and s.35(1)(a) FOIA.

a. Redactions made under s.40(2) FOIA are not challenged in this appeal.

b. Redactions made under s.35(1)(a) FOIA are found at:

i. Open bundle D69, D70, D73.

ii. Closed bundle pp 66, 67, 72, 74 (green highlighting).

The Tribunal note that redactions made under s.35(1)(a) FOIA are very limited. They are made to preserve a space for the efficient, effective and high-quality formulation and development of government policy. The Treasury submits it has applied the redactions judiciously, carefully and only where the withholding ground is properly engaged, and the public interest test is met.

Third release – 28 March 2023

64. On 31 January 2023, the Treasury released the "*additional material*" referred to at paragraph 16 of the Treasury's skeleton argument. That included five email chains (comprising 22 emails), together with attachments **[D88 – D160]**.

65. Redactions were made to these email chains and attachments under ss 40(2) FOIA, s.35(1)(a) FOIA, and under s.36(2)(b)(ii) FOIA.

a. Redactions made under s.40(2) FOIA are not challenged in this appeal.

b. Redactions made under s.35(1)(a) FOIA are found at:

i. Open bundle D97, D98, D99, D108, D156.

ii. Closed bundle pp 104, 105, 106, 107, 117, 168.

The Tribunal will note that redactions made under s.35(1)(a) FOIA are very limited. They are made to preserve a space for the efficient, effective and high-quality formulation and development of government policy. HMT submits it has applied the redactions judiciously, carefully and only where the withholding ground is properly engaged, and the public interest test is met.

c. Redactions under s.36(2)(b)(ii) FOIA are found at **[D153]** of the open bundle and **[164]** of the closed bundle. 30 words in total are redacted. The rationale for the redaction is set out in the submission provided to the qualified person on 22 February 2023: see **[175]** – **[179]** of the closed bundle). The qualified person's opinion is at **[F1]** of the open bundle. That opinion is plainly reasonable.

Fourth release – 29 August 2023

66. On 29 August 2023, the Treasury released the "further additional material" referred to at paragraph 24 of the Treasury's skeleton argument. That included fifteen further email chains that had not previously been disclosed, and two attachments: see the supplementary bundle.

67. Redactions were made to these email chains and attachments under ss 40(2) FOIA and under s.36(2)(b)(ii) FOIA. The rationale for the redaction is set out in the submission provided to the qualified person on 22 February 2023: see **[181]** – **[196]** of the closed bundle). The qualified person's opinion is at **[F2]** of the open bundle. That opinion is plainly reasonable.

68. As this release post-dates the DN, the Tribunal does not have jurisdiction to make a determination on the lawfulness of HMT's reliance on s.36(2)(b)(ii). However, this release is relevant to the order the Tribunal may make. The Treasury submits that the ground 1 appeal is academic now that the further information has been provided.

Conclusions:

69. The Tribunal sat on 23 February 2023 to hear the substantive appeal. Mr Fisher on behalf of the Second Respondent again apologised to all concerned on behalf of the Treasury

for the inadequate manner the request had been handled from the outset and comprehensively summarised the issues.

70. In Case Management Directions dated 27 November 2023, the 2nd Respondents were asked to clarify the refence applicable to the DN dated 29 March 2023. At the hearing, Mr Fisher indicated that he understood it to be IC-133476-G6T0 as stated on the DN in the open bundle [OB A1]. However following the appeal, the Panel became aware of an email from the Commissioner dated 28 April 2023, which clarified that IC-133476-G6T0 had been used in error on the DN and that the correct reference was IC-161762-Z1X9. Under the 'slip rule' the Commissioner has issued a revised DN containing the correct reference (IC-161762-Z1X9).

71. Mr Tinker outlined the up-to-date position from the Appellants' view. He also fairly acknowledged that he had not fully recognised the difference between the s35 and 36 exemptions in that the Tribunal was limited in their ability to challenge 36 exemptions claimed in that we can only interfere where we find that the Qualified Persons Opinion was not reasonable. Having considered all the material evidence in this case (leaving the Jurisdiction issues on the grounds of whether it post-dated the refusal of the request aside), we are satisfied that the Opinion of Baroness Penn (as a Qualified Person) who provided her opinion that release would be likely to cause the harm identified in sections 36(2)(b)(ii) FOIA was reasonable and we cannot criticise it in that regard.

72. In relation to the 35(1)(a) of FOIA exemption claimed the Tribunal accept 35(1)(a) is engaged (again leaving the Jurisdiction issues on the grounds of whether it post-dated the refusal of the request aside). We accept on the evidence and the facts before us that the information withheld under s.35(1)(a) FOIA relates to the formulation or development of policy that, at the date of the request sand its refusal, was still under active consideration. Further we accept that the Safe Space sought was justified in the pursuance and interests of efficient, effective formulation of high-quality Government policy.

The Public Interest Test:

73. The Appellant argued that the impact of the Loan Charge affects a large number of individuals (67,000) and their families and there have been a number of suicides and attempted suicides by those facing a charge. The Appellant submits that this factor

should be afforded significant weight and should outweigh the factors in favour of withholding the information.

74. The Treasury acknowledges there is a broad public interest in transparency in the work of the government and how policies are developed. They also recognise there is considerable interest in the LC, especially by those impacted by it.

75. However, the Treasury argue that disclosure would undermine the safe space in which Government officials can speak freely and candidly as part of the policy making process and this is a highly significant factor in the Public Interest Test

76. The Tribunal noted that during the Commissioner's investigation, the Treasury made some significant additional disclosures of information that had previously been withheld. This was because the Treasury felt that owing to the passage of time and the progress of policy development, that the balance of the public interest test had shifted in favour of disclosure. However, the Treasury argued that the limited amount of information in respect to related policies that is now being withheld, is in order to protect the effective and efficient formulation and development of government policy.

77. In relation to the Public Interest Test on the engagement of 35(1)(a) of FOIA exemptions herein we agree that the Public Interest in disclosure in the circumstances argued by and on behalf of the Appellant are significant and high but on balance, the public interest in the safe space for formulation of government policy on the facts and all the material evidence before us does just outweigh the interest in disclosure of the withheld information.

78. Similarly in relation to s36., whilst we accept the s36 exemption is engaged if we have a 'reasonable' Qualified Person's opinion, on the facts in this case, we could find the Public Interest favours disclosure, on the basis that the Qualified Person does not have the benefit of hearing from the Appellant who may put forward factors that they did not consider. Of course, we do give the Qualified Parsons's opinion weight as they are a person well placed to understand the harm of disclosure. In all the circumstances in this case we have concluded that that the Public Interest test favours withholding the remaining closed information (see below).

79. For the avoidance of doubt the Tribunal Panel undertook a rigorous inspection of the remaining withheld material. The panel closely scrutinised the contents of the closed

bundle and were satisfied that what has been withheld has been properly withheld. The majority of the information which was in scope has now been disclosed to the Appellant. The very limited information that is withheld clearly relates to the formulation of government policy. The panel are satisfied that the amount of material withheld is minimal compared to the amount of material which has been disclosed.

80. It is also apparent from comparing the closed bundle and the open bundle that within the open bundle appears a single identifying comment citing the relevant exemption and representing material which had been redacted due to that specified exemption. Often in cases where information is released, and parts of that information being redacted the requester can assess the *"blacked out portions"* allowing them to formulate a view on the amount of information being withheld. In this instance, a single line does not give any such indication, and while the panel does not criticise this approach, it is notable that the Appellant would not know how minimal the amount of material that has been withheld in the context of the emails which were released.

81. The Tribunal acknowledge the profuse apology by Mr Fisher on behalf of the 2nd Respondent but agree with the Appellant that the manner in which the 2nd Respondent handled the request was manifestly unsatisfactory and their breach of s10 has led to much suspicion and delay. The original hearing on 16 November 2023 had to be adjourned. Detailed and specific Case Management Directions had to be drafted and served on 27 November 2023 and thereafter additional searches revealed information in scope that should have been disclosed form the outset and ultimately had to be.

82. In all the circumstances and on the evidence before us we do not find it necessary to consider the Jurisdiction point raised. For all the reasons set out above we allow the appeal (given the relevant information within the scope of the request that has been disclosed subsequent to the DN) and we make no order for further action on the part of the Second Respondent and issue the above Substituted Decision.

Brian Kennedy KC **07 March 2024.**

Promulgated **13 March 2024.**