UPPER TRIBUNAL CASE NO: GIA/2453/2017

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference EA/2016/0168, made on 8 June 2017 after a hearing on 8 May 2017, did not involve the making of an error on a point of law.

REASONS FOR DECISION

A. History and background

1. Mr Whitmey asked the Department for Education to provide information under the Freedom of Information Act 2000 (FOIA). Only one piece of information remains in dispute:

> Please would you supply me with a copy of:
>
> (a) A letter from Lord Nash to Nick Clegg, Deputy Prime Minister and Vince Cable, the Secretary of State for Business, Innovation and Skills dated 30 May 2014 relating to the public consultant Proposed New Independent School Standards Launch date 23 June 2014.

The background to the request was the reports of Muslim attempts to take control of schools in Birmingham in 2013, the so-called Trojan Horse affair. The request, which was made on 14 August 2015, related to the Government's response. Mr Whitmey had asked for this information the year before without success, but argued that the passage of time changed the analysis. The Information Commissioner agreed and decided that it should be disclosed. The relevant parts of the Commissioner's decision notice are in the Appendix to this decision.

2. The First-tier Tribunal decided that the Commissioner's decision notice was 'in accordance with the law' (section 58(1)(a) of FOIA). The issue for me is whether 'the making of the decision concerned involved the making of an error on a point of law' by the First-tier Tribunal (section 12(1) of the Tribunals, Courts and Enforcement Act 2007). I have decided that it did not.

3. I held an oral hearing on 25 September 2018. Ewan West of counsel appeared for the Department and Christopher Knight of counsel appeared for the Information Commissioner, as they had in the First-tier Tribunal. Mr Whitmey spoke on his own behalf. I am grateful to them all for their clear and concise arguments.

B. The legislation

4. The First-tier Tribunal decided the appeal by reference to section 35 of FOIA:

> **35 Formulation of government policy, etc**
>
> (1) Information held by a government department or by the Welsh Government is exempt information if it relates to—
>
> …
>
> (b) Ministerial communications, …
>
> (3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).
>
> (4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.
>
> (5) In this section—
>
> …
>
> 'Ministerial communications' means any communications—
>
> (a) between Ministers of the Crown, …

Information covered by section 35 is exempt if 'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information' (section 2(2)(b)).

5. The Department had initially relied on section 36:

> **36 Prejudice to effective conduct of public affairs**
>
> (1) This section applies to—
>
> (a) information which is held by a government department or by the Welsh Government and is not exempt information by virtue of section 35, …
>
> (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—
>
> (a) would, or would be likely to, prejudice—
>
> (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, …

C. The Information Commissioner and the tribunal were right to consider section 35

6. Mr Whitmey objected to the Information Commissioner and the First-tier Tribunal considering section 35, arguing that the Department should have been limited to section 36, on which it originally relied. I reject that argument. Once it had been raised, the Commissioner and the tribunal were required to consider section 35. Indeed, they should have considered it even if it had not been raised. The reason is that section 36 only applies to information held by a Government Department if it 'is not exempt information by virtue of section 35'. The Commissioner and the tribunal were required to consider whether section 35 applies before considering section 36, regardless of whether or not the Department had relied on it.

D. The evidence before the First-tier Tribunal

7. This is how the tribunal summarised the oral and written evidence. I have included evidence relating to other information that is no longer in dispute, as it is in places general in nature and equally application to the letter in dispute (item (a)).

> 19. The Department called witness evidence from Mr. Hardip Begol (Director of the Independent Education, Safeguarding in Schools and Counter-Extremism Group within the Department for Education) and Ms. Shona Dunn (Director General with responsibility for the Economic and Domestic Affairs Secretariat within the Cabinet Office). Both witnesses had made open and closed witness statements.
>
> 20. In his open evidence, Mr Begol gave the Tribunal some helpful background to Mr Whitmey's request. There had been a consultation in 2014 concerning changes to the Independent Schools Standards framework. The consultation had run from 23 June to 18 August 2014, therefore some of the consultation period was during the school holidays. Mr Whitmey had made an information request for information relating to the decision to run the consultation period at that time. In an earlier Decision Notice, the Information Commissioner had upheld the Department's reliance on s. 35 (1) (b) and s. 36 (2) (b) (i) and (ii) FOIA and agreed with the Department that the public interest in maintaining these exemptions outweighed the public interest in disclosing the information requested. Mr Whitmey had made a second request for the withheld information in 2015.
>
> …
>
> 23. Mr Begol's evidence in relation to the public interest balance was that there must be a safe space for Ministers to be briefed effectively and candidly, which includes offering advice on the balance of options or on possible 'trade-offs' between different policy priorities. His evidence was that, if civil servants could not clearly identify the risks inherent in any single path, then Ministers would be taking decisions without the fullest advice on the likely or possible outcomes. His evidence was that disclosure

of the timetabling information in part (b) of the request would risk a significant chilling effect because it would be likely to damage officials' confidence that they could give candid advice without seeking to reflect presentational factors and that disclosure would be likely to damage Ministers' willingness to request frank written advice on sensitive or controversial matters. He did not consider that the passage of time since the consultation decision with which the request was concerned had the effect of reducing the harmful effects of disclosure. His evidence was also that there is sufficient information about this matter already in the public domain to satisfy the public interest.

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

25. In cross examination, Mr Begol accepted that the proposed changes to the Independent School Standards had been controversial. They had concerned the promotion of 'British values' in the wake of the so-called 'Trojan Horse' problem in Birmingham. He acknowledged that the changes had been made 'pretty speedily' following a consultation period of six weeks. The consultation process had been criticised by a Parliamentary committee, and the Minister had accepted that 'not enough care' had been given to it. Mr Begol accepted that the Minister's comments had heightened public debate. However, the Government's response to the consultation had explained its intention to implement the new standards at the start of the forthcoming academic year in view of its concern that a small number of schools were not promoting 'British values'.

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

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

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

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

30. In her open witness evidence, Ms Dunn addressed the convention of Cabinet collective responsibility and the application of s. 35 (1) (b) FOIA to part (a) of the requested information. She explained that the Ministerial Code protected the privacy of opinions expressed in Cabinet and Ministerial Committees. In this case, the requested item (a) clearly constituted Ministerial correspondence. It was a letter from one Minister to others, copied to the chairs of relevant committees. She understood that the issue for the Tribunal was one of balancing the public interest, and her evidence was that even if (as the Decision Notice had concluded) the information contained in the requested letter was 'fairly routine', then its disclosure still had great potential to harm the collective process by causing Ministers to question whether it was possible to protect the majority of such correspondence. She explained that many of the recipients of the letter were still in Government and those who are not (Liberal Democrat Ministers from the Coalition Government) are still politically active, so disclosure would have a chilling effect on Ministers' willingness to have necessarily candid recorded discussions about policy development. Ms Dunn accepted that there was a public interest in disclosure of Lord Nash's letter but asserted that this was outweighed by the public interest in protecting the collective decision making process.

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

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

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

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

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

E. The tribunal's assessment of the public interests

8. This is how the tribunal dealt with the balance of interests in respect of the letter in dispute:

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

> '…what is required is an assessment and comparison of actual harm and benefit by reference to the contents of the requested information that falls within a qualified exemption….'

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

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

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

The tribunal adopted Mr Knight's argument in paragraph 48, which reads:

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

F. Ministerial communications

9. The exemption in section 35(1)(b) applies if 'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information' (section 2(2)(b)).

10. The public interest in disclosure must be judged by reference to the information; that is what section 2(2)(b) says. The public interest in maintaining the exemption must also be judged by reference to the information, but it will inevitably require an understanding of the nature and purpose of the convention in order to assess the effect that disclosure of that information will have on that convention. That is the only way to assess the true effect of disclosure of the specific information on a convention that is of general application. And it is essential to assess that effect in order to see how it balances against the public interest in disclosure.

11. The exemption in this case is 'Ministerial communications'. It is not about collective ministerial responsibility directly. That is the subject of a separate exemption in section 36(2)(a)(i). There is, though, a connection, because confidentiality of ministerial communications bolsters collective responsibility in at least two ways. First, by keeping ministers' differing views private, it makes it easier for them to maintain a public posture of collective responsibility. Second, by providing a safe space in which ministers can discuss and agree or disagree, it improves the policy decisions to which collective responsibility applies, thereby making it easier to maintain. So disclosure will not alter the fact that ministers are collectively responsible for the final decision, but it will incidentally undermine some of the safeguards that are important in justifying and maintaining that responsibility.

12. Any assessment of the significance of confidentiality in ministerial communications must be realistic. There is surely no one who believes that all ministers agree with all Government policy or that there are no compromises. It is a truth universally recognised that their collective responsibility is a stance. And there is no need for evidence to show that information is leaked, that journalists are briefed, that there are 'off the record' interviews, and that Ministers later publish diaries and write memoires.

13. The scope of the convention of confidentiality of Ministerial communications – and of collective responsibility for that matter – changed when FOIA came into force. From then on it was qualified by the possibility that information might have to be disclosed. It no longer represented an absolute ideal, albeit one that was not perfectly maintained in practice. Now it was a qualified ideal that was liable to be displaced by the balance of public interests under FOIA. Although this regulated release restricts the scope of the convention of confidentiality, it better maintains it than the unregulated leaking, briefing and the like that Ministers and others engage in.

14. It is tempting to argue that any disclosure will undermine the confidentiality of ministerial communications. In a sense, that is right, but it misses two points. First, it misses the point that the convention is now qualified by the possibility of disclosure. Second, it misses the point that section 2(2)(b) requires a comparative exercise. So an 'any disclosure is bad' argument may or may not outweigh the case for disclosure, depending on the comparative merits of

the opposing interests (*Foreign and Commonwealth Office v Information Commissioner and Plowden* [2013] UKUT 275 (AAC) at [15]).

G. How section 2 applies

15. The task set for the tribunal by section 2 involves two stages. First, the tribunal has to identify the positive case for each public interest. They may or may not be the same as the ones put forward by the parties. Second, it has to make a judgment of whether the public interest in maintaining the exemption outweighs the other. This second stage presents problems for a tribunal, not only in making its judgment, but also in explaining how it weighed one case against the other. This problem is not unique under FOIA; it arises whenever a tribunal has to assess the comparative significance of different and competing factors.

16. Stage two does not involve a discretion. There is no choice involved: for a particular tribunal, there can only be one permissible answer. But the nature of the process means that different tribunals may, quite properly, form different judgments on the same material. The approach to an appeal on error of law reflects that reality. The Upper Tribunal does not impose its judgment in preference to that of the First-tier Tribunal, other than to ensure that it is within permissible limits. There was argument about the precise test that defines what is permissible. I do not need to deal with that argument, because the tribunal's judgment was permissible by any of the tests in the authorities.

17. The legal test that a tribunal's reasons have to meet is adequacy. The key to providing adequate reasons in this sort of case is a clear statement of the competing public interests: stage one. The clearer the statement, the easier it is to explain the judgment: stage two. In some cases, the statement may speak for itself. In other cases, the tribunal will have to explain, however briefly, why it exercised the judgment as it did. It can be difficult to disentangle the mental processes that led to that judgment, but it should always be possible to point to one or more factors that were particularly significant (*B v B (Residence Order: Reasons for Decision)* [1997] 2 FLR 602 at 606). The context is also important (*Crake v Supplementary Benefits Commission* [1982] 1 All ER 498 at 508). In this case, the First-tier Tribunal found that the Information Commissioner's decision notice had been in accordance with law. It was, in effect, approving the reasoning in that notice, which was balanced and detailed.

18. In this case, the tribunal did not keep its analysis of the two stages distinct. That does not matter; the test for error of law is one of substance, not form. The tribunal accepted and adopted the Information Commissioner's statement of the public interest in disclosure. There is no doubt about what it found that case to be. There was, though, argument about what the tribunal decided about the Department's case. The core of the tribunal's reasoning is in paragraph 57 of its written reasons. It accepted the Department's general evidence about the importance of the convention of Ministerial responsibility and confidentiality, but not its evidence on the particular letter. There was an argument about what the tribunal meant, in particular by the words 'as we found'. My reading is as I have

just said: it did not accept the evidence about the effect on the convention of disclosing this particular letter, and so found.

19. Given that conclusion, the tribunal's judgment was already decided. Its reasoning was set out in its explanation of why it accepted only part of the Department's case about the letter. There was nothing to be gained by setting it out in a separate paragraph, especially as it was by its decision endorsing the Commissioner's analysis. It is implicit in what I have just said that a tribunal does not have to set out everything that it took into account (*Redman v Redman* [1948] 1 All ER 333 at 334). Just to take an example, it did not say what significance it had attached to Ms Dunn's unique role in understanding collective responsibility. That was not necessary: it was not a matter of dispute, and the tribunal accepted what she said in general terms about the convention. Where it differed was in the effect on the convention of releasing the letter. It explained why it disagreed; its reasons were clear and adequate.

20. There will often be a danger in disclosing limited information. It can lead to speculation, accurate or not. So in this case, people might draw inferences about disagreements among Ministers. The tribunal was not persuaded by this argument and rightly. It should come as no surprise that Ministers discuss, disagree and make compromises. There may, of course, be cases in which such speculation would be dangerous, even if given only a flimsy basis from which to argue. That might make or support a case in support of the public interest in maintaining confidentiality, but not this case.

Signed on original
on 22 October 2018

Edward Jacobs
Upper Tribunal Judge

APPENDIX

The Information Commissioner's Decision Notice Reference FS50608958

Request 1(a) letter from Lord Nash (30 May 2014)

14. The DfE has argued that Lord Nash's letter engages section 35(1)(b) of FOIA. If this exemption was found not be engaged, however, the DfE claimed sections 36(2)(b)(ii) and (c) as an alternative.

15. The complainant has accepted that the Information Commissioner is required to consider the application of an exemption that, in respect of section 35(1)(b), was only introduced after a complaint to the Commissioner had been made. The complainant has submitted though that the Commissioner might give the application little weight given that the DfE had already cited the exemption in response to an earlier version of the request which had covered the same information and had still failed on two occasions – at the initial response and internal review stages - to raise section 35(1)(b) in relation to the request currently under consideration. The Commissioner disagrees with the complainant's submission, however. Just as he does not have any discretion as to whether to accept for consideration the late application of an exemption, so the Commissioner is bound to consider fully and objectively a public authority's reasons for applying the exemption. It follows from this that any determination must therefore turn on the facts of the case, the strength of the arguments provided and the Commissioner's own analysis of the withheld information.

16. Section 35(1)(b) states that information held by a government department or by the National Assembly for Wales is exempt information if it relates to Ministerial communications. FOIA explains that in this context 'Ministerial communications' means any communications between the Ministers of the Crown and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet.

17. To support its position, the DfE has pointed out that the Commissioner in FS50566201 had agreed the exemption applied to the same information. In his decision notice, the Commissioner made reference to the principle of collective responsibility in the Ministerial Code (paragraph 17) and the way in which the Ministerial Code applied to consultations (paragraph 19). The Commissioner went on to conclude at paragraph 20 that the document quite clearly fell within the definition of 'Ministerial communications'.

18. The Commissioner is content that the letter continues to be covered by the exemption. He has therefore gone on to consider the public interest test.

19. With regard to the possible application of the exemptions in section 36(2) cited by the DfE, the Commissioner notes that although they protect similar interests sections 35 and 36 are mutually exclusive. This means that if any part of section 35 is engaged, section 36 cannot also apply – even if the public interest

results in disclosure under section 35. In light of his finding on the engagement of section 35(1)(b), therefore, the Commissioner has not had to consider the alternative application of section 36 in the context of this request.

The balance of the public interest test

20. In FS50566201 the Commissioner acknowledged that the respective weights of the competing public interest arguments, for and against disclosure, were finely balanced.

21. The Commissioner noted in the decision notice that the requested information relates to the DfE's decision to launch the public consultation on the ISS in two stages and the resolution to have a shorter consultation period for that aspect of the standards pertaining to the spiritual, moral, social and cultural development of pupils (SMSC) (Part 2 of ISS). The complainant argued, and in effect continues to argue, that the public interest in disclosure was strengthened because of concerns about what was a particularly short consultation period for Part 4 of the ISS and its launch date close to the school summer term with a closing date in the summer holiday.

22. The Commissioner considered that the issues raised by the complainant carried significant weight, particularly when the proposals were viewed against the backdrop of the so-called Trojan Horse controversy in Birmingham in 2013. This related to allegations made in an anonymous letter that there was an organised plot by Muslim groups to promote in some schools a particular narrow-based ideology (although the DfE did state that the new standards were not linked to the allegations). The Commissioner also recognised, however, that the convention of collective responsibility was engaged with respect to the letter and significant weight should be applied to this principle. While the need for private thinking space in which to deliberate on the timing of the SMSC consultation period and possible implementation of the policy was no longer required, the Commissioner did attach some weight to the wider 'safe space' and 'chilling effect' arguments advanced by the DfE. On balance, the Commissioner concluded that the public interest favoured maintaining the exemption.

23. The wider importance of education in society cannot be over-stated. Any policies or systems that aim to maintain or enhance high quality education will therefore be of interest to the public. The revisions of the ISS are significant because inspections of independent schools, and some academies and Free schools, will be tested against the standards. Ideally then, any proposed changes should be properly tested and consulted upon. In most cases, the substance and development of policy decisions will attract a greater degree of scrutiny than the way in which the policy proposals are administered and finally implemented. The interest in the administration of a policy will increase though where, say, the normal process for consultation is not followed as this could point to weaknesses in the means by which a policy decision was reached. In the view of the Commissioner, there remains a considerable public interest in the requested information.

24. In FS50566201 the Commissioner identified that this public interest was outweighed by what he considered were entirely valid concerns about ensuring that decisions were based on free and frank deliberations. The matter to be decided by the Commissioner in this case is whether the circumstances have changed sufficiently since the previous requests were made to sway the balance of the public interest towards disclosure. In assessing where the balance of the public interest lies, it has been necessary for the Commissioner to return to the principle of collective responsibility.

25. In his guidance on section 35 of FOIA, the Commissioner says the following with respect to collective responsibility:

> *209. Collective responsibility is the longstanding convention that all ministers are bound by the decisions of the Cabinet and carry joint responsibility for all government policy and decisions. It is a central feature of our constitutional system of government. Ministers may express their own views freely and frankly in Cabinet and committees and in private, but one a decision is made they are all bound to uphold and promote that agreed position to Parliament and the public.* […]
>
> *210. The convention of collective responsibility incorporates elements of safe space and chilling effect already considered above. However, there is an additional unique element that will carry additional weight: that ministers need to present a united front in defending and promoting agreed positions. If disclosure would undermine this united front by revealing details of diverging views, this would undermine ongoing government unity and effectiveness.*
>
> *211. If collective responsibility arguments are relevant, they will always carry significant weight in the public interest test because of the fundamental importance of the general constitutional principle.*
>
> *212. This weight may be reduced* ***to some extent*** *if the individuals concerned are no longer politically active, if published memoirs or other public statements have already undermined confidentiality on the particular issue in question, or if there has been a significant passage of time.* […]
>
> *213. Whether or not the issue is still 'live' will not reduce the public interest in maintaining collective responsibility (although it will affect the weight of related safe space arguments). This is because the need to defend an agreed position will, by its very nature, continue to be relevant after a decision has been taken, and because of the constitutional importance of maintaining the general principle of collective responsibility for the sake of government unity.*

26. Two points salient to the present case emerge from the guidance. Firstly, the importance of the convention of collective responsibility. Secondly, the public interest in collective responsibility continues to carry weight even after the policy decision-making process has concluded. The Commissioner accepts the importance of ministers being able to be frank and candid with one another, the

risk that any inhibition could have on the quality of debate and the importance of a collective approach to government decision making.

27. It is clear that any decision to disclose information covered by section 35(1)(b) of FOIA should not be taken lightly. That the exemption is not absolute but is qualified by the public interest test also means, however, that it is necessary to return to the withheld information itself and consider the nature and severity of the harm that would occur through disclosure.

28. In the view of the Commissioner, the general risk of weakening the principle of collective responsibility, and of undermining a united front, is not increased when the information in this case is taken into account. The general risk of inhibiting ministerial discussions in future debates would not be increased by the specific content of the information. With regard to the timing of the request and the sensitivity of the information, the Commissioner has also found important the fact that, while Lord Nash remains in his position as Parliamentary Under Secretary of State for Schools, the recipients of the letter are no longer in government, a general election took place and a new government was in place by the date of the request. In effect therefore, a fundamental change in the decision-making mechanism had occurred in the interval between the date of the letter and the date of the request.

29. In summary then, while the Commissioner gives weight to the wider public interest in preserving the principle of collective responsibility, the actual risk of harm to the convention is at the lower end of the scale. Against this is the relatively strong public interest in disclosure. The Commissioner considers that the information itself is fairly routine in content. He is of the view though that it does give the public some insight into how decisions regarding the consultation process on an education policy developed. Given the wider context mentioned in paragraphs 22 and 23, the Commissioner considers that disclosure would be of value to the public.

30. Comparing the nature and severity of the prejudicial effects of disclosure against the benefits of transparency, the Commissioner has concluded that in all the circumstances the public interest in favour of disclosure now outweighs the public interest in disclosure. In making this finding, the Commissioner has remained attentive to the importance of the principle of collective responsibility.