DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) promulgated on 16 January 2017 under file reference EA/2016/0078 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. The Appellant's appeal against the Information Commissioner's Decision Notice FS50588594, dated 1 March 2016, is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the re-hearing:

(1) The new First-tier Tribunal should not involve either the tribunal judge or either of the two members who were previously involved in considering this appeal on 27 September 2016 and 10 January 2017.

(2) The new First-tier Tribunal should proceed on the basis that the qualified exemptions in both section 35(1)(a) and 37(1)(b) are engaged, and so will be confined to considering the application of the public interest test.

(3) These Directions may be supplemented by later directions issued by the Registrar or a Tribunal Judge in the General Regulatory Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Summary

1. Mr Morland (along with many others) supports a campaign for the Government to introduce a 'National Defence Medal' (or NDM) to honour servicemen and women who did not participate in a specific conflict but stood ready to do so as a member of Her Majesty's Armed Forces. The various arguments for and against creating a NDM are not for us.

2. The issue for us is solely whether the First-tier Tribunal (from now on, 'the Tribunal') erred in law in its decision promulgated on 16 January 2017. Consideration of that issue means we have to address three questions. First, did the Tribunal properly apply section 37(1)(b) of the Freedom of Information Act 2000 (or FOIA) (Communications with Her Majesty, etc and honours)? Second, did the Tribunal properly apply section 35(1)(a) of FOIA (Formulation of government policy, etc)? Third, and if the answer to either or both of the preceding two questions is in the negative, what happens next?

3. In a nutshell, the Tribunal decided that neither of the two qualified exemptions in issue was engaged and so it did not go on to consider the application of the public interest balancing test. We conclude that the Tribunal went wrong in law on both counts. In the circumstances we do not consider that we should determine the public interest balancing exercise afresh ourselves. We accordingly remit the case to a new Tribunal with the directions as set out above.

Two preliminary matters: what this appeal is not about

4. We emphasise that there are two wider issues raised in the course of these proceedings which are not for us to determine.

5. First, and as noted above, the arguments for and against the creation of a NDM for veterans have to be resolved elsewhere. Mr Morland (and Colonel Scriven on his behalf) drew our attention to a number of concerns that have been expressed by NDM campaigners. These included, for example, complaints about the way that the medals review process had been conducted and about the estimates of the costs of introducing a NDM. We recognise the strength of feeling amongst many veterans over the NDM issue, which in many ways seems to have acted as a lightning rod for concerns about the extent of official recognition for the role played by former servicemen and women. Some of these arguments – for example as regards the importance of transparency in public debate – may well have purchase in the application of the public interest balancing test. However, they do not directly affect the questions of statutory construction we have to resolve in this appeal.

6. Second, this appeal is also not directly about "the *Bell* question", a procedural issue which is of undoubted considerable practical importance in the operation of the freedom of information legislation. The *Bell* question may be summed up thus: in disposing of an appeal against a decision notice, does the First-tier Tribunal have the power to remit a case to the Information Commissioner to issue a new decision notice? The eponymous question derives from *Information Commissioner v Bell* [2014] UKUT 106 (AAC), a question which in that appeal Upper Tribunal Judge Jacobs essentially answered in the negative. As the issue of the proper approach to the *Bell* question was raised by the First-tier Tribunal in giving permission to appeal, this case was joined at an early stage with the appeal in *Information Commissioner v Malnick and ACOBA* (GIA/447/2017; or '*Malnick*'), in which that question arises four square. Charles J., the Chamber President of the Upper Tribunal (Administrative Appeals Chamber), appointed a three-judge panel to hear the appeals in *Malnick* and

Morland. This was because the cases involved, in the words of the relevant Practice Statement, "a question of law of special difficulty or an important point of principle or practice". However, at a late stage in the proceedings the significance of the *Bell* question in the present appeal fell away, and the Cabinet Office expressly disavowed any intention to pursue the issue in the context of *Morland*. Although the two appeals were then 'de-coupled', it was not considered wise to stand down the three-judge panel in this case, not least lest the *Bell* question make a sudden late re-appearance (and indeed we do deal with a sub-*Bell* point: see paragraphs 33-41 below). It follows that this appeal has in effect been determined by a three-judge panel by happenstance.

The background to the appeal before the First-tier Tribunal

7. The background to the appeal was helpfully set out by the Tribunal in its reasons as follows:

> *'Background to Appeal*
> 3. The Appellant is involved with a campaign for the Government to create a National Defence Medal ("NDM"), to honour veterans who did not participate in a specific conflict but who stood ready to do so as members of the Armed Forces. This would include those who were conscripted into the Armed Forces after the Second World War. Other Commonwealth countries, such as New Zealand and Australia confer such a medal for service of three and four years respectively. United States veterans are awarded a similar medal after three years' service. In the United Kingdom, length of service is recognised only after fifteen years.
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> 4. The Honours and Decorations Committee ("HDC") is the permanent standing committee of the Cabinet Office which provides advice to the Sovereign regarding honours, decorations and medals. Its terms of reference are:
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> > *To consider general questions relative to the grant of Honours, Decorations and Medals; to review the scales of award, both civil and military, from time to time; to consider questions of new awards and changes in the conditions governing existing awards.*
>
> 5. In April 2012 the Prime Minister appointed Sir John Holmes to conduct an independent review of policy concerning medals, including consideration of the case for a National Defence Medal. Sir John recommended that the case for a NDM should ultimately be considered by the HDC, which should then make a recommendation to government. Following that process, a written Ministerial Statement was issued on 29 July 2014 to the effect that the HDC "*was not persuaded that a strong enough case can be made at this time, but has advised that this issue might usefully be reconsidered in the future".* The HDC considered the matter again at a meeting in February 2015.
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> 6. On 8 April 2015 the Appellant made a request to the Cabinet Office for minutes of the HDC. His request was in the following terms:
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> > *Perhaps you could also pass on (under the FOI Act) a request to see the minutes of the HD Committee meeting which reached this conclusion. At least we will then be able to address the perceived weaknesses in the case, and you can stop fielding the same questions.*
>
> 7. The Cabinet Office refused the Appellant's information request in reliance upon s. 37 (1) (b) and s. 35 (1) (a) of the Freedom of Information Act 2000 ("FOIA").
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> 8. The Information Commissioner issued Decision Notice FS50588594 on 1 March 2016, upholding the Cabinet Office's reliance on s. 37 (1) (b) of FOIA. The Decision Notice found (at paragraph 13) that the exemption 5 under s. 37 (1) (b) was engaged by the request and (at paragraph 25) that the public interest favoured maintaining the

> exemption "*by a narrow margin*". The Decision Notice expressly did not consider the Cabinet Office's reliance on s. 35 (1) (b).'

The First-tier Tribunal's decision

8. The Tribunal, which determined the appeal without a hearing (a procedural decision with which none of the parties has taken issue), allowed Mr Morland's appeal and required the Cabinet Office to release a redacted copy of the minutes of the Honours and Decorations Committee (HDC) of 23 February 2015, such that only item 3, paragraph 4 headed 'National Defence Medal' could be read (Tribunal's reasons at paragraph [2]). In doing so, the Tribunal concluded that the Information Commissioner's decision notice was "not in accordance with the law" (the relevant test for determining appeals under section 58(1)(a) of FOIA). The Tribunal summarised its conclusions as follows (Tribunal's reasons at paragraph [42]):

> '… We find that (i) the scope of the Appellant's request was narrower than the Decision Notice found it to be; (ii) that s.37(1)(b) FOIA is not engaged by the information request; (iii) we express doubt that it is open to us to reach a view as to s.35(1)(a) FOIA when it was not adjudicated upon by the Information Commissioner, but if we may properly do so, then we find that that exemption was not engaged at the time of the request…'

9. We simply interpose here that no party sought to challenge the Tribunal's finding as to the proper scope of Mr Morland's original FOIA request (point (i) in the extract immediately above). Rather, the Cabinet Office's grounds of appeal were directed towards points (ii) and (iii), namely the Tribunal's conclusion that neither section 37(1)(b) nor section 35(1)(a) was engaged.

The proceedings before the Upper Tribunal

10. We held an oral hearing of the appeal at the Rolls Building in London on 26 October 2017. The Cabinet Office was represented by Ms Holly Stout of Counsel and the Information Commissioner by Mr Peter Lockley of Counsel. Ms Stout's oral submissions focussed on the section 37(1)(b) point while Mr Lockley 'majored' on section 35(1)(a), and each adopted the other's submissions (albeit with the occasional difference of nuance). Mr Morland attended and was represented by Colonel Terry Scriven; his argument, in summary, was that the Tribunal had arrived at the right outcome and for the right reasons. We are grateful to all three representatives for their helpful skeleton arguments and their oral submissions. We regret the further delay in promulgating this decision but we considered it important to align our deliberations in this case with those in *Malnick*, given the *Bell*-related arguments that were put to us in both cases.

11. There are two other matters we should mention in relation to the oral hearing.

12. First, the Upper Tribunal is an inquisitorial tribunal. We are acutely aware of the difficulties faced by litigants in person (and, in effect, both Mr Morland and his representative Colonel Scriven are litigants in person) at this level where the issues turn on whether the First-tier Tribunal erred in law or not. It was for that reason that we interjected at various stages in the oral submissions made by Ms Stout and Mr Lockley. In doing so, we were exploring the sorts of points which we considered counsel would have put on Mr Morland's behalf had he been represented by a professionally qualified lawyer.

13. Second, we record that we held a closed session for about half an hour in the first part of the afternoon session in order to explore the closed material (i.e. the requested information from the HDC minute) in the context of the grounds of appeal.

In particular, we were concerned to establish whether section 35 was engaged on the facts. When we came back into open session, we summarised to Col Scriven, as best we could, what had taken place in the closed part of the hearing. As we explained on the day, the main reason why the closed session took as long as it did was that we took some time to press both counsel in the inquisitorial spirit referred to above.

14. We now turn to address the Cabinet Office's two grounds of appeal.

FOIA section 37(1)(b) (Communications with Her Majesty, etc and honours)

The legislation

15. Section 37 of FOIA (as amended) provides as follows (with the key phraseology for the purposes of this appeal in bold):

> **'37 Communications with Her Majesty, etc. and honours.**
> (1) **Information is exempt information if it relates to**—
> (a) communications with the Sovereign,
> (aa) communications with the heir to, or the person who is for the time being second in line of succession to, the Throne,
> (ab) communications with a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne,
> (ac) communications with other members of the Royal Family (other than communications which fall within any of paragraphs (a) to (ab) because they are made or received on behalf of a person falling within any of those paragraphs), and
> (ad) communications with the Royal Household (other than communications which fall within any of paragraphs (a) to (ac) because they are made or received on behalf of a person falling within any of those paragraphs), or
> **(b) the conferring by the Crown of any honour or dignity.**
> (2) 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).'

The First-tier Tribunal's decision

16. The Tribunal adjourned its initial consideration of the appeal on the papers so as to enable the parties to make further submissions on the question of whether the s.37(1)(b) exemption was engaged in relation to the conferral of existing honours and dignities only, or whether its scope also extended to the creation of a new honour or dignity. It summarised the parties' submissions on that issue as follows (Tribunal's reasons at paragraph [27]; in those proceedings the Appellant was Mr Morland):

> 'The Information Commissioner submitted that the exemption refers to both existing and proposed Honours and Dignities, and referred us to the Commissioner's own published guidance to that effect. The Cabinet Office submitted that the wording of s.37(1)(b) FOIA was deliberately broad and that the word "*any*" is all-encompassing, so that the natural reading of the section was wide enough to include "*all honours, past and future*". It refers us to archived Ministry of Justice Guidance which supports this view. The Appellant submitted that an Honour or Dignity cannot be conferred by the Crown if it does not exist.'

17. The Tribunal then explained its reasoning and conclusion on the scope of section 37(1)(b) (and hence, the Tribunal found, its non-engagement) as follows:

> '28. We share the Appellant's concern as to the scope of s.37(1)(b). If the exemption was in respect of information that merely related to any Honour or Dignity then the creation of a new award would be caught. However, Parliament chose to use the words "*conferring by the Crown*" in this section of FOIA. The meaning of "conferring" is "the act of bestowing". We appreciate the policy behind the exemption

> and note that the public interest balancing exercise tends to refer to the need to protect confidences, and to ensure candour in the recommendation process, but such considerations do not seem to us to be relevant in relation to a medal which does not exist and so cannot be conferred.
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> 29. The Cabinet Office submitted that, were we to take the view that s.37(1)(b) were not engaged by information pertaining to the creation of a new medal, that this view would be inconsistent with previous decisions of the Information Commissioner and of the First-tier Tribunal. We acknowledge this to be the case, but remind the parties that differently-constituted panels of the First-tier Tribunal are not bound by each other's decisions and are at liberty to disagree with each other and indeed with the Information Commissioner.
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> 30. The Cabinet Office and Information Commissioner also submitted that the guidance issued by ICO and the Ministry of Justice was relevant in interpreting FOIA. We found the guidance useful but we do not consider that it is strictly appropriate to rely on it in interpreting a statutory provision as it does not meet the criteria for the use of extrinsic materials as an aid to interpretation set out by the House of Lords in *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 31. We note that the IC's guidance is in itself somewhat ambiguous in referring to "new awards". This could be understood to refer to the conferral of a new award on an individual, rather than the creation of a new Honour.
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> 31. Having considered the issue carefully, we have concluded that the exemption under s.37(1)(b) is not engaged by information relating to a proposed new medal. We conclude that Parliament's use of the word "conferring" in s.37(1)(b) FOIA is intended to relate to Honours and Dignities which already exist and so may be "conferred". Having reached this conclusion, we have not found it necessary to go on to consider the relevant public interest arguments. We note that the Decision Notice (paragraph 25) described that issue as "*finely balanced*".'

The Upper Tribunal's analysis

18. Our early and provisional impression was that there was considerable merit in the Tribunal's approach. The statutory language of "the conferring by the Crown of any honour or dignity" undoubtedly creates a mental picture of the act of bestowing a medal or other honour. On closer analysis, however, we agree with Ms Stout that the Tribunal adopted an unduly narrow interpretation of the statutory language and in doing so erred in law. There was no dispute but that the 'act of bestowing' was an accurate synonym for 'conferring'. However, the Tribunal's exclusive focus on the term 'conferring' meant that it failed to have sufficient regard to the remainder of the statutory language, and in particular the stipulation that information is exempt information if it "*relates to* … the conferring by the Crown of *any* honour or dignity" (emphasis added). Case law has established in the FOIA context that "relates to" carries a broad meaning (see *APPGER v Information Commissioner and Foreign and Commonwealth Office* [2016] AACR 5 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. Thus the terms "relates to" and "any" both point to the breadth of the statutory language, which in turn suggests that the exemption covers both potential future honours as well as currently extant honours.

19. We considered whether the Tribunal's narrower approach, confining the coverage of the exemption to existing honours and dignities, could be supported by other linguistic arguments. For example, if the Cabinet Office's broader construction was correct, we initially saw some force in the view – given the acknowledged

meaning of 'conferring' – that Parliament would then have used rather different statutory language, e.g. covering information that "relates to … the creation or conferring by the Crown of any honour or dignity". However, given the subject matter of section 37 as a whole, namely 'Communications with Her Majesty, etc and honours', it followed that there had to be an explicit reference to the Crown in section 37(1)(b) itself – as there is to the Sovereign herself and associated individuals in sub-paragraphs (1)(a)-(ad) inclusive. That requirement in turn necessitated some verb to carry on doing the work of the sub-section and connecting the subject-matter to the Crown. There are awards that are bestowed otherwise than by Her Majesty the Queen (e.g. the Metropolitan Police Commissioner's bravery awards) which are clearly excluded by the words "conferring by the Crown".

20. We also accept the force of Ms Stout's further argument that section 37(1)(b) must be read against the backdrop of section 37 as a whole. Thus we agree with the First-tier Tribunal in *Luder v Information Commissioner and the Cabinet Office* (EA/2011/0115 at paragraph 16) that the purpose of section 37 itself is to protect the fundamental constitutional principle that communications between the Queen and her ministers are essentially confidential. Section 37(1)(a)-(ad), as noted in the previous paragraph, specifically protects the actual communications with the Sovereign and certain other members of the Royal Family and the Royal Household. Section 37(1)(b) must be concerned with activities other than communications with the Sovereign. The logical purpose of section 37(1)(b) is to ensure candour and protect confidences in the entire process of considering honours, dignities and medals. Colonel Scriven's argument that where a decision is made not to recommend the creation of a particular award or medal then Her Majesty may well not be informed does not avail him once it is recognised that the provision is not confined to communications with the Sovereign. In any event it does not detract from Ms Stout's submission that recommendations would have to be made to the Queen both about proposed new honours as well as the proposed new recipients of existing honours – and information about the decision on the NDM is information which thereby "*relates to* … the conferring by the Crown of *any* honour or dignity".

21. Any FOIA request in relation to a proposal to award a medal to a particular named individual would in principle inevitably engage section 37(1)(b), but such information would in any event be covered by the absolute exemptions in section 40(1) (personal information) and/or section 41 (confidential information). That suggests section 37(1)(b) must serve some wider purpose not limited to the circumstances of identifiable individuals: for example, any discussion in the HDC about a proposal to create a new honour. However, we agree with both Ms Stout and Mr Lockley that there are limits to the breadth of "relates to" and "any" in this context – so information about the venue where the HDC meets could not realistically be said to be information that "relates *to* … the conferring by the Crown of any honour or dignity".

22. In our view the point was put particularly well by Mr Lockley in the course of oral argument, building on the submissions in his skeleton argument (at §23). It is true, he conceded, that one cannot confer a hypothetical honour. However, one can have a meaningful discussion within the HDC about the criteria to be applied when conferring some hypothetical future honour. A record of the debate in the HDC about the latter is just as much information that "relates to … the conferring by the Crown of any honour or dignity" as information about the fate of the proposal to award a medal to a particular individual. Mr Lockley illustrated this by reference to the discussion of the NDM proposal in the already released (albeit partly redacted) minutes of the meeting of the Advisory Military Sub-Committee of the HDC held on 29 August 2013 (at paragraphs 13-19, at Tab 10 of Mr Morland's bundle).

23. We therefore agree with Ms Stout and Mr Lockley that the Tribunal erred in law in its approach to the proper construction of section 37(1)(b).

FOIA section 35(1)(a) of FOIA (Formulation of government policy, etc)

The legislation

24. Section 35 of FOIA (as amended, and omitting sub-section (5), which simply defines certain terms) provides as follows (and again with the key phraseology for the purposes of this appeal in bold):

> '**35 Formulation of government policy, etc.**
>
> **(1) 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**,
>
> (b) Ministerial communications,
>
> (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
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> (d) the operation of any Ministerial private office.
>
> (2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded—
>
> (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
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> (b) for the purposes of subsection (1)(b), as relating to 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.'

The First-tier Tribunal's decision

25. The Tribunal noted that it had received limited argument from the parties on the question of whether section 35(1)(a) was engaged, namely whether the requested information related to "the formulation or development of government policy". This was perhaps understandable given that the Information Commissioner had not addressed the Cabinet Office's reliance on the section 35(1)(a) exemption, given her conclusion on the section 37(1)(b) exemption. The Tribunal's adjournment directions invited the parties' further written submissions to comment "on whether government policy in relation to the NDM was still being formulated or developed at the time of the Appellant's request" (Tribunal's reasons at paragraph [36]). The Tribunal continued:

> 'The Cabinet Office's response to our query was that the phrase '*might usefully be reconsidered in the future'* contained in the Ministerial Statement meant that the policy was left open and live. The Information Commissioner's response was that the matter was unclear and that the Cabinet Office was better placed to assist the Tribunal. The Appellant submitted that the NDM is no longer under consideration and so there is no process of policy formulation to protect by withholding the requested information.'

26. The Tribunal explained its reasoning and conclusion on the non-engagement of section 35(1)(a) as follows:

> '37. It does seem to us that, if it were the case that policy in relation to the NDM were still being formulated or developed, then s.35(1)(a) would be the most natural provision of FOIA to be engaged in relation to consideration of the creation of a completely new medal. We note that a differently-constituted panel of the First-tier Tribunal considered s.35(1)(a) FOIA in relation to the minuted discussion of the NDM by HDC's Advisory Military Sub-Committee in *Halligan v IC and MOD* EA/2015/0291. It was not disputed before that Tribunal that s.35(1)(a) was engaged, although the Tribunal at paragraph [23] noted the arguments to the effect that policy development in relation to the NDM was no longer live. The Tribunal in that case decided that the public interest did not favour maintaining the exemption and directed that redacted minutes should be disclosed.
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> 38. In the evidence and submissions before us in this appeal, we note that there is evidence that policy is still being formulated or developed. This is in the form of a letter from the Cabinet Office to the Information Commissioner (see p.190 of the open bundle) where it is stated: "*policy in relation to the National Defence Medal was at the time of the request, and continues to be, a live issue….".*
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> 39. However, we also have evidence before us which would lead us to a contrary conclusion. This is the letter from the HDC Secretariat to the Appellant (see p.161 of the open bundle) which states: *"there are no plans for further work on this issue".*
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> 40. We also have before us evidence which we regard as ambiguous, namely the written Ministerial Statement (see p.202 of the open bundle) which states: "*The Committee on the grant of Honours, Decorations and Medals is not persuaded that a strong enough case can be made at this time, but has advised that this issue might usefully be reconsidered in the future".*
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> 41. Applying the balance of probabilities test to the totality of the evidence, we conclude that we cannot be satisfied on the evidence before us that it is more likely than not that policy in relation to the proposed NDM was still being formulated or developed at the time of the Appellant's request. We are not persuaded by the Cabinet Office's submission that the terms of the Ministerial Statement left the issue open. As the Information Commissioner did not reach a conclusion on that issue, we regard the Cabinet Office, in seeking to rely on s.35(1)(a) FOIA, as bearing an evidential burden in relation to that issue. We find that this has not been discharged to the required standard.'

The Upper Tribunal's analysis

27. We have no doubt but that the Tribunal was entitled to find as a matter of fact on the evidence before it that the process of policy formulation and development as regards the proposal for a NDM was over by the time that Mr Morland made his request in April 2015. Indeed, as Colonel Scriven put it, the Government had by that time made it plain that the issue was "dead". Moreover, as Mr Lockley correctly acknowledged, that was a pure finding of fact which is unassailable on an appeal confined to errors of law. However, that finding did not lead ineluctably to the conclusion that the section 35(1)(a) exemption was not engaged.

28. We agree with Mr Lockley (and Ms Stout) that the Tribunal fell into error by treating the state of the policy process as in effect determining whether or not the section 35(1)(a) exemption was engaged. Instead, given the breadth of the wording of the statutory provision, the Tribunal should simply have asked itself (at this stage of the analysis) whether the requested information related to the process of policy formulation or development. That question is unaffected by the date of the FOIA request. There are three main reasons that lead us to that conclusion.

29. First, the focus of section 35(1)(a) itself, on any plain reading, is on the *content of the requested information* and not on *the timing of the FOIA request* in relation to

any particular decision-making process. There is no requirement on the face of the legislation that the policy-making process must still be live in order for the qualified exemption to bite.

30. Second, section 35(1)(a) must be read in the context of section 35 as a whole. In particular, section 35(2) excludes background statistical information from the scope of the exemption once a decision has been taken. The logical inference from the fact that there is a specific carve-out for such data (in the words of the sub-section) "once a decision as to government policy has been taken" is that other relevant material in principle remains in scope, even after such a decision has been taken. Section 35(4) carries the same necessary inference although, as Mr Lockley recognised, admittedly not in such compelling terms.

31. Third, case law has established that 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: see e.g. *Office of Government Commerce v Information Commissioner* [2008] EWHC 774 (Admin); [2010] QB 98 ("the *OGC* case") at paragraph 101 per Stanley Burnton J. That approach is also implicit in *Department for Business Enterprise & Regulatory Reform v O'Brien* [2009] EWHC 164 (QB), where the timing issue was analysed as relevant to the balance of the public interest and not whether the section 35(1)(a) exemption was engaged at all. The inter-section 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) at paragraph 75(iv)-(v) (a decision approved in the *OGC* case 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, s. 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.'

32. We accordingly find the Cabinet Office's second ground of appeal is also made out. We now divert to consider a sub-*Bell* point before returning to the issue of the proper disposal of this appeal.

The sub-*Bell* point

33. We have already noted that the *Bell* question – does the First-tier Tribunal, on disposal of an appeal, have the power to remit the case to the Information Commissioner to issue a new decision notice? – does not arise for decision in the current appeal. We deal with that issue in *Malnick*. We concluded there that in the event that the Information Commissioner issues a decision notice stating that the authority has complied with section 1 (and any additional duties under sections 11, 16 or 17 of FOIA, if they arise for consideration), then the Commissioner has entirely discharged her functions under section 50 of FOIA. As we put it in *Malnick* (at paragraph 81), "The Act makes no provision for the Commissioner to amend or supplement her decision, or to exercise any other function." We further concluded (at paragraph 97) that a decision notice by the Commissioner which is "not in accordance with law" under FOIA is not a nullity. It follows that the Information Commissioner's functions "do not revive following a successful appeal and so there is no question of the FTT remitting the case to be determined by the IC."

34. The present case, however, does raise what Ms Stout neatly referred to as a "sub-*Bell* point". It will be recalled that the Information Commissioner's decision notice on Mr Morland's complaint did not reach any conclusion as to the engagement of section 35(1)(a) – having taken the view both that section 37(1)(b) was engaged and that the public interest test favoured maintaining the exemption, she effectively regarded any further consideration of section 35(1)(a) as otiose. However, the Cabinet Office argued before the Tribunal that it could still – in addition to pleading section 37(1)(b) – decide to withhold the requested information in reliance upon section 35(1)(a). So what is the position of the Tribunal where an exemption is not dealt with substantively in the Commissioner's decision notice but remains live on further appeal?

35. The Tribunal was clearly troubled by this issue. It noted that its jurisdiction was a full merits appeal, which suggested that it was open to it to consider an exemption originally relied on by the public authority but not adjudicated upon by the Information Commissioner (Tribunal's reasons at paragraph [33]). But the Tribunal was also concerned about fairness issues:

> '34 … In this case, the Appellant was on notice that s.35(1)(a) FOIA was at issue when he made his complaint to the Information Commissioner, but he has understandably been left in the position of considering it no longer to be relevant, due to the Information Commissioner's non-determination of that issue. We wonder whether it is fair and just in those circumstances for the Cabinet Office to be allowed to revert to its pre-Decision Notice reliance on that exemption? We note that the Cabinet Office has not appealed against the Decision Notice on the basis that its initial reliance upon s.35(1)(a) FOIA should have been adjudicated upon by the Information Commissioner. It would have been open to it to do so. We are left with a situation where, as the Decision Notice did not reach a conclusion on that issue, none of the parties appear to have regarded s.35(1)(a) as being seriously in play in this appeal, with the effect that we have received limited argument on that issue.'

36. Colonel Scriven also took the point that the Cabinet Office had not sought to appeal the non-determination of its initial reliance on the section 35(1)(a) exemption. We are not persuaded by this criticism. The Cabinet Office had successfully defended the case before the Information Commissioner on the basis of section

37(1)(b), and it was accepted that the public interest balancing exercise looked the same whether section 35 or 37 was relied upon. Indeed, on the basis of our reasoning in *Malnick* there was nothing for the Cabinet Office to appeal against. On a proper analysis the issue of the section 35(1)(a) exemption would have arisen only if the section 37 exemption had been found not to apply.

37. In the event, the Tribunal concluded that it was able to consider the section 35(1)(a) issue (Tribunal's reasons at paragraph [35], omitting footnotes):

> '35. In all the circumstances, we express considerable reservations as to whether we are technically seized of the s.35(1)(a) issue, given that it did not feature in the Decision Notice against which we are considering an appeal. Alternatively, if we are seized of it in the exercise of our *de novo* jurisdiction, then we are concerned that it is not fair and just to reach a determination on an issue which the Appellant was not properly forewarned may feature in our conclusions. We regard the failure of the Decision Notice to determine a key issue between the parties as rather unsatisfactory, especially given that the Information Commissioner has concluded at least one other matter in relation to the NDM where her Decision Notice was in respect of s.35(1)(a) FOIA. We note that we have no power to remit the matter to the Information Commissioner for her further consideration before determining this appeal – see *Information Commissioner v Bell* [2014] UKUT 106 (AAC).'

38. The Tribunal determined the section 35(1)(a) issue against the Cabinet Office. However, when granting permission to appeal to the Upper Tribunal, the Tribunal Judge again noted that the Information Commissioner had not reached a finding on the engagement of section 35(1)(a), so leaving "the Tribunal and the parties in an unsatisfactory position, about which the Upper Tribunal may wish to comment" (permission ruling dated 20 February 2017).

39. In that context we repeat what we said in *Malnick* (at paragraph 109):

> "109. We summarise the effect of our analysis on the role of the FTT where a public authority has relied on two exemptions ('E1' and 'E2') and the Commissioner decides that E1 applies and does not consider E2. If the FTT agrees with the Commissioner's conclusion regarding E1, it need not also consider whether E2 applies. However it would be open to the FTT to consider whether E2 applies, either by giving its decision on the appeal in the alternative (e.g. E1 applies but, if that is wrong, E2 applies in any event) or by way of observation in order to assist the parties in assessing the prospects of appeal or, in the event of an appeal to the Upper Tribunal, so that that Tribunal has the benefit of consideration of all exemptions which may be in play including relevant findings of fact. It is a matter for the FTT as to how it approaches such matters, taking into account all relevant considerations including the overriding objective. On the other hand, where the FTT disagrees with the Commissioner's conclusion on E1 it must consider whether E2 applies and substitute a decision notice accordingly."

40. It follows that the FTT in the present case need not have been concerned as to the jurisdictional issue it highlighted. On a proper analysis, the effect of *Malnick* is that once section 37(1)(b) (E1) had been knocked out, the section 35(1)(a) exemption (E2) had to be addressed by the FTT precisely because it could not be remitted for further consideration by the Information Commissioner. Clearly tribunals and parties will need to be alive to this possibility arising in other cases. It is then ultimately a question of effective case management as to how to ensure that process is handled fairly to all concerned.

The disposal of the present appeal

41. We have decided that the Tribunal's decision involves two errors of law. We are satisfied both that (i) the Tribunal misapplied the qualified exemptions in section 37(1)(b) and section 35(1)(a) and (ii) on a proper reading of those provisions both exemptions were engaged. We therefore set aside the decision of the Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). That leaves us with the choice of either re-deciding the case ourselves or remitting to the First-tier Tribunal for reconsideration.

42. It was not in dispute between the parties that if the Cabinet Office and the Information Commissioner succeeded in relation to the proper interpretation of the qualified exemption in section 37(1)(b), then that exemption was plainly engaged on the facts of this case. In addition, as a result of our investigation in the closed part of the hearing, we are also satisfied that the qualified exemption under section 35(1)(a) is likewise engaged.

43. The effect of this decision is that someone – ourselves or the First-tier Tribunal – has to determine the public interest balancing test in relation to the two exemptions in play. Mr Morland is understandably anxious that some progress is made, and hence Colonel Scriven argued that the Upper Tribunal should if necessary go on to resolve the public interest test itself. We acknowledge the sense of frustration felt by both Mr Morland and Colonel Scriven. However, the realities of listing cases in the Upper Tribunal are such that there would be no guarantee this Tribunal would be able to hear the public interest aspect of the case any quicker than the First-tier Tribunal.

44. There are several other reasons why we consider it more appropriate for the public interest balancing exercise to be remitted to the First-tier Tribunal. First, there are no findings of fact on the issue from the Tribunal below. Second, both Mr Morland and the Cabinet Office would doubtless wish to introduce further evidence as to the facts, and there is no good reason why the Upper Tribunal should supplant the role of the First-tier Tribunal (with its range of expertise) as the primary fact-finder. Third, if the Upper Tribunal were to address the public interest balancing exercise then the ultimate losing party would face a serious disadvantage in terms of onward appeal rights (given that any right of appeal from our decision lies to the Court of Appeal and on narrower criteria than to this Tribunal from the First-tier Tribunal).

45. For all those reasons we allow the Cabinet Office's appeal, set aside the Tribunal's decision and remit the appeal to the First-tier Tribunal subject to the directions set out above.

Conclusion

46. We conclude that the decision of the First-tier Tribunal involves an error of law. We allow the appeal and set aside the decision of the Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). We are not in a position to re-make the decision under appeal and therefore remit the appeal for re-hearing before a freshly constituted First-tier Tribunal (section 12(2)(b)(i) and (3)(a)).

Signed on the original
on 1 March 2018

Nicholas Wikeley
Judge of the Upper Tribunal

Stewart Wright
Judge of the Upper Tribunal

Kate Markus QC
Judge of the Upper Tribunal