Appeal Nos.:
GIA/1552/2019 & GIA/1553/2019

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

ON APPEAL FROM:

First-Tier Tribunal (General Regulatory Chamber)
Information Rights (Case Nos.: EA/2018/0001 & EA/2018/0002)

Before:

MRS JUSTICE FARBEY CP

Appellant: Department of Health and Social Care

Respondent: Information Commissioner

Hearing dates: 24 and 25 June 2020

Ms Christina Michalos QC (instructed by **The Government Legal Department)** appeared by video for the Appellant
Ms Zoe Gannon (instructed by **The Information Commissioner Legal Division**) appeared by video for the Respondent

DECISION

1. The OPEN grounds of appeal are dismissed.
2. The CLOSED ground of appeal relating to the proposed OPEN gist of the First-tier Tribunal's CLOSED decision is allowed.
3. Save as set out above, the decision of the First-tier Tribunal dated 26 February 2019 under references EA/2018/0001 and EA/2018/0002 did not involve a material error of law and is not set aside.

REASONS

Introduction

1. This is an appeal about the balance between two important public interests: the need for civil servants to formulate and develop government policy for the public good in

a manner which is not inhibited by undue publicity, and the public interest in transparent government and freedom of information. It is an appeal by the Department of Health and Social Care ("the Department") against the decision of the First-tier Tribunal (General Regulatory Chamber) ("FTT") in which the FTT concluded that certain draft versions of the Government's Childhood Obesity Plan ("the Plan") should be disclosed to Buzzfeed News (who had requested the drafts from the Department but who have taken no part in these proceedings).

2. The FTT itself granted permission to appeal. The five OPEN grounds of appeal contend: (1) the FTT misdirected itself in law and failed to give proper weight to the prejudice to the public interest that would be caused by disclosure; (2) the FTT failed to place any weight on the harm that disclosure would cause to the public interest in protecting the "safe space" for policy formulation; (3) the FTT misdirected itself on the question of whether the draft versions of the Plan related to "live" policy formulation; (4) the FTT erred in directing that some drafts should be disclosed in redacted form which (5) had caused it to focus on the contents of the document as individual packets of information rather than considering the documents as a whole or considering the whole of the information in a document as a package.

3. There is a further, CLOSED ground of appeal (Ground 6) which concerns the proposed inclusion of certain material in the OPEN gist of what occurred at the CLOSED hearing before the FTT. I have dealt with this ground in a short CLOSED decision.

4. The Information Commissioner resists the grounds of appeal (both OPEN and CLOSED). For various reasons which include the exigencies of the current pandemic, the appeal has a somewhat lengthy procedural history. Both counsel advanced their submissions with skill. I am grateful to them and to their instructing solicitors for their assistance in what I understand to have been the less than ideal working conditions which the pandemic brought about for some of the lawyers involved.

Factual background

5. On 18 August 2016, the Government published a policy document called "Child Obesity. A Plan for Action." The Plan announced or mentioned a number of policy measures, such as the introduction of a soft drinks industry levy. The Plan's introductory section states among other things:

> "We aim to significantly reduce England's rate of childhood obesity within the next ten years. We are confident that our approach will reduce childhood obesity while respecting consumer choice, economic realities and, ultimately, our need to eat. Although we are clear in our goals and firm in the action we will take, the launch of this plan represents the start of a conversation, rather than the final word."

6. On the day before publication (17 August 2016), Ms Sara Spary on behalf of Buzzfeed had requested copies of every official draft version of the Plan. The Department refused this request which was referred to the Commissioner on 14 November 2016. There were three official drafts (sent for approval to the Home Affairs Select Committee) that fell within the scope of this first request.

7. On 1 August 2017, Ms Spary made a second request. Following some refinement of what she sought, the second request was for copies of working (ie non-official) drafts 1, 35 and 68 of the Plan. Following correspondence which I need not set out here, the Department

confirmed to the Commissioner in a letter dated 6 November 2017 that it would not disclose any of the drafts. The Department relied on the exemption from the requirement to disclose information relating to the formulation or development of government policy under section 35(1)(a) of the Freedom of Information Act 2000 ("FOIA").

8. On 30 November 2017, the Commissioner issued separate decision notices in relation to the first and second requests. In relation to each request, the Commissioner decided that the Department had correctly engaged the exemption but that the public interest in disclosure outweighed the public interest in maintaining the exemption. The Commissioner required the Department to disclose the three official draft versions and drafts 1, 35 and 68 as requested.

9. I will follow the course adopted by the FTT in referring to the drafts as follows:

    Draft A (draft number 1)
    Draft B (draft number 35)
    Draft C (official draft)
    Draft D (draft number 68)
    Draft E (official draft)
    Draft F (official draft).

10. By notice dated 28 December 2017, the Department appealed against both decision notices. On 23 May 2018, the FTT (a judge and two specialist, non-legal members) held a hearing at the East London Tribunal Hearing Centre. The FTT held OPEN and CLOSED sessions. The Department's lead official for childhood obesity, Mr Richard Sangster, gave OPEN and CLOSED evidence. He was the lead author of, and lead policy official for, the Plan.

11. In his OPEN evidence, Mr Sangster made the general point that the development of policy is an "iterative process" involving a large number of different processes and forums. The draft of a document is the result of multiple meetings, discussions, analysis and evidence-gathering. Taken in isolation, the requested drafts provide little context of the process of decision-making. Release of the drafts would provide the public with a very limited understanding of the policy development process.

12. Addressing the particular context of the Government's policy on tackling obesity, Mr Sangster said that the Plan was "not the final version of the policy." He emphasised the part of the Plan cited above, which says that it was "the start of a conversation." He said that media lines had included variations of the phrase: "we will take further action if the results are not seen." There were significant differences between the drafts and the published Plan.

13. Mr Sangster set out the Department's disagreement with the Commissioner's view – set out in the reasons for her decisions – that recommendations not featuring in the Plan were widely known through press coverage in any event. Nor did he agree with the Commissioner's conclusion that there was widespread concern that the Plan concentrated on the soft drinks industry levy, which the Commissioner regarded as a factor lending significant weight to the public interest in disclosure of the drafts. For reasons set out only in the CLOSED version of his statement, Mr Sangster said that disclosure could cause significant harm to the Department's relationship with its stakeholders. I was told that the stakeholders to which Mr Sangster referred were other government departments working in this policy area, businesses, schools, local authorities and the general public.

14. Mr Sangster's witness statement emphasised the public interest in officials having a so-called "safe space" in which to develop policy privately:

> "8. The safe space required for the development of Government policy lies at the very heart of the policy making process, the effective conduct of public affairs and securing effective delivery of major Government programmes. The Obesity Strategy is a major Government policy with significant implications for many Government departments. For effective development of policy under these circumstances it is necessary that candid advice, and free and frank exchanges of views (which may often be diametrically opposed due to the different policy objectives of departments) can be aired without the undermining of the final collectively agreed Government position. Such candour can only exist within a space that provides the assurance of confidentiality and discretion.
>
> 9. Publication of policy, when still being developed, may have a debilitating effect on the ability of Government programmes to progress and move forward. There is a real risk that the raising of potentially unpopular policy considerations that are nevertheless in the public interest may be prejudiced if officials or Ministers are concerned that the public airing of those unpopular but necessary considerations will give rise to public opprobrium. The sensitive and confidential material helps to shape the success of a Government programme; it is the very essence of why such a process exists. It is something that cannot be done within the public eye, or such a system will be fruitless."

15. The FTT record Mr Sangster as saying that, although public announcements were made saying that the focus was on implementing the Plan, this did not mean that the Department was not developing policy behind the scenes. For example, an obesity policy research unit had been established after the Plan's publication.

16. Mr Sangster said that some of the drafts were documents that could be published at some point as a record of government intention whereas others were only "presentational and stylistic." The latter category had been retained so that future civil servants know what has happened.

17. Having heard evidence and the parties' closing submissions, there was insufficient time for the FTT to hear submissions on the question of individual redactions, which would arise if the FTT were to consider that parts of the drafts should be disclosed in redacted or gisted form. The FTT indicated at the conclusion of the hearing that, if it were minded to direct the disclosure of redacted versions of the withheld information, the Department would be given an opportunity to make further submissions.

18. More than a month later, on 28 June 2018, the FTT directed that the Department make written submissions on redactions by 23 July 2018 and that the Commissioner make any reply by 13 August 2018. The parties were directed to "attempt to agree" a draft redacted version of each of the drafts by 10 September 2018. A further hearing for consideration of gists would be listed before 5 November 2018. The parties queried the efficacy of the directions which - for reasons that are not clear - triggered still further delay. The FTT amended the directions on 7 August 2018, so that the Department's submissions became due by 14 September and the Commissioner's reply by 5 October 2018. A further hearing was listed for 26 November 2018.

19. By written submissions dated 5 October 2018, the Department indicated that it could not add to the extensive submissions and evidence that it had filed to date. It maintained its position at the hearing that no part of any of the drafts should be disclosed. The FTT was invited to reach a decision without a further hearing which would involve further costs. By email dated 9 October 2018, the Commissioner indicated that she did not propose to file further written submissions and questioned the need for an oral hearing. By email to the parties dated 19 October 2018, the FTT vacated the November hearing.

20. On around 18 December 2018, the FTT issued a draft decision to the parties which was signed by the judge alone. In written submissions dated 20 January 2019 (drafted by Sir James Eadie QC as well as by junior counsel who had appeared at the hearing), the Department objected to certain passages of the OPEN draft decision which contained a gist of the CLOSED evidence of Mr Sangster who produced a further witness statement (dated 20 January 2019) in support of the objection. The Department submitted that the passages were not a fair, accurate and complete description of his evidence. There was no proper, principled basis for the inclusion of the passages in the decision because they played no part in the FTT's reasoning on the issues before it. The Commissioner responded to the Department's submissions by letter dated 15 February 2019 which I have read in the CLOSED bundle. The FTT promulgated its OPEN decision to the parties on 22 February 2019 together with a CLOSED annex.

21. The FTT concluded that:

    i. Draft A should be withheld in its entirety.
    ii. Draft F should be disclosed in its entirety.
    iii. Drafts B-E should be disclosed in redacted form.

    The Department was directed to prepare redacted versions in accordance with the FTT's CLOSED decision. The appeal to the Upper Tribunal was then launched. The FTT's OPEN decision has been withheld from publication pending this appeal.

Legal framework

The section 35(1(a) exemption

22. Section 1 of the FOIA creates a general right to request information from public authorities. A person who makes such a request is entitled to be informed in writing by the public authority as to whether it holds the information requested and, if the information is held, to have the information communicated to him or her, subject to the exemptions contained within Part II of the FOIA.

23. Among the Part II exemptions is section 35 which (in so far as relevant) provides:

> "(1) Information held by a government department…is exempt information if it relates to—
>
> (a) the formulation or development of government policy…"

24. The purpose of the section 35(1)(a) exemption is to protect "the efficient, effective and high-quality formulation and development of government policy" (*HM Treasury v Information Commissioner* (EA/2007/0001), para 57(4))). It is not in dispute that the

exemption is class-based: the relevant government department does not need to demonstrate prejudice for the exemption to be engaged.

The section 2(2)(b) balancing exercise

25. The exemption is not absolute. By virtue of section 2(2)(b) of the FOIA, it will apply only if:

> "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

26. Section 2(2)(b) requires decision-makers to carry out a balancing exercise, weighing the factors in favour of maintaining the exemption against the public interest factors that favour disclosure. There is neither a presumption in favour of disclosure nor a presumption in favour of non-disclosure (*Department of Health v Information Commissioner* [2017] EWCA Civ 374, [2017] 1 WLR 3330, para 46; *Office of Government Commerce v Information Commissioner (Attorney General intervening*) [2008] EWHC 774 (Admin), para 79). I agree with the view of the Information Tribunal at para 75(i) of *Department for Education and Skills v Information Commissioner and Evening Standard* (EA/2006/0006) ("the *DFES* case") that:

> "The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case."

This well-established approach is not seriously in dispute.

27. Where the decision-maker concludes that the competing interests are equally balanced, he or she will not have concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information – so that disclosure will be required (*Department of Health v Information Commissioner* [2017] EWCA Civ 374, [2017] 1 WLR 3330, para 46).

The objective of the exemption and timing

28. The case law refers to the "chilling effect" on candour among officials that would be caused if internal discussions on the formulation and development of policy were not exempt from publication. In any particular case, the chilling effect need not be proved by evidence (*Department of Work and Pensions v Information Commissioner, JS and TC* [2015] UKUT 0535 (AAC), para 13). The phrase "chilling effect" helps to express (in shorthand form) the objective of the exemption– which is to avoid inhibitions on imagination and innovation in thinking about public policy issues.

29. In different language, contained in the Commissioner's published policy documents, it is in the public interest that civil servants and officials involved in policy-making should have a "safe space" in which to do so. I accept that the free and uninhibited flow of ideas

between civil servants plays an important part within the United Kingdom's constitutional arrangements. I did not understand this proposition to be in dispute.

30. The exemption relates only to the formulation and development of policy (which I shall in shorthand call "live policy" or "live policy-making") as distinct from delivery of policy objectives and from implementation. The timing of any request for information is therefore important. The need for a safe space may be diminished or even superseded by the finalisation and publication of a policy.

31. In the *DFES* case, para 75, the Information Tribunal held that:

> (iv) The timing of a request is of paramount importance to the decision. We fully accept… 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..." (emphasis in the original).
>
> (v) When the formulation or development of a particular policy is complete for the purposes of (iv) is a question of fact. However, section 35(2) and to a lesser extent section 34(5), 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…"

That analysis was approved by a three-judge panel of the Upper Tribunal in *Cabinet Office v Information Commissioner and Morland* [2018] AACR 28, para 31. I was not asked to depart from it. It means that the question of whether the formulation or development of policy is complete (as opposed to live) is a question of fact for the FTT to determine by considering and evaluating all the evidence before it.

32. In *Department of Health v Information Commissioner and Rt Hon John Healey MP* (EA/2011/0286 & 0287), the FTT recognised (at para 28) that there is no absolute divide between policy formulation and its implementation, with the consequence that officials may need a succession of safe spaces:

> "We are prepared to accept that there is no straight line between formulation and development and delivery and implementation… For example while the policy is being formulated at a time of intensive consultation during the

> initial period when policy is formed and finalised the need for a safe space will be at its highest. Once the policy is announced this need will diminish but… It may be necessary for the government to further develop the policy, and even undertake further public consultation… Therefore there may be a need to, in effect dip in and out of the safe space… However the need for safe spaces… depends on the facts and circumstances in each case. Critically the strength of the public interest for maintaining the exemption depends on the public interest balance at the time the safe space is being required."

33. Timing is also important in so far as the risk of distraction and counter-productive discussion about disclosure before a policy is published will vanish after publication (*Department of Health v Information Commissioner and Lewis* [2015] UKUT 159, para 31).

34. The qualified nature of the exemption under the Act implies that a person taking part in policy discussions can have no expectation that relevant communications will not be disclosed. Any properly informed person will know that information held by a public authority is - in accordance with the scheme which Parliament has laid down - at risk of disclosure in the public interest. The greater the public interest in the disclosure of discussions - even if they are intended to be confidential or frank – the more likely it is that they will be disclosed (*Lewis*, paras 27-28).

35. I agree with Ms Gannon that the content-based approach established by the authorities means that there is no automatic or class-based exception to disclosure for live policy-making. The weight to be given to the fact that policy-making is live is a matter for the FTT to decide. The public interest will vary from case to case.

36. Ms Michalos drew attention to some passages in the case law – in relation to section 35(1)(a) and other exemptions - which state or imply the importance of a safe space for policy formulation (*Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin), [2008] Env. L.R. 40, para 38, per Mitting J; *Gordon v Information Commissioner & others* (EA/2010/0115), para 103). There has been no suggestion, either by the Commissioner or by the FTT, that section 35(1)(a) does not encapsulate an important public interest. It is not however a trump card. None of the dicta cited by Ms Michalos displace the authorities against a presumption of non-disclosure. They cannot displace the authorities that establish a fact-based and context-based approach to the balance of competing public interests. They do not displace the authorities to the effect that, by force of the Act itself, civil servants cannot have a complete expectation of non-disclosure. Discussion of section 35 before the tribunal is likely to become arid if, in pressing selective dicta from other judgments, a party to an appeal loses sight of broad principle (see *Office of Government Commerce*, above, para 78).

An information-based approach

37. In carrying out the section 2(2)(b) balancing exercise, the FTT in the present case concluded that parts of certain drafts should be disclosed and parts withheld. In order to give effect to its conclusion, it directed that redacted versions be disclosed, rejecting the Department's submissions that partial disclosure would be confusing for readers and lead to misunderstanding of the meaning and effect of the drafts when taken as a whole. I was

directed to case law dealing with the question whether the Commissioner and tribunal should consider the force of the exemption within a whole of a draft document or whether a "sentence by sentence" approach was permissible.

38. The Information Tribunal in *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth* (EA/2007/0072) considered this question in the context of a document covering multiple subjects, some of which were of the sort intended to fall within the exemption and some of which were not:

> 33. Most of the Disputed Information is comprised of documents covering many subjects. This is largely because the documents comprise notes of meetings which covered a wide range of subjects. This has resulted in the Commissioner reviewing the Documents in some detail and making decisions sometimes in relation to paragraphs and even sentences. As already observed this is an extremely onerous process and clearly raises concerns for dealing with such requests.
>
> 34. This was not the original approach of BERR who seemed to have claimed exemption(s) per document. However during the investigation of the complaint both BERR and the Commissioner seem to have resorted to a much more detailed analysis partially arising out BERR's original disclosure of heavily redacted documents.
>
> 35. Was the Commissioner right to take this approach? As with environmental information, public authorities are required to deal with requests under s.1(1) FOIA for 'information'. Information is defined under s.84 as 'information recorded in any form.' There is no reference to 'documents'. We therefore find that the Commissioner's approach is correct, despite the onerous implications.
>
> 36. In deciding this case we have therefore had to undertake a detailed examination of all the Disputed Information and have appreciated at first hand the size of the task. However we would observe that we infrequently have to take this approach to documents, largely because most documents tend to be based on a single issue or predominantly one subject matter where exemptions are able to be properly claimed in relation to the whole document.

39. In *FCO v Information Commissioner and Plowden* [2013] UKUT 02755 (AAC), Upper Tribunal Judge Jacobs emphasised the importance of putting individual items of information in context:

> "16. I also consider that the tribunal failed to take account of the information as a package. It adopted a sentence by sentence approach. I accept that that was appropriate, but not to the exclusion of looking at the information as a whole. The letter contained a record of a conversation. To isolate one side of the conversation from the other is unrealistic. In my grant of permission I described the information that the tribunal ordered to be disclosed as 'quite innocuous'. On reflection, I made the same mistake as the First-tier Tribunal made. The

> information may be innocuous if read in isolation and without knowing that it came from a letter containing other information. But if released, it would be known that this was but one side of what was recorded. That could lead to attempts to infer what might be missing. In some cases, that might be possible. In other cases, it would not. In either case, the results of the speculation could cause problems that need to be taken into account when balancing the public interests. The tribunal seems to have lost sight of this in its focus on the individual sentences of the information."

40. Judge Jacobs did not say that disclosure of a document must be all or nothing. There is a middle ground between the disclosure of a document as a package and a zealous, microscopic analysis which runs the risk of confusion and the possibility of even an informed or professional reader (such as a journalist) becoming misled. Where that middle ground lies is a matter for the FTT to determine.

41. In the *Lewis* case, Charles J adopted what he called (at para 31) a "contents approach" to a qualified FOIA exemption. He held (at para 30(ii)) that the wide descriptions of (and so the wide reach of) some of the qualified exemptions ought not to lead to information within the description that does not in fact engage the reasoning on why disclosure would give rise to harm (eg anodyne discussions) being treated in the same way as information that does engage that reasoning because of its content (eg examples of full and frank exchanges). Charles J observed (at para 32) that there was no inconsistency with the *Plowden* approach. I understand Charles J to be saying that the consideration of the information as a package will cast light on the meaning and effect of its content. I do not understand him to be saying that only an all or nothing approach is lawful.

The role of the Upper Tribunal

42. An appeal to the Upper Tribunal lies only on a point of law (section 11(1) of the Tribunals, Courts and Enforcement Act 2007). As an appellate tribunal, the Upper Tribunal will on conventional principles respect the fact-finding role of the FTT and will not interfere with its assessment of the public interest absent any error of law. The Upper Tribunal will recognise that the FTT is a specialist tribunal entrusted by Parliament to reach make factual findings and to reach conclusions about the public interest. Provided that the FTT asks the correct legal questions and applies the facts, as reasonably found, to those questions, this Tribunal will not interfere. A mere disagreement with the way in which the FTT has weighed or evaluated the various considerations relevant to the section 2(2)(b) balancing exercise does not give rise to error of law.

The FTT's decision

43. In its written decision, the FTT set out the procedural and factual background in detail. Turning to the issues falling for decision, it held (at para 112 of its decision) that the relevant date for consideration of the section 2(2)(b) balancing exercise was 6 November 2017 as being the date of the Department's response to the refined request.

44. Dealing with the Department's submissions on the effect of the *DFES* case, the FTT rejected the proposition that in all section 35(1)(a) cases the public interest would necessarily favour non-disclosure where a policy is live save in cases of something akin to

wrongdoing within government. Given the breadth of material potentially falling within the terms of section 35(1)(a), the Department's approach would mean that material would be withheld even if there was no possible harm to the public interest in disclosing it. The approach would be inconsistent with para 75(i) of the *DFES* case which makes plain that each case turns on its facts, which is inconsistent with any general rule. The FTT observed that the tribunal's comment in the *DFES* case that it would be highly unlikely to be in the public interest for discussions of live policy options to be disclosed provided a useful guide but could not determine the outcome in any particular case. It held (at para 118) that:

> "potential damage to policy making will be strongest when there is live policy process to protect, and…it will not be outweighed by the mere fact that a topic is of significant interest to the public."

45. The FTT gave detailed consideration to the question whether policy formulation or development was live on the relevant date. The Plan had by then been published but the FTT was willing to accept that policy issues relating to obesity were live at a broad and umbrella level. The Plan did not bring to an end the formulation of policy on tackling obesity in general. In relation to childhood obesity, policy work was likely to continue for many years. The FTT accepted that the Government's broad ongoing work on obesity carried weight in favour of maintaining the exemption.

46. The FTT was nevertheless bound to consider those factors weighing in favour of disclosure. In so doing, the FTT took into consideration the public statement that the Plan was "the start of the conversation and not the final word" but refused to treat this statement as being decisive of the balancing exercise which it was required to carry out. The FTT drew a distinction between ongoing policy work on obesity and the specific measures announced in the Plan. As regards ongoing policy work not announced in the Plan, it accepted that policy formulation or development was live at the relevant date and held in its CLOSED annex that the exemption from disclosure should be maintained. As regards the measures set out in the Plan, it held that policy formulation or development was not live at the relevant date save in relation to a small number of the measures which it set out in the CLOSED annex and which will not be disclosed.

47. The FTT then considered whether it was bound by law to carry out the public interest balancing exercise in relation to an entire document or whether particular content within a document could fall for disclosure. Setting out the relevant case law, it held (in effect) that it was not obliged to take an all or nothing approach. It held that the focus of the balancing exercise is information and not documents. It recognised that, in assessing the public interest in relation to part of a document, the information should be considered in the context of the document as a whole. It noted that, in the present case, some of the information contained in the drafts related to policies that had been publicly announced on the relevant date and were no longer live, which made it difficult to assess the public interest in disclosing or not disclosing the document as a whole. It held:

> "This does not mean that we do not take account of the submissions and evidence related to harm which, the Department submits, flow from the nature of the document in which the information is contained. That is part of the context which we must take into account."

48. Proceeding to the balancing exercise itself, the FTT set out the public interest reasons in favour of disclosure and the public interest reasons in favour of maintaining the

exemption. It then went on to consider how the relevant factors in each direction should be applied to each of the drafts A-F.

49. It concluded that the whole of Draft A should be withheld. In relation to Drafts B-E, the FTT held:

> "In making decisions about which information to disclose we have not had the benefit of further evidence or submissions addressing the specific information contained in the drafts. The parties were given the opportunity to provide this evidence and/or submissions but declined to do so and/ or provided very limited further submissions. We have therefore proceeded on the basis of the evidence available to us, but we note that this did not specifically address all of the information contained in the drafts."

50. Having assessed the information in Drafts B-E, the FTT divided it into three categories: (i) "no longer live"; (ii) "lower risk of harm"; and (iii) "live and harm." The FTT held that, in relation to the first two categories, the public interest in the maintaining the exemption was outweighed by the public interest in disclosure, and directed that passages in these categories should be disclosed. It maintained the exemption in relation to the third category. Its detailed reasoning is set out in the CLOSED annex to its decision.

51. In relation to Draft F, Ms Gannon said in the OPEN session before me, without objection from Ms Michalos, that the only difference between Draft F and the published Plan was contained in one sentence. The FTT held that none of the harm highlighted by the Department would flow from disclosure. There was very limited, if any, public interest in maintaining the exemption. On the other side of the scales, the FTT regarded the public interest in disclosure as "much diminished." It concluded that the competing interests were evenly balanced and therefore the public interest in maintaining the exemption did not outweigh the public interest in disclosure. It directed that Draft F should be disclosed in full.

52. In summary, the FTT held:

    i. Draft A: non-disclosure
    ii. Drafts B-E: partial disclosure
    iii. Draft F: full disclosure.

    There is no appeal in relation to Draft A. I need say no more about it. The remainder of this decision concerns Drafts B-F.

Analysis and conclusions

53. **Ground 1:** On behalf of the Department, Ms Christina Michalos QC (who did not appear below) submitted under Ground 1 that the FTT had failed to give proper weight to the inherent prejudice to the public interest that disclosure would cause to live policy formulation. The FTT's decision would have a potentially chilling effect on the necessary freedom of civil servants to develop effective policies without fear of external criticism. The final, published policy was sufficient to allow proper public scrutiny.

54. In straining to avoid treating the section 35(1)(a) exemption as an absolute exemption, the FTT had gone too far in the opposite direction. It gave no proper weight or consideration to the public interest in maintaining a safe space especially where (as she submitted) the development of the policy was still live. The FTT had misinterpreted the effect of the *DFES* case (cited above) as meaning that little weight should be given to the "safe space"

argument. That misinterpretation – and the FTT's undue discounting of the weight to be attributed to the public interest in safe space for the development of iterative policy drafts - amounted to an error of law.

55. Ms Michalos submitted orally (but not in her skeleton argument) that the FTT had failed to give proper weight to Mr Sangster's expertise in the formulation and development of policy relating to obesity. The FTT ought to have deferred to his views on the workings of government. The FTT – including its non-legal members – did not have this expertise because they do not operate within government.

56. In response, Ms Zoe Gannon on behalf of the Commissioner took me to the various passages within the FTT's decision that deal with the FTT's recognition of the public interest in a safe space. She submitted that the FTT had applied the correct legal framework and had balanced the relevant competing public interests in a way which cannot now be impugned in this Tribunal.

57. I agree with Ms Gannon. In balancing the competing public interests, the FTT accepted that the section 35(1)(a) exemption reflects and protects longstanding constitutional conventions of government. It stated in terms:

> "…civil servants and subject experts need to be able to engage in free and frank discussion of all the policy options internally, to be able to expose their merits and demerits and possible implications."

58. It recognised too that a safe space is particularly important where the policies set out in the drafts, like many obesity policies, have cross-departmental elements. It concluded that, on the facts of the present case, the disclosure of background evidence or broad, high level intentions would cause a lower risk of harm than the disclosure of detailed policy proposals. The premature disclosure of detailed policy proposals would have a number of adverse effects such as enabling stakeholders to take action to avoid the effects of the policy or to commission research to counter it. In these circumstances, I do not accept that the FTT minimised or failed to give due weight to the public interest in safe space.

59. In her argument that the FTT had misdirected itself in relation to the *DFES* case, Ms Michalos relied on what she submitted were some ambiguities in the wording of the FTT's decision. For example, the decision says: "We do not accept this as a general principle." In isolation, the word "this" could be read as meaning that the FTT did not accept the reasoning of the *DFES* case. However, reading this part of the FTT's decision in context, it is plain that the FTT were referring to question of whether, where a policy is live, the balancing exercise must fall in favour of non-disclosure without consideration of the facts. The FTT were entitled to reject any such general principle. I discern no material error of law in their approach to the *DFES* case, either in this passage or in any other part of the decision.

60. Nor was the FTT bound to accept everything said by Mr Sangster because he had expertise which the tribunal did not have. The point arose in relation to the FTT's conclusion that stakeholders would understand the nature of a draft and would appreciate (with the assistance, if necessary, of a short explanation from the Department) that it is only a snapshot of the policy-making process. I am not persuaded that the FTT did not have sufficient expertise or knowledge to reach that conclusion. The FTT was not bound – whether as a matter of specialism or otherwise – to assume the worst of stakeholders or to assume that the Department would desist from explanation of draft documents (*DFES*, para 75(x)).

61. The specialist contribution of the non-legal members was recognised in *Plowden* (at para 12) in which Judge Jacobs drew the common-sense conclusion that the non-legal members cannot offer expertise in every sphere (in that case, the diplomatic consequences of disclosure). The present case raises no such problem because it does not cover territory beyond the regular territory of the GRC's information rights jurisdiction. As Ms Gannon submitted, the FTT is the specialist judicial forum for the application of the FOIA and can be expected to have a general understanding of government. A similar argument that the FTT had no real alternative to accepting the evidence of eminent witnesses on the effects of disclosure was considered but rejected in the *DFES* case (see para 72).

62. In my view, the FTT directed itself properly in law and reached a reasonable conclusion on the evidence before it. There are no grounds for this Tribunal to interfere. This ground of appeal fails.

63. **Ground 2:** Under Ground 2, Ms Michalos expanded her submissions on the public interest which the exemption in section 35(1)(a) is intended to protect. She emphasised the risk that a slow creep into disclosure of draft policies would weaken record-keeping as civil servants would be slower to write things down. It would lead to fewer iterations of policy ideas. By providing a disincentive to writing things down, the ability of civil servants to provide future scrutiny of past ideas would be diminished or lost. She criticised the FTT for imputing this chilling effect to the operation of the FOIA itself and so discounting it. The purpose of section 35(1)(a) was, contrary to the FTT's reasoning, to avoid a chilling effect which could not lawfully be discounted. There was no real or compelling public interest in the disclosure of early drafts which were exploratory, and a chilling effect would be inevitable. If the FTT had properly directed itself in law, it would have concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.

64. Ms Michalos emphasised a number of factors as demonstrating that the FTT had failed to reach a lawful conclusion under section 2(2)(b). At the date of Buzzfeed's first request, the Plan had not been published and all the measures within it were the subject of live discussion in the iterative drafts. Discussion was continuing across various government departments whose interests should have been taken into account. On the face of the published Plan, the launch of the Plan was "the start of a conversation" which could only mean that everything within the published Plan remained live.

65. On behalf of the Information Commissioner, Ms Gannon submitted that it was lawful for the FTT to treat different drafts differently and to give different weight to maintaining the exemption in relation to different material. It had been open to the FTT to divide the material into three categories (as set out above: no longer live; lower risk of harm; live and harm). In its CLOSED annex, the FTT had given detailed consideration to these categories and had reached conclusions that were open to it on the evidence. The reference to "the start of the conversation" was a relevant factor which the FTT took into account but could not replace an analysis of all the evidence.

66. I agree with Ms Gannon's submission that this ground amounts to an attempt to reargue factual matters falling outside the Upper Tribunal's error of law jurisdiction. The FTT found that the relevant date for determining the balance of the public interest was 6 November 2017 because that was the date of the Department's substantive response after clarity had been obtained from the requestor on the scope of the requests and specific

drafts had been requested in the second, refined request. In my view, the FTT's conclusion as to the relevant date involved no error of approach or other error of law.

67. The FTT's written decision is incapable of being construed as ignoring the importance of safe space on that date. The importance of that constitutional principle, particularly importance in the context of policies that cross-cut government departments, is expressly recognised. The FTT was however correct to recognise that the section 35(1)(a) exemption is not absolute and to weigh other factors in the balance. The weight to be attributed to the Plan's reference to the "start of the conversation" (and other government lines to that effect) was a matter for the FTT to determine. Nothing in the case law persuades me that the Government's statement ought to have been the sole or decisive factor in the scales.

68. Ms Michalos relied on one sentence in the FTT's CLOSED annex: "Any harm such as chilling effects caused purely by disclosure of 'a draft' are caused by the FOIA itself and we discount them." From that sentence, Ms Michalos infers that the FTT discounted the chilling effect entirely. However, this sentence in the CLOSED annex related only to Draft F (which was the penultimate draft and virtually identical to the published Plan) and needs to be read in the context of the overall balancing exercise which the FTT undertook in relation to that draft. Read in contact, this single sentence does not cancel out the FTT's balanced consideration of relevant factors and cannot cast doubt on them. There is no reason to interfere with the FTT's decision.

69. **Ground 3:** Under Ground 3, Ms Michalos submitted that the FTT erred in treating the issue of whether policy formulation was live as severable in the sense that the FTT was wrong to conclude that some parts of the information in a single draft should be treated as no longer live, leading to their disclosure in an otherwise redacted document. Having accepted that policy formulation was ongoing, the FTT should not have descended into particularity as to whether parts of the policy were at different stages of "liveness" at the relevant date. The effect of the FTT's approach was to undermine the purpose of the FOIA, wrongly treating policy development as something that is amenable to a bright line demarcation. The FTT should not have divided the information in each draft into packets of live information and packets of information that was not live. Such an approach creates unnecessary confusion and undermines the public interest balancing process. It fails to take into account the need to dip in and out of a safe space (see *Department of Health v Information Commissioner and Rt Hon John Healey MP*, para 28, above).

70. These submissions face the insuperable obstacle that the question whether a policy is live is a question of fact. The launch of the Plan was described as "the start of a conversation." These words cannot mean that the FTT was bound to conclude – irrespective of anything else written in the Plan and irrespective of anything in the drafts – that policy formulation in relation to the published measures was live. As the FTT held and as Ms Gannon submitted to me, ongoing work in relation to obesity generally does not mean that individual policies or measures remain in a state of formulation or development.

71. The FTT had in mind that there is no absolute divide between policy formulation and its implementation, and recognised that officials may need to dip in and out of safe spaces. There is no error of approach in its decision. This ground of appeal fails as raising no material error of law.

72. **Grounds 4 and 5:** It is convenient to consider Grounds 4 and 5 together. They concern only Drafts B-E and relate to the FTT's decision that these drafts should be disclosed

partially, in redacted form. Under Ground 4, Ms Michalos submitted that the FTT erred in engaging in a redaction exercise at all. The FTT ought to have held that all of the information was so intertwined that there was no public interest in disclosing parts of the information that outweighed the public interest in maintaining the exemption in relation to the entirety of Drafts B-E. All of the information in Drafts B-E was exempt.

73. Under Ground 5, Ms Michalos submitted that the FTT was wrong to focus on the contents of documents as individual packets of information and failed to go on to consider each document as a whole or the information as a package. It would rarely be possible for a tribunal to direct that parts of a document should be disclosed unless the subject matter of a particular packet of information was so different from the remainder of the document that it could be severed with no loss to its meaning. By cherry-picking information for disclosure, the FTT had breached the principle in *Plowden* that analysis of whether a part of a document should be disclosed must be viewed in the context of the document as a whole. If the FTT had directed itself properly under *Plowden*, it would not have embarked upon a redaction exercise.

74. Ms Gannon submitted that *Plowden* expressly contemplated partial disclosure of documents and that a sentence by sentence approach to redactions could be appropriate on the particular facts of a case (see para 16). The FTT had considered each part of each draft carefully and in detail, in a manner which left no room for an error of law challenge.

75. The FTT's decision makes plain that it was aware of its duty to consider the information in context (see para 125 of its decision). I am not persuaded that it somehow then lost sight of that duty in deciding on redactions. I accept Ms Gannon's submission that, while generally a line by line approach will not be necessary, it may be appropriate in some cases. In this case, it was lawful (indeed appropriate) for the FTT to consider individually each of the different policies included in Drafts B-E, while not losing sight of the context. I do not accept that the *Plowden* duty was breached.

76. I accept that an over-zealous, microscopic approach may led to confusion and thereby confound rather than promote the public's understanding of policy-making. In the present case, the Department had an adequate opportunity to submit further evidence and make submissions – including oral submissions – on individual redactions. The Department chose not to do so. It decided that it would not appear at the oral hearing (listed for 26 November 2018) which was subsequently vacated. It maintained a position of blanket non-disclosure. It was aware that the FTT was considering redactions but decided nevertheless to maintain the blanket position.

77. Ms Michalos emphasised that the level of work involved in redacting documents is time-consuming and a drain on resources within the Department. It detracts from the Department's important policy work, which is the public interest which section 35(1)(a) is designed to protect. That may be correct but (i) it is a feature of the Act as interpreted by courts and tribunals that redactions may be part of FOIA processes; and (ii) it makes it no easier for me to deal with individual aspects of, or limits to, the redactions on which neither the FTT nor I had any focused submissions.

78. I acknowledge the importance of obesity policy in public life. I have taken into consideration that the practices and procedures of this Tribunal are flexible. That said, I was not asked to deal with particular or specific passages in any of the drafts and was not asked to consider specific ways in which the redaction process had in itself gone wrong. In its CLOSED annex, the FTT deals in detail with the precise way in which each draft should and should not be redacted. It would have been difficult, perhaps impossible, for

the Department to raise before me - as errors of law - points in relation to the CLOSED annex which were not argued below. I do not see how it would have been open to Ms Michalos (who as I have said did not appear below) to submit that different or other redactions were needed. I take the view that the Upper Tribunal has not been put in a position to interfere with the approach to the material which the FTT (with the assistance of its specialist members) adopted.

79. **Ground 6:** The closed ground of appeal can be stated here only in broad terms. Ms Michalos submitted that the FTT erred in concluding that certain information should be included in an OPEN gist of the CLOSED session because (among other things):

    (a) the information was not relevant or relied on by the Tribunal in relation to the final decision such that it should remain in the FTT's CLOSED annex;

    (b) the information was not a fair and accurate reflection of the evidence that had been given in the CLOSED session; and

    (c) its disclosure would amount to an interference with an individual's rights under article 8 of the European Convention on Human Rights as there was no necessity to disclose it.

80. Ms Gannon relied on para 56 of the FTT's OPEN decision which states that the gist (which had been proposed by the Commissioner) accurately reflected the evidence given at the hearing, based on the recollection of all three members of the tribunal and on the FTT Judge's non-verbatim notes. In summary, the FTT had been entitled to include the disputed information in the OPEN gist in accordance with the principle of open justice. The FTT was under a duty to disclose as much as possible of what transpired in the CLOSED session (*Browning v Information Commissioner & another* [2014] EWCA Civ 1050, [2014] 1 WLR 3848, para 35).

81. I have concluded in a short CLOSED decision that Ground 6(b) succeeds: in its original proposed gist, the FTT to deal fairly with one aspect of the evidence to the extent that it made an error of law. It would be unjust for this aspect of the evidence to form part of an OPEN gist. I give brief reasons for this conclusion in my CLOSED decision. I have reached no conclusion on Ground 6(c). I have reached no conclusions of principle on Ground 6(a): my CLOSED decision rests on the facts of this case, though it is correct that the FTT's overall decision and the material in the drafts which will now be disclosed are not affected. I agree with Ms Michalos that the disputed passage does not play a material part in the FTT's reasoning and that it is not necessary to include this aspect of the evidence in order for the requestor and others to understand the FTT's decision.

82. This means that the FTT decision will be published without reference to the disputed information. Save in this single respect, the appeal is dismissed.

83. For the purpose of observations only, I add that I raised with the parties, and there was helpful discussion on, the procedural twists and turns that arose after the FTT ran out of time on 23 May 2018. The succession of case management directions after the hearing had appeared to me as an imperfect solution to problems which I have needed to consider in this appeal.

84. Both parties very properly impressed on me that this Tribunal has the benefit of hindsight. I was, however, directed to the decision of Upper Tribunal Judge Knowles QC (as she then was) in *Cabinet Office v Information Commissioner* [2017] UKUT 229 (AAC) in which she referred to the GRC Practice Note on Closed Material in Information Rights

Cases dated May 2012. Judge Knowles invited the GRC to amend the Practice Note so that, when dealing with closed material where there is no excluded party (such as where the requestor plays no part in the proceedings), it would be prudent and indeed necessary for the FTT to canvass with the parties at the end of each closed session what material could be made publicly available and, if necessary, for the FTT to rule on the same in default of agreement. The parties observed that the GRC does not appear to have amended its Practice Note to reflect Judge Knowles' concerns.

85. There was discussion before me as to whether I should invite the President of the GRC to update the Practice Note to reflect Judge Knowles' concerns and also to include such further guidance as would reduce the need for prolonged post-hearing procedures of the sort that happened in this case. I have decided to refrain from such an invitation while emphasising the need for FTT judges to ensure (under existing procedure rules) the expeditious progress of FOIA cases, particularly where important public interests (in this case: health, freedom of information and journalistic material) are in play.

86. I directed that the parties should provide the Upper Tribunal with agreed further directions for the disposal of this appeal within 10 days of receiving my decision in draft form (including any request that I move any content into or out of the CLOSED decision). After granting an extension of time for that to take place, I received some submissions from Ms Michalos which I have incorporated into my decision but I have received no submissions from either party in relation to disposal. In the circumstances, I shall simply confirm that paras 163-164 of the FTT's decision – which deal with disposal – remain extant.

THE HON MRS JUSTICE FARBEY

Chamber President

AUTHORISED FOR ISSUE ON: 29 October 2020